

COMMITTEE AGAINST TORTURE

K.M. v. Switzerland

Communication No 107/1998

16 November 1999

CAT/C/23/D/107/1998

VIEWS

Submitted by: K.M. [name deleted] [represented by counsel]

Alleged victim: The author

State party: Switzerland

Date of communication: 23 February 1998

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

Meeting on 16 November 1999,

Having concluded its consideration of communication No. 107/1998, 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 and the State party,

Adopts the following decision:

1.1 The author of the communication is Mr. K.M., a Turkish citizen of Kurdish ethnic origin, born in 1972, currently living in Switzerland where he has applied for asylum. His application, however, has been rejected and he is at risk of expulsion. He alleges that his forced return to Turkey would constitute a violation by Switzerland of article 3 of the Convention. He is represented by counsel.

1.2 In accordance with article 22, paragraph 3, of the Convention, the Committee transmitted the communication to the State party on 11 March 1998. At the same time the State party was requested, pursuant to rule 108, paragraph 9, of the Committee's rules of procedure, not to expel the author to

Turkey while his communication was under consideration by the Committee. In a submission of 15 April 1998 the State party informed the Committee that measures had been taken to ensure that the author would not be returned to Turkey while his case was pending before the Committee.

The facts as submitted by the author

2.1 The author comes from the south-eastern part of Turkey. He states that, although sympathetic towards the cause of the Kurdish Workers' Party (PKK) he was not involved in political activities. He performed his military service with the Turkish army in 1992/93. He ran a shoe shop together with his father in the village of Gaziantep. Although not politically active, he was arrested by the police on two occasions in August and September 1994, on suspicion of helping the PKK, and was kept in detention for a brief period. During one of his detentions he was severely beaten, resulting in the loss of one of his teeth and damage to others. On both occasions he was released without charge.

2.2 In early 1995 a member of the PKK whom they did not know contacted the author and his father and asked them to supply the organization with a large quantity of shoes. Being sympathetic towards the organization, the author and his father accepted the deal and shoes were supplied on a weekly basis. According to the author, his cousin, who was working actively for the PKK and came sometimes to collect the weekly ration of shoes, was arrested by the Turkish police in March 1995 while in possession of the shoes. Under torture he informed the police that the author was making shoes for the PKK. The police then looked for the author at his domicile, but the author managed to escape and hide. His father was arrested in order to make the author show up. The author decided to leave the country and arranged his departure with the help of smugglers. He later learned that his cousin had been killed while trying to escape from prison.

2.3 The author arrived in Switzerland on 20 April 1995 and immediately applied for asylum. The Federal Office for Refugees (ODR) rejected his application on 14 November 1996. On 12 January 1998 the Appeal Commission for Asylum Matters (CRA) turned down the author's appeal.

2.4 The author complains that his interviews with the Swiss asylum authorities were conducted without the assistance of a lawyer and disagrees with the arguments used by those authorities to conclude that he lacked credibility and reject his application. The Swiss authorities indicated that there were a number of contradictions in the information supplied by the author during his three interviews with asylum officers. Those contradictions concerned, inter alia, the author's profession, the request he had received to make shoes for the PKK and the arrests to which he had been subjected in 1994. The author provides the Committee with detailed explanations designed to demonstrate that there are no such contradictions and that he has told the truth about the reasons that motivated his departure from the country.

2.5 The author provided the Committee with a document issued by the prosecutor of Gaziantep, dated 28 March 1995, indicating that he was wanted by the police. The document was considered by the Swiss authorities as a fake. The author disagrees with that conclusion and complains that, contrary to the usual practice, the Swiss authorities never asked the Swiss Embassy in Ankara to verify the authenticity of the document.

The complaint

3.1 The author claims that his forcible return to Turkey would constitute a violation of Switzerland's obligations under the Convention, since in view of the reasons that motivated his departure from Turkey, there are substantial grounds to believe that he would risk imprisonment, torture and even extrajudicial killing upon return.

The State party's observations on the admissibility and merits of the communication

4.1 The State party did not contest the admissibility of the communication and made observations on its merits in a letter dated 13 August 1998.

4.2 The State party informs the Committee of the discrepancies which the authorities have found to exist during their interviews with the author. The State party notes, for example, that his account of the order for mountain shoes for PKK soldiers is strewn with contradictions and inconsistencies. These relate to an essential point of the communication, namely, the grounds for the persecution to which the author was allegedly subjected by the authorities of his country. The State party also considers that the statements by the author regarding the circumstances in which he allegedly received the order for shoes cannot be reconciled with the situation with which members of the PKK are faced. It does seem surprising, at the very least, that a member of a terrorist movement, at war with the current regime, which has mobilized the main forces of the country against it, would arrive one day at the home of strangers and ask them to support the armed struggle, in broad daylight and without taking the slightest precaution. To accept the author's version would be to ignore that the PKK must have instituted a whole system of security measures, such as strategies for identifying its members, in order to safeguard their lives so as to continue the armed struggle. In this regard, it is interesting to note that, by the author's own account, it is well known that the secret police and its informers are present in all areas of civil society. A genuine PKK member could not be ignorant of this fact and would not have rashly exposed himself to danger as the author claims.

4.3 The State party finds it astonishing that an individual suspected by the police in August 1994 of having given support to the PKK should spontaneously accept, at the beginning of 1995, a stranger's suggestion that he should produce shoes for the movement, without for a second imagining that the security services might have been trying in this way to confirm their suspicions about him.

4.4 The State party also contests the reality of the proceedings instituted by the police against the author. The author stated that his father had also made shoes for the PKK; however, the father was never subjected to any criminal prosecution for participation in terrorist activity, but was only arrested and interrogated with regard to his son. The leniency shown by the Turkish authorities to the author's father is completely inexplicable. Even if the cousin did not denounce the author's father, the fact remains that the father also made shoes for the PKK or at least allowed them to be made in his workshop. Thus, the father's behaviour would doubtless have justified the opening of a criminal investigation against him since he had, as the owner of the workshop, given his support to a terrorist movement. In fact, the father has never been bothered on these grounds by the national authorities.

4.5 Moreover, the author stated that his cousin had been sentenced to five years' imprisonment and

that he had informed the police that the author had made the shoes. However, the author has never produced an extract from the judgement in question, which, if it had really existed, could have proved that he had been his cousin's accomplice.

4.6 With regard to the future persecutions to which the author would allegedly risk being exposed on returning to his country, the State party informs the Committee that, following the request of the ODR dated 3 April 1998, the Swiss embassy in Ankara made inquiries regarding the situation of the author in Turkey. By letter of 21 April 1998 the embassy confirmed that the police had no political file on the author and no record of his having committed a criminal offence, that he was not wanted by the police or the armed special police at the national or local level and was not prohibited from holding a passport.

4.7 On the basis of this recent information, the author could surely no longer seriously maintain that the letter from the Office of the Public Prosecutor in Gaziantep was authentic. The Swiss authorities were, moreover, convinced that the document was a forgery. Firstly, it was an internal official letter which would normally not be intended, at least in this form, to be handed over to the wanted person. Secondly, the quality of the paper used and the absence of any of the official indications that generally appear on this type of document according to the specialized service of the ODR, led to the conclusion that the author had had the document forged by friends or relatives.

4.8. The author also made contradictory statements regarding the dates and duration of his alleged arrests in 1994. He firstly stated that the two arrests had taken place in August 1994, and subsequently in September and October 1994; that they had lasted, respectively, three days and one day, and then only one day. It is therefore quite likely that the dental damage suffered by the author was caused by some other incident than that indicated by him, for example an accident at work. The dental certificate in no way confirms the statements by the author with regard to the cause of the damage. Moreover, it can be seen from the communication that the author did not leave Turkey because of these events, which leads one to suppose that there is no causal link between them and the grounds for the future persecution which the author claims he will suffer if he returns to his country.

Counsel's comments

5.1 Counsel reiterates the explanations he had already provided regarding the contradictions in the author's statements referred to by the State party. As for the document from the prosecutor of Gaziantep, the State party seems to suggest that the author asked his relatives to produce a false document. The author asked his father to send him evidence, not to forge a document. He does not know how his father obtained the document but there is nothing to indicate that the document is a forgery. In a telephone conversation on 23 December 1996, the father told counsel that he had had to go to the police station several times in order to obtain the document.

5.2 As for the argument that the author was unlikely to place himself at risk again, counsel claims that many Kurds in Turkey are suspected by the police of collaborating with the PKK, in spite of which they continue to work for the organization.

5.3 As for the argument that the author's father should have been prosecuted, counsel says that the

father is a sick old man who does not belong to the sector of the population that normally joins the guerrilla movement, i.e. the younger generation. The author, however, clearly informed the Swiss authorities that his father had been held in police custody for one week, during which time he was questioned two or three times about his whereabouts.

5.4 Counsel considers that it is not realistic to ask the author to provide a copy of his cousin's criminal record. The author left Turkey shortly after his cousin's arrest and does not know whether his cousin had a lawyer. Only a lawyer would have been in a position to provide such documents, since his cousin's wife, children and mother left the country and the author has no contact with them. Counsel says that the Swiss authorities should have been able to obtain that kind of document.

5.5 Counsel adds that the PKK member who contacted him and his father and asked them to make the shoes knew through the author's cousin that the author and his father were PKK sympathizers, so that he did not run the kind of risk referred to by the State party.

Issues and proceedings before the Committee

6.1 Before considering any claims 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 procedure of international investigation or settlement. The Committee also notes that all domestic remedies have been exhausted and that the State party has not contested the admissibility of the communication. It therefore considers that the communication is admissible. Since both the State party and the author's counsel have provided observations on the merits of the communication, the Committee proceeds with the consideration of those merits.

6.2 The issue before the Committee is whether the forced return of the author to Turkey would violate the obligation of Switzerland under article 3 of the Convention not to expel or to return a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.

6.3 The Committee must decide, pursuant to paragraph 1 of article 3, whether there are substantial grounds for believing that the author would be in danger of being subjected 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. 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; specific grounds must exist indicating 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.

6.4 The Committee recalls its general comment on the implementation of article 3 which reads:

"Bearing in mind that the State party and the Committee are obliged to assess whether there are substantial grounds for believing that the author would be in danger of being subjected to torture were he/she to be expelled, returned or extradited, the risk of torture must be assessed on grounds that go beyond mere theory or suspicion. However, the risk does not have to meet the test of being highly probable" (A/53/44, annex IX, para. 6).

6.5 In the present case the Committee notes that the State party draws attention to a number of inconsistencies and contradictions in the author's account, casting doubt on the truthfulness of his allegations. It also notes the explanations provided by counsel in that respect. The Committee considers, however, that those inconsistencies and contradictions are not of such nature as to be relevant for the assessment of the risk under which the author might be if he is returned to Turkey.

6.6 From the information submitted by the author the Committee observes that the events that prompted his departure from Turkey date back to 1995. The author provided the Swiss authorities with a document allegedly issued by the Office of the Public Prosecutor of Gaziantep, soon after his departure, as evidence of proceedings initiated against him for his links with the PKK. The Swiss authorities considered that the document in question was a forgery. In the Committee's opinion the explanations provided by the author to demonstrate that the said document is authentic are not convincing. Furthermore, the Committee notes the information provided by the Swiss embassy in Ankara according to which the police has not established a dossier on the author and he is not under an order of arrest. Accordingly, the author has failed to demonstrate that he is under risk of being arrested upon his return. The Committee further notes the author's allegations that his father was arrested by the police and questioned about his whereabouts. However, the arrest in question took place in 1995. There is nothing to suggest that the author or members of his family have been sought or intimidated by the Turkish authorities since then. There is nothing to suggest either that the author has collaborated with the PKK in any way since leaving Turkey in 1995.

6.7 The Committee notes with concern the numerous reports concerning the use of torture in Turkey, but recalls that, for the purposes of article 3 of the Convention, the individual concerned must face a foreseeable, real and personal risk of being tortured in the country to which he is returned. In the light of the foregoing, the Committee deems that such a risk has not been established.

6.8 On the basis of the above considerations, the Committee is of the opinion that the information before it does not show substantial grounds for believing that the author runs a personal risk of being tortured if he is sent back to Turkey.

7. The Committee against Torture, acting under article 22, paragraph 7, of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, concludes that the decision of the State party to return the author to Turkey does not constitute a breach of article 3 of the Convention.

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