

COMMITTEE AGAINST TORTURE

N.M. v. Switzerland

Communication No. 116/1998

9 May 2000

CAT/C/24/D/116/1998.

VIEWS

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

Alleged victim: The author

State party: Switzerland

Date of communication: 10 July 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 9 May 2000,

Having concluded its consideration of communication No. 116/1998, 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. N.M., a citizen of the Democratic Republic of the Congo (DRC) born on 10 January 1968 and currently residing in Switzerland, where he applied for asylum on 1 December 1997. His application having been turned down, he maintains that his forcible repatriation to the DRC would constitute a violation by Switzerland of article 3 of the Convention against Torture. 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 23 September 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 the DRC while his communication was under consideration by the Committee. In a submission dated 23 November 1998, the State party informed the Committee that steps had been taken to ensure that the author was not returned to the DRC while his case was pending before the Committee.

The facts as submitted by the author

2.1 The author claims he worked in Kinshasa between 1992 and 1997 as an employee of a company called Hyochade, belonging to Mr. Kongolo Mobutu, the son of former President Mobutu. According to the author, this company was a cover for plundering the wealth of the country in various ways, such as extorting money from foreign businessmen or organizing demonstrations that required State authorization. It paid no taxes and had no administrative obligations. Acting on behalf of the regime, it also carried out propaganda activities and kept track of members of the political opposition in order to keep them under some kind of control.

2.2 The author explains that his work consisted of acting as an intermediary in certain business transactions, such as obtaining permits for foreign businessmen. But his responsibilities also included collecting information on members of the opposition within a particular geographical area and denouncing any subversive activities. One day, he denounced a friend's father, who was subsequently tortured to death. The author states that he reported to his supervisors at least every two months and was generously paid. In addition to his salary, he received a bonus when he denounced someone and he enjoyed a whole range of other privileges.

2.3 During this period, he was warned by both friends and enemies that his activities might one day be dangerous for him. His parents, particularly his father, tried to persuade him to leave the job and return to university. The author eventually left Hyochade in January 1997 and stayed with his parents while waiting for an opportunity to go back to university.

2.4 On 17 May 1997, the rebellion led by Mr. Kabila reached Kinshasa. On the night of 18 June 1997, soldiers burst into the author's parents' house to arrest him. As he was not there, the soldiers arrested his father. When he learned what had happened to his family, the author decided to go into hiding in Bas-Zaïre, where he stayed with a friend until mid-September. He then caught typhoid fever and decided to return to Kinshasa, where he stayed with his sister.

2.5 On 6 October 1997, his father was released on condition that he report to the military post every two weeks until the author returned. On the day he was released, the father came to visit the author, but was followed by three plain-clothes officers with an arrest warrant and a photograph of him. The author was arrested and taken to the Kokolo military camp. His father was allowed to accompany him only as far as the entrance.

2.6 The author states that he was kept in isolation in a cell for three days without food. He was then taken to the office of the camp commander, where he was informed that he was accused of treason, extortion and complicity in murder. He denied the charges, but was ordered by the commander to be taken away to another cell, where he received a beating, including blows to his genitals, from several soldiers. He was in hospital until 25 November 1997, when a doctor, who had been bribed

by his sister, helped him to escape. He decided to leave the country immediately.

2.7 On arriving in Switzerland, on 1 December 1997, he applied for asylum. His application was turned down by the Federal Office for Refugees on 25 March 1998. He then submitted an appeal against this decision, but it was declared inadmissible on 18 June 1998 by the Swiss Appeal Commission on Asylum Matters, on the grounds that the author had not paid the full amount needed to cover the cost of the proceedings until four days after the deadline.

Merits of the complaint

3.1 The author states that, if he were returned to the DRC, he would be tortured and summarily executed. Given the fact that he carried out his professional activities in his own neighbourhood, that he had sent many people from that neighbourhood to be tortured if not to their death, and that he enjoyed many privileges, there are grounds for believing that he has certainly not been forgotten and that, if he returned to Kinshasa, the fate awaiting him would be commensurate with his actions. The numerous documents he has produced during the asylum proceedings also provide substantial reasons for believing that this fear is well founded.

Observations by the State party

4.1 By letter of 23 November 1998, the State party informed the Committee that it did not contest the admissibility of the communication. Nevertheless, in its observations dated 11 March 1999, it requests the Committee to make sure that the same matter is not being examined under another procedure of international investigation or settlement.

4.2 With regard to the merits of the communication, the State party makes it clear first of all that, in accordance with previous decisions of the Committee,¹ it in no way opposes the absolute nature of article 3. It adds, however, that while the author's fears must be analysed in the light of the general situation prevailing in the country, it must also be determined that any risk is personal, real and foreseeable.

4.3 The State party points out that the author made many contradictory statements during questioning on vital points of his story. For example, the author did not mention the events of 18 June 1997 during his first hearing and even specified that he had had no problem with the new Congolese authorities prior to 6 October 1997. Moreover, the circumstances surrounding his departure from Kinshasa for Bas-Zaïre were brought up only during the second hearing. He also contradicted himself with regard to the person who had helped him leave the hospital; the first time he had said it was a nurse and the second time that it was a doctor. Also, while at the second hearing he was able initially to give the doctor's name and approximate address, a little later he could no longer remember. The State party notes that the author has provided no explanation for these contradictions in his communication.

4.4 Furthermore, the State party questions the plausibility of certain facts introduced by the author only towards the end of the proceedings, for no apparent reason other than to strengthen his argument for asylum. In particular, he suggested that working for Hyochade implied that he had to be a member of the People's Revolution Movement (MPR - the single party during President

Mobutu's regime). As to reasons for his arrest in October 1997, it was only at the end of the proceedings that he mentioned treason, complicity in murder and embezzlement.

4.5 In the view of the State party, some parts of the author's story are completely implausible, such as the claim that, during his escape, he was wheeled out of the hospital on a bed hidden under a sheet. There are also serious doubts about his escape from the country, since he came to Europe by plane, the most tightly controlled means of transport, although he claims that he was wanted on serious charges.

4.6 The State party considers it surprising that the author produced no medical certificate, even though he claimed to be suffering from the after-effects of the acts of torture to which he had been subjected and that these acts were recent enough for a doctor to determine that they had taken place. No documentary evidence was produced to explain these contradictions in the author's account and hence he cannot use the argument put forward in previous cases before the Committee, whereby "the effects of a post-traumatic stress disorder, as in the case of many torture victims" may account for "the inconsistencies that appear in some statements".²

4.7 While acknowledging that a person does not have to have been tortured in the past to have a justifiable fear of being tortured in the future, the State party points out that there is no further evidence in the author's case to prove this risk exists. Referring to the Committee's decision in the case of *Seid Mortesa Aemei v. Switzerland*,³ it thus notes that, even if the author's position in Hyochade really did involve being a member of the MPR, his political activities were not important enough to warrant his persecution by the current Government.

4.8 The State party expresses serious doubts about the author's professional activities and about the very existence of the Hyochade company, since the author has never been able to produce any documents relating to his work for that company, even though he was able to obtain a number of other documents and his family on the spot could have helped him find the papers he wanted. In addition, the State party believes that for the author to be effective as an informant, he would have needed the help of other informants. Yet the author has always maintained that he had been working alone, which appears inconsistent to the State party.

4.9 Regarding the lack of evidence, the State party's comments in the previous paragraph also apply to the author's escape from hospital, insofar as his sister or the person who helped him could have provided a statement.

4.10 Lastly, as far as the general situation in the DRC is concerned, the State party accepts the Committee's observations in the case of *X, Y and Z v. Sweden* (4) and recalls that the Office of the United Nations High Commissioner for Refugees (UNHCR) has not as yet made any recommendations to the effect that asylum-seekers whose applications are unsuccessful should not be sent back to that country.

Additional observations by the author

5.1 In a letter dated 28 April 1999, the author comments on the State party's observations on the merits of the communication.

5.2 With regard to the contradictions found by the State party in the author's accounts, the author refers to the appeal submitted to the Swiss Appeal Commission on Asylum Matters on 30 April 1998, in which all the necessary explanations are given. It is made clear there that, while it had not indeed been recorded during the first hearing that he had had problems with the authorities on 18 June 1997, the author had in fact meant to say that he had not been physically ill-treated by the authorities prior to 6 October 1997. On the same point, the author draws attention to the fact that the problems encountered on 18 June 1997 emerge clearly from the report on the second hearing, which mentions his stay in Bas-Zaire from that date. With regard to the exact status of the person who helped him escape from the hospital, it is pointed out that the author, a novice in that respect, never really knew whether the person was a nurse or a doctor, a distinction which is even more difficult to draw in the DRC. As far as that person's name is concerned, it is natural that the author should have had difficulty remembering it, since, for the sake of security, an accomplice will rarely reveal his name. The author mentioned one name at the beginning of the hearing, but then gave up.

5.3 With regard to the other arguments put forward by the State party, the author refers to the additional statement dated 4 June 1998, which was submitted to the Swiss Appeal Commission on Asylum Matters. In it, the author explains why he chose to travel to Europe by plane and how he organized his trip so that he would not be spotted. He had actually obtained a return plane ticket that belonged to a Zairian citizen residing in Italy. He also states that he no longer has any contact with his family, which means that he is unable to obtain certain documents. Lastly, with regard to his activities on behalf of the regime and his political activities, the author observes that he was asked very few questions on the subject and so did not have a chance to give all the necessary explanations in reply to the doubts of the authorities responsible for the asylum proceedings.

5.4 The author believes that the State party has not honoured its international commitments in its handling of his application for asylum, particularly in its excessive reliance on a formality (the payment of the 250 Swiss franc deposit for appeal costs four days after the deadline) to declare his appeal to the Swiss Appeal Commission on Asylum Matters dated 30 April 1998 inadmissible.

5.5 The author derives some satisfaction from the State party's observations on his communication, since for the first time the merits of his reasons and arguments have been examined in depth. He regrets, however, that this examination was carried out not by the actual judicial authority normally competent in asylum matters, but by the Government, which, by virtue of the proceedings, is a party in the case and consequently does not have the independence and impartiality of the judiciary.

5.6 The author believes that, by signing the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the State party undertook not to expel, return or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture. To determine the risk involved, the State party must take account of all relevant considerations, including the existence of systematic violations of human rights in the country concerned. The author believes that these relevant considerations have not been examined, since the Swiss authorities dealing with the matter did not at any time consider the merits of his application for asylum.

5.7 With regard to the lack of a medical certificate, the author recalls that he was examined upon his arrival in Switzerland, but, being unfamiliar with the details of the procedure, did not think of asking

for an examination of the marks left by the ill-treatment to which he had been subjected.

5.8 In respect of his political activities while working for Hyochade, although his actions were not political in the strict sense of the word, they were serious enough for him to be remembered in Kinshasa. As to the lack of documentation to back up his statements about his work, he adds that there would be no documents relating to his activities at Hyochade at his father's house because of the nature of the company's activities.

5.9 Lastly, the author believes he has provided enough plausible evidence to show that his story is true, believing that any made-up story would never have held together.

Issues and proceedings before the Committee

6.1 Before considering any of the allegations in a communication, the Committee against Torture must decide whether or not the communication is admissible under article 22 of the Convention. It has ascertained, as in accordance with article 22, paragraph 5 (a), of the Convention it is required to do, that the same matter has not been and is not being examined under another procedure of international investigation or settlement. It 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. As both the State party and the author 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 the Democratic Republic of the Congo would violate the obligation of the State party under article 3 of the Convention not to expel or 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 article 3, paragraph 1, whether there are substantial grounds for believing that the author would be in danger of being subjected to torture upon return to the Democratic Republic of the Congo. In reaching this decision, the Committee must take into account all relevant considerations, pursuant to article 3, paragraph 2, 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 or her return to the country. There must be other grounds 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 might not be 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.

6.6 The Committee finds the arguments advanced by the author in support of his allegations of being tortured before fleeing the Democratic Republic of the Congo to be inconsistent and unconvincing.

6.7 The Committee also finds that it has not been given enough evidence by the author to conclude that the latter would run a personal, real and foreseeable risk of being tortured if returned to his country of origin.

6.8 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 the Democratic Republic of the Congo 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.]

Notes

1/ Gorki Ernesto Tapia Paez v. Sweden, Communication No. 39/1996, section 14.5.

2/ Babikir v. Switzerland, Communication No. 38/1985.

3/ Seid Mortesa Aemei v. Switzerland, Communication No. 34/1995.

4/ X, Y and Z v. Sweden, Communication No. 61/1996.