

COMMITTEE AGAINST TORTURE

E. A. v. Switzerland

Communication No 28/1995

10 November 1997

CAT/C/19/D/28/1995

VIEWS

Submitted by: E. A. (name deleted) (represented by counsel)

Alleged victim: The author

State party: Switzerland

Date of communication: 14 June 1995

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

Meeting on 10 November 1997,

Having concluded its consideration of communication No. 28/1995, 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 into account all information made available to it by the author of the communication, his counsel and the State party,

Adopts its

Views under article 22, paragraph 7, of the Convention

1. The author of the communication is a Turkish citizen of Kurdish ethnic origin, born in 1961, who left Turkey in July 1990 and requested political asylum in Switzerland on 23 July 1990. At the time of submission the author was residing in Switzerland, but on 10 August 1995 he left Switzerland and is now believed to be residing with relatives in Munich, Germany. In his submission the author claimed that his expulsion to Turkey would have

constituted a violation of article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

The facts as submitted by the author

2.1 The author has been a sympathizer of the illegal organization Dev-Yol since the end of the 1970s. He was involved in propaganda activities until 1980. At the end of 1980, he was arrested by the Turkish authorities and kept in police detention for one and a half months, during which he was tortured. Later he was again detained for a month, since he failed to appear before the Military Tribunal.

2.2 In October 1980, the author started his military service. On 22 April 1983, the Military Tribunal acquitted the author of the charges against him. The author states, however, that he continued to be harassed and detained for short periods, despite his acquittal. After the trial, the author halted his public political activities. In July 1988, while he was working at the Atatürk dam, he was stopped by the police and interrogated about the political activities of his colleagues. One week later, he had a collision with a military jeep, because of which he broke his lower leg and was unable to work for 17 months. According to the author, the collision was no accident, but an attack in order to scare him.

2.3 The author further explains that he was also in danger because of political activities of family members. His elder brother was detained from 1975 to 1979/80 because of his membership in Dev-Yol, and has been in hiding since. The author has lost contact with his brother, but states that the police called him to their office and asked after his brother, about five months before he left Turkey. When he was once again called to the police office, the author became afraid and decided to leave the country. The author further states that his wife and children had to leave their home town Cat and are now staying with family in Mersin.

2.4 The author's application for refugee status was considered by the Swiss Refugee Office, which reviewed his submissions against other relevant information obtained by the Swiss Embassy in Ankara, from which it appeared that the author was not personally in danger of detention or persecution. By decision of 12 July 1994 the author's application for refugee status was denied. The author's appeal was considered by the Asylum Review Commission, which confirmed the earlier decision on 28 March 1995.

The complaint

3. The author submits that Turkey is a country where torture is systematically practised and that the human rights situation in the country has been deteriorating over the past years. The author states that he is at risk of being subjected to torture upon his return to Turkey because he is Kurd, because he has been accused of membership in an illegal political party and was put on a blacklist because of this, and because family members are politically active and being persecuted by the authorities. The author further refers to statements from three Kurd activists who have been recognized as refugees in Germany, according to whom the author would be in danger of being detained and tortured if he were to return to his country.

Admissibility considerations

4.1 By note verbale on 22 December 1995 the State party informed the Committee that the author had left Switzerland on 10 August 1995 and that he was no longer within Swiss jurisdiction. It argued that pursuant to rule 107, paragraph 1 (b), of the Committee's rules of procedure, the author lacked the quality of victim for purposes of article 22 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

4.2 In his submission of 26 March 1996 author's counsel argued that the author only left the territory of Switzerland because he believed that he was in imminent danger of being returned to Turkey, since the Committee had declined to request Switzerland, pursuant to rule 108, paragraph 9, of the Committee's rules of procedure, that he not be expelled while the Committee was seized of the case. The author, however, wished to maintain his complaint before the Committee.

5.1 At its sixteenth session, the Committee considered the admissibility of the communication. It noted that, pursuant to article 22, paragraph 1, of the Convention, the Committee may consider a communication from an individual who claims to be a victim of a violation of a provision of the Convention by a State party, provided that the individual is subject to the jurisdiction of that State party, and that the State has declared that it recognizes the Committee's competence under article 22.

5.2 The Committee observed that at the time of the submission of the author's communication, he was under the jurisdiction of the State party and that the communication was properly registered. The Committee needed not to examine the reasons why the author left the jurisdiction of the State party and did not consider his absence from Switzerland a ground for inadmissibility. In the absence of other obstacles to admissibility, and bearing in mind that domestic remedies had been exhausted in Switzerland, the Committee found that it should proceed to an examination of the merits of the claim.

6. On 8 May 1996, the Committee therefore decided that the communication was admissible.

State party's observations on the merits of the communication

7.1 The State party recalls that the author's claim has been duly examined by the Office fédéral des réfugiés (ODR) and by the Commission de recours en matière d'asile (CRA), and that the Swiss embassy in Ankara was requested to inquire into some of the author's allegations. The State party notes that the author bases his claim mainly on the fact that he was suspected of membership of an illegal political party, but that he was acquitted of these charges in 1983, and that he only left Turkey seven years later.

7.2 As to the merits of the communication, the State party submits that its embassy in Ankara has made enquiries which show that the author is not listed by the police, which appears logical since he was acquitted of the charges against him. According to the State party, the author's declarations about the arrests he has undergone since his acquittal are

contradictory and vary from instance to instance. As to his political activities after 1983, the State party notes that the author never mentioned these before the ODR and brought it up for the first time in his appeal to the CRA.

7.3 As to the author's accident in 1988, the State party argues that it is very unlikely that this was an attack on him, given the fact that it happened in the middle of the day, in the presence of many witnesses and that it failed. The State party further points out that at first the author declared that the collision was with a police jeep, whereas later he said that it was with a military jeep. According to the State party, the interrogation by the police a week before the accident appears to have been routine procedure and is not linked to the accident.

7.4 As to the circumstances of the author's departure from Turkey, the State party notes that the author states that he left Turkey illegally with a falsified passport. However, the Swiss embassy in Ankara found that the author had been issued a passport in 1991 by the competent authorities in Tunceli, which the author has never mentioned. According to the State party, if the author had left Turkey in the circumstances related by him, the Turkish authorities would not have issued him a new passport.

7.5 As to the author's claim that close family members are politically active and sought by the police, and that he therefore fears torture upon his return to Turkey, the State party contends that the Turkish authorities cannot possibly expect the author to have stayed in close contact with his brother over the past five years, since he was residing outside the country. The State party moreover points out that the author's brother was actually arrested on 4 April 1985 for having a false identity card on him and subsequently released, which seems to indicate that he is not being sought by the authorities.

7.6 As to the author's own political activities, the State party notes that they go back seven years and were subject to a judgement of acquittal. The State party notes that Dev-Yol no longer manifests itself actively and is no longer an object of interest on the part of the Turkish security forces.

7.7 The State party refers to the text of article 3 of the Convention and observes that it does not imply that an automatic danger of torture exists when human rights violations regularly take place in the country concerned, but only that this situation must be taken into account when determining whether a danger exists. The danger must be concrete, that is directly affecting the applicant, and serious, that is highly likely to occur. With reference to the arguments outlined above, the State party is of the opinion that the author of the present communication has not shown the existence of substantial grounds for believing that such a danger exists if he were to return to Turkey.

7.8 With regard to the author's reference to the situation of Kurds in Turkey, the State party argues that reference to a general situation cannot in itself be evidence of the existence of a concrete and serious danger for the author. Moreover, the State party argues that the author could establish himself in another part of Turkey, if he believes that the region of Tunceli is dangerous for him. In this context, the State party recalls that the author's wife and children are now living in Mersin.

7.9 Finally, the State party recalls that Turkey is a party to the Convention against Torture and also has recognized the Committee's competence to examine individual communications under article 22 of the Convention. According to the State party, a finding of a violation by the Committee in the instant case would have serious and paradoxical results.

Counsel's comments on the State party's submission

8.1 Counsel argues that the existence in a country of a pattern of gross, flagrant or mass violations of human rights is in itself an indication that a danger of torture exists. In this context, counsel notes that the State party does not contest that such a pattern exists in Turkey.

8.2 Moreover, counsel refers to his initial communication and argues that individual grounds for believing that the author would be in danger of torture exist. In this context, counsel notes that the State party bases itself on information provided by the Swiss embassy in Ankara. Counsel claims that the information provided by this embassy has been proven wrong on several occasions and therefore questions the reliability of the information provided in the author's case.

8.3 Counsel further recalls that the author originates from Tunceli, and that even the Swiss authorities are of the opinion that no refugee claimant should be sent back to that area of Turkey because of the violence plaguing the region. In its decision in the author's case, the CRA argued that the author could safely return to other parts of Turkey. According to counsel, the CRA has since changed its jurisprudence and now holds that no safe alternatives exist for persons from Tunceli, since the province of origin is always mentioned in the identity cards and since Tunceli has the image to be PKK-friendly; as a consequence, persons from Tunceli are at a particular risk during identity checks.

8.4 As regards the State party's argument that a finding of a violation would lead to paradoxical situation, since Turkey is a party to the Convention against Torture including article 22, counsel argues that Turkey's ratification of the Convention and recognition of the complaints procedure cannot preclude the application of article 3 to Switzerland.

State party's further submission and counsel's comments thereon

9.1 In a further submission, the State party explains that the information in which the embassy has recognized that it has erred in the past concerned declarations that a person was not in possession of a passport, and that this does not affect the information provided by the embassy in the author's case. According to the State party, the CRA has found the information provided by the embassy to be fully reliable. Furthermore, the State party points out that the information furnished by its representations abroad is only one of many elements on which the authorities base their decisions.

9.2 With regard to Tunceli, the State party acknowledges that the CRA has rendered a decision in which it is stated that persons from Tunceli run particular risks during identity checks because of their place of origin. However, the State party argues that the fact that the

author is from Tunceli is not in itself sufficient to conclude that he cannot live in security elsewhere in Turkey. In this context, the State party points out that thousands of Kurds have established themselves in the west of Turkey in recent years and that in Istanbul alone more than three million Kurds are registered.

10.1 Counsel notes that the State party has not contested that its embassy in Ankara has provided wrong information in the past. He contends that this wrong information was not limited to declarations about the issuance of passports. Counsel refers to a report published by the Swiss Refugee Aid Organisation, in which it is stated that, although it cannot be contested that the information provided by the embassy is reliable in relatively many cases, mistakes can easily be made and a whole list of cases exists in which the Embassy gave information which was later shown wrong. Counsel also refers to the Committee's Views in communication No. 21/1995 (*Ismail Alan v. Switzerland*) in which the Committee concluded that the return to Turkey would constitute a violation of article 3 of the Convention, despite information provided by the Swiss embassy in Ankara that the author was not being sought by the police and that no passport prohibition for him existed.

10.2 Counsel explains that the embassy's enquiries are made by an officer of the ODR accredited to the Ministry of Foreign Affairs. According to counsel, the Turkish authorities would certainly not provide any information which could damage their interests. Since most of this information is to be considered as illegally gathered, because of the lack of an international legal basis, counsel argues that this evidence should be treated with circumspection.

10.3 Counsel submits that for Kurds from Tunceli no real possibility exists to settle elsewhere in Turkey, and that they are subject to human rights violations also in the west of Turkey. Counsel refers to the Committee's Views in communication No. 21/1995 (*Ismail Alan v. Turkey*) in which the Committee held that since the police were looking for the author, it was not likely that a "safe" area for him existed in Turkey.

10.4 Finally, counsel submits that the human rights situation in Turkey has not improved, and that Amnesty International, in its annual report of 1996, reports that torture is being used routinely as has also been recognized by the Committee. Counsel also refers to a judgement by the Swiss Federal Court of 11 September 1996, concerning an extradition to Turkey, in which the Court found that serious human rights violations took place in Turkey, and that the extradition should therefore be subject to certain assurances.

Examination of the merits

11.1 The Committee has considered the communication in the light of all the information made available to it by the parties, in accordance with article 22, paragraph 4, of the Convention.

11.2 The Committee must decide, pursuant to paragraph 1 of article 3, whether there are substantial grounds for believing that E. A. would be in danger of being subject to torture upon return to Turkey. In reaching this decision, the Committee must take into account all

relevant considerations, pursuant to paragraph 2 of article 3, including the existence of a consistent pattern of gross, flagrant or mass violations of human rights. The aim of the determination, however, is to establish whether the individual concerned would be personally at risk of being subjected to torture in the country to which he or she would return. It follows that the existence of a consistent pattern of gross, flagrant or mass violations of human rights in a country does not as such constitute a sufficient ground for determining that a particular person would be in danger of being subjected to torture upon his return to that country; additional grounds must exist to show that the individual concerned would be personally at risk. Similarly, the absence of a consistent pattern of gross violations of human rights does not mean that a person cannot be considered to be in danger of being subjected to torture in his or her specific circumstances.

11.3 The Committee has noted that the State party's argument that the danger to an individual must be serious ("substantial") in the sense of being highly likely to occur. The Committee does not accept this interpretation and is of the view that "substantial grounds" in article 3 require more than a mere possibility of torture but do not need to be highly likely to occur to satisfy that provision's conditions.

11.4 In the present case, the Committee notes that the author's political activities date back to the beginning of the eighties, at which time he was arrested, tortured, prosecuted and acquitted. The author himself states that he did not resume his activities and although was interrogated by the police twice (once in 1988 and once five months before leaving) there is no indication that the police intended to detain him. In this context, the Committee finds also that the author has not provided substantiation for his claim that the collision with a jeep in 1988 was in fact an attack on him. The Committee further notes that the author has not contested the State party's assertion that the authorities in Tunceli issued him a passport in 1991, and that there is no indication that the police are looking for him at present.

11.5 The Committee is aware of the serious human rights situation in Turkey, but recalls that, for the purposes of article 3 of the Convention, a foreseeable, real and personal risk must exist of being tortured in the country to which a person is returned. On the basis of the considerations above, the Committee is of the opinion that such risk has not been established.

11.6 The Committee considers that the information before it does not show that *substantial* grounds exist for believing that the author will be personally at risk of being subject to torture if he is returned to Turkey.

12. The Committee against Torture, acting under article 22, paragraph 7, of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, is of the view that the facts as found by the Committee do not reveal a breach of article 3 of the Convention.

[Done in English, French, Russian and Spanish, the English text being the original]