

COMMITTEE AGAINST TORTURE

Aemei v. Switzerland

Communication No 34/1995

9 May 1997

CAT/C/18/D/34/1995

VIEWS

Submitted by: Seid Mortesa Aemei (represented by counsel)

Alleged victims: The author and his family

State party: Switzerland

Date of communication: 26 October 1995

The Committee against Torture, established in conformity with article 17 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,

Meeting on 9 May 1997,

Having completed consideration of communication No. 34/1995 submitted to the Committee against Torture under article 22 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,

Having taken account of all the information communicated to it by the author of the communication, his counsel and the State party,

Adopts the following:

Views under article 22, paragraph 7, of the Convention

1. The author of the communication is Seid Mortesa Aemei, an Iranian citizen, born on 1 February 1957, currently residing in Switzerland, where he seeks asylum. He claims that his return to Iran after dismissal of his refugee claim would constitute a violation of article 3 of the Convention by Switzerland. He submits the communication also on behalf of his wife. He is represented by counsel.

The facts as submitted

2.1 The author became a People's Mojahedin activist in Iran in 1979. On 20 June 1981, after he had participated in a demonstration by the Mojahedin, he was arrested and kept in detention for 25 days. Thereafter, he had to abandon his university studies. In 1982, he threw a Molotov cocktail into the house of a senior officer of the Revolutionary Committee.

2.2 On 4 April 1983, the author was again arrested and his house was searched. He claims that he was ill-treated during the interrogations and, in particular, that he was caned after having his feet and head submerged in ice, that the next day the police officers extinguished cigarettes on his body while he was dressed only in underclothes, that he still bears the scars from those burns, and that his wife was only allowed to visit him after six months. Subsequently, he was convicted for his political activities and for stealing the licence plate of a car and sentenced to two years' imprisonment.

2.3 Seven months after his release, the author's brother-in-law fled the country, and the author was detained for three hours and questioned about the whereabouts of his brother-in-law. The author then moved to Teheran, but returned to his home town after three years. In February or March 1989, he was recognized by a client of his father's firm as the person who had thrown the Molotov cocktail seven years earlier. In panic, he fled to Teheran. He claims that his parents were visited regularly by the police and questioned about his whereabouts. After a year, he decided to leave the country, also because his son, who was born on 23 January 1984, had reached school age and he was afraid that his son's enrolment in school would lead to the police discovering his whereabouts. With a false passport he fled the country, together with his wife and their two children, and applied for asylum in Switzerland on 2 May 1990.

2.4 On 27 August 1992, his application was refused by the Federal Office for Refugees, which considered his story not credible and full of inconsistencies. It also considered that the author's wife was not aware of any political activities on the part of her husband. The Appeal Commission rejected his appeal on 26 January 1993, considering that the author's claim and story were illogical and revealed no practical experience in illegal political activities and were moreover full of contradictions.

2.5 On 26 April 1993, the author, represented by the Beratungsstelle für Asylsuchende der Region Basel, filed a request for reconsideration, based on his activities in Switzerland for the Armenian and Persian Aid Organization (APHO), which, according to the author, is considered an illegal organization in Iran. The author refers in this connection to three attempts to murder the leader of the APHO in Zurich and claims that these attempts prove that APHO members are being persecuted by Iran. The author stated that he had distributed leaflets and helped run various APHO stands, notably at a demonstration in Bern. In support of his statements he presented an APHO membership card and stand permits issued in his name, and photos showing his activities. He also said that incidents involving representatives of the Government of Iran had occurred in May 1991 (when a friend of the brother of the President of the Iranian Council of Ministers threatened APHO members with a pistol) and in June 1992 (when the Iranian consul visited the APHO stand and attempted to identify the

participants). The author stated that he had reported the incident to the police the same day, in his capacity as the person in charge of the stand. In his request for review he alleged that his activity within the APHO would render him liable to treatment contrary to article 3 of the Convention if he returned to Iran.

2.6 By a decision of 5 May 1993, the Federal Office for Refugees refused to consider his request for review. The Appeals Commission also declared his application to be ill-founded by a decision of 10 August 1994. The author states that he has since been contacted by the police for the purpose of the preparation of his departure from Switzerland.

Substance of the complaint

3. The author is afraid that he will be questioned about his political activities when he returns to Iran. He adds that torture during interrogations is common in Iran. Furthermore, he is afraid that he will be charged with the Molotov cocktail attack of 1982 and that he will consequently be sentenced to a long term of imprisonment or even death. He adds that the mere act of requesting asylum in another country is considered an offence in Iran.

Procedural questions

4.1 On 22 November 1995, the Committee transmitted the communication to the State party for its observations.

4.2 In its observations of 22 January 1996, the State party contests the admissibility of the communication, stating that since the author had not, in the course of the ordinary asylum procedure before the national bodies, mentioned his fear that his political activities in Switzerland would render him liable to torture if he returned to Iran, he had not exhausted domestic remedies. The State party explains that this point should have been made during the procedure to establish the right of asylum. Since the point was not mentioned until the request for review, the authorities were not able to consider it, as the author's activities within the APHO did not constitute a new development in the light of the criteria established by the jurisprudence of the Federal Court.

4.3 In its observations, the State party nevertheless submits "that is a subjective ground under article 8 (a) of the Asylum Act, which in this connection provides that 'asylum shall not be granted to a foreigner when ... only his conduct following his departure would justify his being considered a refugee within the meaning of article 3'. According to case law and doctrine, the concept of 'subjective grounds occurring after flight from the country' covers situations in which the threat of persecution could not have been the cause of the departure of the asylum-seeker but results from his subsequent conduct. Although such grounds are not relevant to the granting of asylum under the exclusion clause of the above-mentioned article 8 (a), an applicant who invokes subjective grounds may nevertheless remain in Switzerland, by virtue of the non-return principle, if the conditions of article 45 of the Asylum Act are met. The allegation of 'subjective grounds', like the grounds which prompted the applicant to leave his country, must nevertheless satisfy the requirements of asylum procedure, among which are those relating to the obligation to cooperate. In accordance with

article 12 (b) of the Asylum Act, the applicant is required to cooperate in the verification of the facts; to this end, he has in particular to explain, at his hearing, his grounds for asylum and the reasons which prompted him to request asylum."

4.4 The State party also contests Mrs. Aemei's status as author of the communication.

4.5 In a letter of 1 March 1996, the author's counsel refutes the State party's argument contesting Mrs. Aemei's status as author of the communication on the grounds that she has not claimed any ground for asylum peculiar to herself. Counsel further states that if Mrs. Aemei were to be sent back to Iran, she would be liable to the same risks as her husband, or even greater risks, and that the State party itself has acknowledged that the applicant's subsequent conduct in Switzerland does not constitute a ground for asylum under Swiss legislation. He also maintains that the applicant had no reason to mention his political activities in Switzerland during the asylum procedures and had always been questioned about his past and about facts which could have supported his application for asylum.

4.6 Counsel points out that in any case the non-return obligation is an absolute obligation. Although the argument of the author's political activities in Switzerland was submitted late and hence, for procedural reasons, could not be taken into account in relation to the asylum decision, counsel is of the opinion that the rejection of the asylum application does not mean that the person can now be sent back to his country. He points out that Swiss legislation offers alternatives such as the possibility of a residence permit for humanitarian reasons (Asylum Act, art. 17, para. 2) or temporary admission (Asylum Act, art. 18, para. 1). Counsel also draws attention to the fact that physical integrity must not be endangered for procedural reasons. The risk that an asylum-seeker will misuse the procedure should not be overestimated, especially as few asylum-seekers can point to events as serious as those referred to by the authors in the case at hand.

4.7 After considering the observations of the parties, the Committee decided, at its sixteenth session, to suspend consideration of the communication pending the result of the author's requests for reconsideration in the light of his political activities in Switzerland. The Committee also requests information from the State party on domestic remedies and asked the applicant to provide additional information concerning his asylum applications in Switzerland on the basis of his political activities in Switzerland. The Committee also asked the State party not to expel the author and his family while their communication is under consideration.

Further observations by counsel

5.1 In a letter of 5 August 1996, counsel explains that the author did not mention his activities within the APHO in the course of the ordinary procedure for obtaining refugee status, which led to the decision of the Swiss Appeal Commission of 26 January 1993, because he had not been aware that those activities would be a determining factor. The situation changed after the decision, when he learned that he would have to return to Iran. At that point, he realized that because of his political activities in Iran before 1990 and, in particular, because of his political activities in Switzerland since 1990, he and his wife ran

a very great risk of being subjected to acts contrary to article 3 of the Convention if they returned to Iran. Counsel repeats that since 1990 the author has been active in the APHO, which is considered an illegal and dissident organization in Iran and whose activities in Switzerland are monitored by the Iranian secret police. The author distributed leaflets attacking the regime in Iran, and in May 1991 he was seen and threatened by the brother of the President of the Iranian Council of Ministers. In June 1992, the Iranian consul visited the APHO stand in Bern and attempted to identify the people participating in APHO activities. Counsel concludes that the author's identity is very probably known to the Iranian authorities.

5.2 Counsel adds that on 13 May 1996 the author filed an application for temporary authorization because of his son's medical problems.

State party's observations on the admissibility and validity of the communication

6.1 In its observations of 7 August 1996, the State party informs the Committee that it no longer contests the admissibility of the communication.

6.2 The State party summarizes the "facts alleged by the author" and the domestic procedures under way. As regards the points raised by the Swiss authorities, it observes that, "under article 12 (a) of the Asylum Act, an asylum-seeker must prove - or at least make out a good case - that he is a refugee within the meaning of article 3 of the Asylum Act, i.e. that he would be likely to suffer serious harm or that he has good reason to fear that he would suffer such harm, in particular because of his political opinions", and concludes that "from that standpoint, articles 3 and 12 (a) of the Asylum Act, as interpreted by the Appeal Commission, establish criteria similar to those of article 3 of the Convention, namely, the existence of serious, concrete and personal danger of persecution (art. 3, para. 1; cf. B. Mutombo v. Switzerland, ...), in the determination of which all relevant considerations must be taken into account (art. 3, para. 2), including, in particular, the likelihood that the author's statements are true (Asylum Act, art. 12 (a)) and, where appropriate, the existence of a consistent pattern of gross, flagrant or mass violations of human rights (art. 3, para. 2)".

6.3 The State party also declares that "in the present case, the Appeal Commission confirmed the decision to reject asylum on the basis of the author's statements. It considered that the grounds invoked did not make it possible to conclude that refugee status was highly probable in the author's case. The Appeal Commission took the following points into account in making its decision:

The author's statements about his political activity were not sufficiently substantiated, since his knowledge of the political programme of the organization in which he claims to have been active was very sketchy in essential respects;

The circumstances in which the author claims to have resumed working with the organization are at variance with what is known about the practice of movements hostile to an established political regime. The author's explanations regarding his alleged conviction following his political activity were also considered to be at variance with the facts;

Finally, the author's wife was unable to corroborate his statements at the hearing before the Federal Office for Refugees."

The State party concludes that Swiss legislation essentially uses the same conditions for prohibiting return as those laid down in article 3 of the Convention.

6.4 The State party refers to the text of article 3 of the Convention and the Committee's practice of considering whether there are specific grounds for believing that the individual would be in personal danger of being subjected to acts of torture in the country to which he would be returned. The existence of a consistent pattern of gross, flagrant or mass violations of human rights does not in itself constitute a sufficient ground for concluding that a person would be in danger of being subjected to torture on his return to that country.

6.5 The State party observes that "in the present case, the author's statements concerning his political activity with the People's Mojahedin did not appear to be sufficiently substantiated in the opinion of the competent Swiss authorities". It maintains that, "in view of the inconsistency of the author's statements, they were not sufficiently plausible to cause the Swiss authorities to consider that refugee status was highly probable in the case of the author of the communication. The allegation of a risk of inhuman treatment if the author were to return to Iran, which is based principally, if not exclusively, on the consequences of his political activity cannot seriously be taken into account when it has never been established that he engaged in the political activities in question, or even that he was a member of a party that opposed the existing political regime". The State party further submits "that the author of the present communication has produced no document with evidentiary value, either in the course of the domestic proceedings or before the Committee against Torture, relating to his political activities for the Mojahedin, or any medical certificate attesting to his having been subjected to treatment prohibited by the Convention". In the opinion of the State party, "at this stage already, the author's communication appears to be manifestly ill-founded as regards the existence of a personal, serious and concrete danger of treatment contrary to article 3 of the Convention, to which the author claims he would be exposed if he were sent back to his country".

6.6 The Swiss authorities further consider that some of the author's statements do not correspond to the facts and, because they show a lack of familiarity with established practice with regard to illegal political activities, describe them as "totally unrealistic". In particular, the author's statement that he was sentenced to only two years' imprisonment because of the judge's respect for his origins contradicts information gathered by the Swiss authorities in the course of asylum proceedings concerning Mojahedin.

6.7 Finally, the State party notes that the author's wife did not corroborate his statements about his political activities. The State party therefore concludes that the author's fear appears to be manifestly ill-founded.

6.8 With regard to the author's activities in Switzerland, the State party is not able to confirm the author's allegation that his identity is very probably known to the Iranian authorities because of the events that occurred in May 1991 and June 1992. In particular, the Bern

police are not aware of the participation of the brother of President Rafsanjani in the May 1991 incident. As regards the Iranian consul's visit to the APHO stand, the Swiss Government has stated that, "a member of the city of Bern police force recalls that there was a skirmish between Iranians in June 1992, but does not know whether it involved members of the Iranian consulate and APHO activists, because the incident was already over by the time the police arrived, when only APHO members were present. In the light of this information, the Swiss Government considers it at least doubtful whether the events in question occurred so they cannot automatically be considered to constitute a decisive ground in respect of article 3 of the Convention".

6.9 As to the author's allegation that the filing of an application for asylum is in itself a relevant ground within the meaning of article 3, paragraph 1, of the Convention, the State party observes that the author adduces no evidence in support of this argument. The State party further notes, "such an argument cannot be sufficient in respect of article 3, paragraph 1, of the Convention since the prohibition laid down in this provision is dependent on the proven existence of substantial grounds for persecution". The State party maintains that it has no information to substantiate the specific danger of persecution as a result of filing an application for asylum in Switzerland.

6.10 The State party considers that the author's statements do not enable the conclusion to be drawn that there are substantial and proven grounds for believing that he would be in danger of being tortured if he returned to Iran. Finally, it observes that "the European Commission of Human Rights has deemed that the general situation in Iran was not characterized by mass violations of human rights [application No. 21649/93, DR, 75/282]" and that, "the author himself does not claim that there is a consistent pattern of human rights violations in Iran".

Counsel's comments on the State party's observations

7.1 In a letter of 30 October 1996, counsel reiterates the points made in his initial communication. As regards the State party's argument that the author's statements about his political activity within the People's Mojahedin did not appear to be sufficiently substantiated, counsel submits that it is normal for a sympathizer not to be as well informed about an organization as one of its members. He explains that the author was motivated by hostility towards the regime rather than the Mojahedin's political ideas. Counsel notes that the author is not in a position to produce documents in support of his allegations concerning the events that took place in Iran, and states that after his release the author was no longer active within the Mojahedin.

7.2 Counsel acknowledges that the security measures taken by the author's group in Iran were not sufficient, but rejects the conclusion that the author's statements are unrealistic. He also maintains that merely distributing leaflets can lead to life imprisonment and explains that the fact that the author was only sentenced to two years' imprisonment in April 1983 was due, *inter alia*, to the author's origin as a descendant of Muhammad. Concerning the alleged contradictions, counsel affirms that the author's statements are not contradictory on essential points, and that the discrepancies with the information provided by his wife are not relevant.

Mrs. Aemei has lived in great fear for years, which would explain the fact that she wanted to know as little as possible about her husband's political activities. In any case, she first heard about them in April 1983.

7.3 Counsel is of the opinion that the author's statements about his political activities are true, which is also proved by the fact that the Swiss Government admits in its observations that there was an APHO stand in June 1992 and that a skirmish between Iranians did indeed take place. He further submits that the Swiss authorities' refusal to consider the author's request for reconsideration, based on his activities in the APHO, is a serious procedural error and contrary to the author's right to have his fear of being tortured considered by the competent authorities.

7.4 Counsel reiterates the fact, already mentioned by the author in his appeal of 24 September 1992, that the mere act of requesting asylum can constitute a relevant ground within the meaning of article 3, paragraph 1, of the Convention against Torture, and refers in this connection to documentation of the Schweizerisches Flüchtlingswerk.

Decision concerning admissibility and examination of the merits:

8. The Committee notes with appreciation the information given by the

State party that the author and his family will not be expelled while the communication is under consideration by the Committee (rules of procedure, art. 108, para. 9).

9.1 Before considering any claim contained in a communication, the Committee against Torture must decide whether or not it is admissible under article 22 of the Convention. The Committee has ascertained, as it is required to do under article 22, paragraph 5 (a) of the Convention, that the same matter has not been, and is not being examined under another international investigation or settlement procedure. The Committee notes that the State party has not raised any objection to the admissibility of the communication (see State party's observations dated 7 August 1996). The Committee therefore finds that no obstacle to the admissibility of the communication exists and proceeds with the examination of the merits of the communication.

9.2 The Committee reiterates that it is by no means its responsibility to determine whether the author's rights as recognized by the Convention have been violated by Iran, the country to which he risks being expelled, regardless of whether or not this State is a party to the Convention. The question before the Committee is whether expulsion, return or extradition to the latter country would violate Switzerland's obligation, under article 3 of the Convention, not to expel or return an individual to a State where there are substantial grounds for believing that he would be in danger of being subjected to torture.

9.3 In accordance with article 3, paragraph 1, of the Convention, the Committee has to determine whether there are substantial grounds for believing that Mr. Aemei and the members of his family would be in danger of being subjected to torture if they returned to Iran. In order to do this, the Committee must, in accordance with article 3, paragraph 2, take

into account all relevant considerations, including the existence of a consistent pattern of gross, flagrant or mass violations of human rights. In other words, the existence of a consistent pattern of violations of human rights within the meaning of article 3, paragraph 2, lends force to the Committee's belief that substantial grounds exist within the meaning of paragraph 1.

9.4 However, the Committee has to determine whether the person concerned would be personally at risk of being subjected to torture in the country to which he would be expelled. Consequently, the existence of a consistent pattern of gross, flagrant or mass violations of human rights in a particular country does not in itself constitute a sufficient ground for concluding that a particular person would be in danger of being subjected to torture after returning to his country; additional grounds must exist in order to conclude that the person concerned is personally at risk. Similarly, the absence of a consistent pattern of flagrant violations of human rights does not mean that a person cannot be considered to be at risk of being subjected to torture in his specific circumstances.

9.5 In the present case, therefore, the Committee has to determine whether the expulsion of Mr. Aemei (and his family) to Iran would have the foreseeable consequence of exposing him to a real and personal risk of being arrested and tortured. It observes that the "substantial grounds" for believing that return or expulsion would expose the applicant to the risk of being subjected to torture may be based not only on acts committed in the country of origin, in other words before his flight from the country, but also on activities undertaken by him in the receiving country: in fact, the wording of article 3 does not distinguish between the commission of acts, which might later expose the applicant to the risk of torture, in the country of origin or in the receiving country. In other words, even if the activities of which the author is accused in Iran were insufficient for article 3 to apply, his subsequent activities in the receiving country could prove sufficient for application of that article.

9.6 The Committee certainly does not take lightly concern on the part of the State party that article 3 of the Convention might be improperly invoked by asylum seekers. However, the Committee is of the opinion that, even though there may be some remaining doubt as to the veracity of the facts adduced by the author of a communication, it must ensure that his security is not endangered. 1/ In order to do this, it is not necessary that all the facts invoked by the author should be proved; it is sufficient that the Committee should consider them to be sufficiently substantiated and reliable.

9.7 In the case of the author of the present communication, the Committee considers that his membership of the People's Mojahedin organization, his participation in the activities of that organization and his record of detention in 1981 and 1983 must be taken into consideration in order to determine whether he would be in danger of being subjected to torture if he returned to his country. The State party has pointed to inconsistencies and contradictions in the author's statements, which in its opinion cast doubt on the veracity of his allegations. The Committee considers that although there may indeed be some doubt about the nature of the author's political activities in his country of origin, there can be no doubt about the nature of the activities he engaged in in Switzerland for the APHO, which is considered an illegal organization in Iran. The State party confirms these activities by the author and does not

deny that skirmishes occurred between APHO representatives and other Iranian nationals in Bern in June 1992. The State party does not say whether it investigated these skirmishes, but the material submitted to the Committee gives the impression that no such investigation took place. In the circumstances, the Committee must take seriously the author's statement that individuals close to the Iranian authorities threatened the APHO members and the author himself on two occasions, in May 1991 and June 1992. The State party simply noted that Mr. Aemei's activities within the APHO did not constitute a new development vis-à-vis the criteria established by the case law of the Federal Tribunal and that consequently the competent authorities could not take up the matter of the author's application for reconsideration.

9.8 The Committee is not convinced by the State party's explanations insofar as they refer to Mr. Aemei's activities in Switzerland. It would recall that the protection accorded by article 3 of the Convention is absolute. Whenever there are substantial grounds for believing that a particular person would be in danger of being subjected to torture if he was expelled to another State, the State party is required not to return that person to that State. The nature of the activities in which the person engaged is not a relevant consideration in the taking of a decision in accordance with article 3 of the Convention. 2/ In the present case, the refusal of the competent Swiss authorities to take up the author's request for review, based on reasoning of a procedural nature, does not appear justified in the light of article 3 of the Convention.

9.9 Lastly, the Committee is aware of the serious human rights situation in Iran, as reported inter alia to the United Nations Commission on Human Rights by the Commission's Special Representative on the situation of human rights in the Islamic Republic of Iran. The Committee notes, in particular, the concern expressed by the Commission, especially about the large number of cases of cruel, inhuman or degrading treatment or punishment.

9.10 In the light of the content of the preceding paragraphs, the Committee considers that substantial grounds exist for believing that the author and his family would be in danger of being subjected to torture if they were sent back to Iran.

10. Taking account of the above, the Committee is of the view that, in the present circumstances, the State party has an obligation to refrain from forcibly returning the author and his family to Iran, or to any other country where they would run a real risk of being expelled or returned to Iran.

11. The Committee's finding of a violation of article 3 of the Convention in no way affects the decision(s) of the competent national authorities concerning the granting or refusal of asylum. The finding of a violation of article 3 has a declaratory character. Consequently, the State party is not required to modify its decision(s) concerning the granting of asylum; on the other hand, it does have a responsibility to find solutions that will enable it to take all necessary measures to comply with the provisions of article 3 of the Convention. These solutions may be of a legal nature (e.g. decision to admit the applicant temporarily), but also of a political nature (e.g. action to find a third State willing to admit the applicant to its territory and undertaking not to return or expel him in its turn).

[Text adopted in French (original version) and translated into English, Spanish and Russian]

Notes

1/ See views on Communication No. 13/1993 (Mutombo v. Switzerland), paragraph 9.2, adopted on 27 April 1994.

2/ See views in communication No. 39/1996 (Tapia Paez v. Sweden), paragraph 14.5, adopted on 28 April 1997.