

COMMITTEE AGAINST TORTURE

H.A.D. v. Switzerland

Communication No 126/1999

10 May 2000

CAT/C/24/D/126/1999

VIEWS

Submitted by: H.A.D. [name deleted] [represented by counsel]

Alleged victim: The author

State party: Switzerland

Date of communication: 21 January 1999

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 May 2000,

Having concluded its consideration of communication No. 126/1999, 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. H.A.D., a Turkish citizen of Kurdish origin born in 1962 and currently residing in Switzerland, where he applied for asylum on 11 March 1991. His application, however, was turned down and he claims that his forcible repatriation to Turkey 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 brought the communication to the attention of the State party on 8 February 1999. At the same time, the State

party was requested, pursuant to article 108, paragraph 9, of the Committee's rules of procedure, not to expel the author to Turkey while his communication was under consideration. On 6 April 1999, the State party notified the Committee that steps had been taken to ensure that the author was not 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. His family owns a farm in the village of Bazlama, in the Karakocan region of Elazig province in south-eastern Turkey, an area traditionally inhabited by the Kurds.

2.2 When the author was living in Turkey, most of the members of his family had problems with the authorities. His older brother Y., an active supporter of the Kurdish Workers' Party (PKK) since 1979, joined the PKK fighters in 1986 and was killed during a battle on 13 February 1995. His father died on 15 January 1980, three months after surviving a month in prison, where he had been tortured. He had been arrested on account of his son Y.'s activities in the PKK. The circumstances surrounding their father's death traumatized the author's younger brother, V., an asylum-seeker in Switzerland. At the age of nine, V. was unable to talk for several months following his father's arrest by the security forces. He has been suffering since then from chronic psychological problems, for which he has needed psychiatric help, including in Switzerland. The only brother of the author to stay in Turkey had to change his surname in order to avoid further persecution. The author's wife was forced to agree to a divorce for the same reasons. Lastly, the author cites the names of several other members of his family who were refugees in Switzerland or who were killed by the Turkish army.

2.3 In 1985, the author was jailed about one month after the arrest of a cousin, N.S., who today has refugee status in Switzerland, on charges of acting as a guide (or "pathfinder"¹) to this cousin and other guerrillas in 1984. During his detention, he was ill-treated and tortured. The doctor's observations on the medical certificate he has produced can only be interpreted as referring to the effects of the torture to which he was subjected. The author emphasizes that such observations of torture cannot be confirmed by a doctor without endangering the latter's life.²

2.4 Later, he took part in the 1991 spring festivities (*Newroz*), which had been moved forward to January for political reasons. The festivities came to an end when the security forces arrived. One guerrilla and two soldiers were killed. The author managed to escape undetected; he went back to Istanbul and left the country as he was afraid he would be persecuted again for taking part in the festivities.

2.5 The author applied for asylum in Switzerland on 11 March 1991. He was questioned on 15 May 1991 and 29 March 1994. The author stresses that these rounds of questioning were difficult for him because of his lack of schooling; moreover, the fact that the second one took place three years after the first meant that his memory of events changed. His lack of education also accounts for his ignorance of various aspects of the PKK and explains why he did what he could to support this organization. The Federal Office for Refugees turned down the author's application for asylum on 1 November 1994. The author's appeal to the Swiss Appeal Commission on Asylum Matters was rejected on 6 November 1998.

Merits of the complaint

3.1 The author claims that torture is commonly used in Turkey during police interrogations, as has been confirmed by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment. According to the author, people committing acts of torture are protected by the 1991 Anti-Terrorist Act and by the courts and tribunals.³ "This state of affairs will never change as long as the Turkish Republic is based on the myth of an ethnically homogeneous Turkish people, sustained despite all proof to the contrary by an army fighting an unwinnable war that the Turkish economy can ill afford, the cost of which has led to the corruption of the entire political class".⁴

3.2 The first argument put forward by the author is that he comes from a family with close links to the PKK and whose mere reputation could give him the most serious kinds of problems with the Turkish authorities, including torture. As emphasized in a court ruling in Stuttgart, Germany, concerning his cousin F.M., as a member of a family that has suffered deeply from persecution, the author will certainly be tortured if he returns to Turkey. The risk is real and personal since he has already been subjected to torture and the Turkish authorities rightly believe that he has helped PKK guerrillas by doing small favours for them and supporting them.

Observations by the State party 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 9 August 1999.

4.2 First, the State party recalls that the existence of a pattern of mass, flagrant or systematic violations of human rights in a country does not as such constitute a sufficient ground for concluding that a person would be in danger of being subjected to torture if he returned to that country. There must also be grounds for believing that the author would be personally at risk.

4.3 Furthermore, the State party does not believe the author can claim to be the victim of "deliberate persecution", defined as government reprisals against the families of political activists. Even though the author's older brother Y. was wanted for his PKK activities, there had been no contact between the two of them for over 10 years, according to the author's statements when he applied for asylum. It is therefore unlikely that the author was wanted by the Turkish authorities at the time of his flight. As the Committee has already recalled, the fear of persecution must be of a current nature at the time when the communication is under consideration.⁵ Moreover, Y. was killed on 13 February 1995 and this gives the Turkish authorities even less reason to look for the author. Lastly, with the death of Y., the author no longer has any family members in Turkey who are active members of the PKK. Those who might be subjected to "deliberate persecution" are either outside Turkey or dead.

4.4 The State party does not see how the situation of his younger brother V., an asylum-seeker in Switzerland, whatever his psychological state, can have anything to do with the alleged risks of torture faced by the author. As for the brother who stayed in Turkey, while he may have changed his name to avoid persecution, it should be stressed that the author's mother, ex-wife and children also live in Turkey and have kept the same name. The State party is therefore of the view that the brother's change of name owes more to the fact that the surname D. is very widespread in Turkey

than to a real fear of persecution.

4.5 With regard to the author's divorce, the State party wonders why it took place only three years after the author's departure and why it was not his wife who applied for it if the aim of the divorce was purely, according to the author's statements, to avoid her continued persecution. The State party believes the reasons for the divorce have more to do with the irreparable breakdown of the marriage, as mentioned on the separation certificate. This impression is confirmed by the author's request for publication of a notice of intent to marry, submitted in February 1999 and withdrawn a few weeks later.

4.6 The State party recalls the Committee's general comment on the implementation of article 3 of the Convention, according to which the risk of torture "must be assessed on grounds that go beyond mere theory or suspicion", even though "the risk does not have to meet the test of being highly probable". In the light of the above, the State party does not consider that the author has demonstrated that the risk of "deliberate persecution" is highly probable. Indeed, according to information provided by the Swiss embassy in Ankara, there is no political file on the author or any file in which it is stated that he has committed a crime under ordinary law; neither the local nor the national police or gendarmerie are looking for him and there are no restrictions at all on his use of a passport. Someone from his village also confirmed that the author had left over 10 years earlier and had settled in Istanbul before leaving for Switzerland.

4.7 On the question of the allegations of torture and ill-treatment suffered by the author in the past, the State party first draws attention to the factors to be taken into account according to the general comment on the implementation of article 3 of the Convention. On the basis of this, it then refers to the observations made by the Swiss authorities on the author's application for asylum and notes that the author produced two letters from a lawyer explaining his problems which contained numerous spelling and syntactical mistakes and which had been drafted in a very unprofessional way. The author argues that the lawyer was a Kurd and did not know Turkish very well, but the State party points out that Turkish is the official language in Turkey, that the laws are written in Turkish and that lawyers' training is given in Turkish. It is therefore highly unlikely that a lawyer would not know Turkish well. The State party also points out that the author makes no further mention of an accommodation document from the *Muthar* of Bazlama and a forged letter from the Karakocan public prosecutor, and this would suggest that the author no longer contests the observations by the Swiss authorities in this regard. The State party then states that no probative value can be attached to the medical report that is supposed to prove that acts of torture took place. For one thing, the report asserts that the "treatment" lasted from 23 May to 3 June 1985, whereas the author has said he was released on 29 June 1985; for another, the author's description of the torture he underwent - including blows, burns, paralysis of two fingers and electric shocks to the genitals - does not correspond to what is described in the medical report. Lastly, the State party draws attention to the contradictory statements in which the author claimed on one occasion that, after seven days in detention, he had been taken before a prosecutor who released him after his family paid a sum of money to an "Oberleutnant" (lieutenant-colonel) and, on another occasion, that he had never been taken before a prosecutor and that his uncle had paid a security to either a judge, a prosecutor, or a "Hauptmann" (captain) or an "Oberst" (colonel).

4.8 The State party also considers that, even if the author was indeed tortured, there is no satisfactory

causal link between his detention and his flight from Turkey. According to previous decisions of the Committee, the foreseeable nature of the risk seems in practice to mean that a causal relationship must be established between the persecution suffered and the reasons for fleeing. In the view of the State party, this relationship is non-existent when there is a lapse of seven years between the persecution and departure from the country, particularly since the author did not resume his political activities in the host country.

4.9 The State party has serious doubts about the author's credibility in terms of his commitment to the PKK. Although he spoke of a whole series of activities and events he had taken part in, he was unable to give any substantial information on the PKK that was not common knowledge in Turkey; the stereotypical accommodating statements made by cousins who are refugees in Switzerland, to the effect that the author was active in the PKK, do nothing to refute these observations. The State party also stresses that it is rather surprising that counsel for the author should assert in the communication that a lack of schooling is the cause of this ignorance when the author claims to have been active in this organization for over 10 years and to come from a family of political activists, including a cousin who was a founder member of the PKK. Lastly, the argument that the contradictions in the accounts given at the different hearings are the result of the three-year gap between them is unconvincing insofar as the author had the opportunity to reread the minutes of the hearings and had to sign them.

4.10 Finally, with regard to the general situation in Turkey prevailing and described by the author with the help of various supporting documents, the State party recalls that, while it should indeed be taken into account when assessing the risk, for the purposes of article 3 of the Convention, the Committee believes there must be a foreseeable, real and personal risk that the person will be tortured if he is returned to the country. The State party also stresses that it regularly reassesses the situation in Turkey and recently decided that a person could not be repatriated to the author's home province (Elazig). However, the areas of conflict are clearly defined and it is quite possible for the author to settle in another, calmer region where he will be able to fit in easily, particularly given his knowledge of Turkish and his level of education.

Comments by the author

5.1 In a letter dated 25 October 1999, the author commented on the State party's observations on the merits of the communication.

5.2 The author first of all regrets that the State party's observations focus on arguments he never intended to put forward. For example, he never claimed that his younger brother's psychological problems were proof of the risk of torture facing him if he returned to his country. The author only wished to emphasize that he came from a family with particularly close links to the PKK and which, as a result, was certainly targeted by the Turkish authorities. It is in this context that he fears, quite rightly, that he will be tortured if he returns.⁶

5.3 It seems that the State party no longer contests any of the events the members of the author's family were involved in in connection with their activities in the PKK. This proves, therefore, that the author must have been involved with the PKK in one way or another.

5.4 The author has always given the same account of his detention in 1985 and clearly bears the marks of it. Another medical report will be produced to bear this out. The inconsistencies and contradictions pointed out by the State party are minimal and do not detract from the author's credibility.

5.5 It is true that Turkey does not recognize the principle of family responsibility. However, no one disputes that the Turkish authorities resort to reprisals against family members in their fight against the PKK. This explains why Y.O., the author's brother-in-law, was arrested, beaten and tortured by the Turkish authorities in August 1996 to extract information from him on members of his family and, in particular, the author's situation. In this connection, the author provides a copy of the State Security Court's decision of 10 September 1996.

5.6 With regard to his contacts with his brother Y., the author emphasizes that he illegally sent him a number of items from Switzerland that would be useful in his guerrilla activities, and this is of course illegal as far as the Turkish authorities are concerned and is a further reason why the author is afraid of returning to the country. Furthermore, the State party did not faithfully transcribe the author's statements: the author in fact stated that he had not **seen** his brother for 10 years before he left, but that did not stop him from having contact with him.

5.7 The author stands by his explanation of why his brother I. changed his name, saying it would be foolish to believe that someone could so easily change his name just because it was a very common name.

5.8 With regard to the author's divorce, it is clear that the real grounds for the divorce could not be revealed to the court and the fact that he tried to become socially integrated in Switzerland, by means of a marriage that in the end did not take place, had absolutely nothing to do with his divorce in 1994. Moreover, he continues to provide for his family.

5.9 The information on the author collected by the Swiss embassy in Ankara is highly suspect. The Turkish Government is under no obligation to provide such information to the State party and it is doubtful that it would voluntarily give accurate information on a conflict taking place in the south-east of the country. This information is in no way a reliable basis for proving there is no risk.⁷ Moreover, the State party has never really disputed the facts of the author's detention in 1985.

5.10 With regard to the only contradiction found in the author's accounts of his appearance before a prosecutor, he emphasizes that it involves a legal term which is difficult to translate into Turkish, that he did not know the precise meaning of that term, since he had only had seven years of schooling, and that the hearings were held in Turkish, which is not his mother tongue. Furthermore, his uncertainty over the rank of the person who received the sum of money has no bearing on the author's credibility. As to the claim that some of the documents are false, the author is convinced that they are authentic and, even supposing some of them were forgeries, that would not have been the result of a deliberate choice on his part and could even have been justified by his extreme fear of being tortured again.

5.11 The author considers the simple spelling mistakes in the lawyer's letters to be irrelevant and a relatively feeble argument. He also refutes the State party's claims that he had accepted its

observations on his lack of credibility.

5.12 The author finds it inexcusable that the State party did not have a medical examination carried out in connection with the torture he had been subjected to. His injuries have indeed affected his memory and it is easy to find inconsistencies in the account of a person who has been tortured.

5.13 The author confirms that he has had only minimal schooling, and this explains why he has no place in the PKK hierarchy. However, this lack of education did not stop him from carrying out all the activities he reported to the Swiss authorities.

5.14 With regard to the State party's argument that he contradicted himself in his account of his flight from Turkey, the author gives some details of this journey, although, according to him, they are not an important aspect of the persecution he suffered.

5.15 Lastly, on the question of the possibility of his settling in another region, the author points out that, in order to return to Turkey, he would have to go through border controls. His name alone and the fact that most members of his family have fled the country will ensure that he is detained while an investigation is carried out in his home province. During that time, he will be subjected to extreme interrogation methods.

Further observations by the State party

6.1 In a letter dated 25 January 2000, the State party provided its final comments on the above observations by the author.

6.2 According to information provided to the Swiss embassy in Ankara by a contact who lives in the author's home village, the author's sister, S.O., and her husband, Y.O., were arrested in 1996 by gendarmes, but, contrary to the author's assertions, they were not tortured. In addition, it appears that, according to the same informants, Y. and S.O. spend their holidays every year in Bazlama.

Further comments by the author

7.1 By letter of 17 April 2000, the author submitted his final comments, particularly on the report by the Swiss embassy in Ankara.

7.2 The author considers that a contact's statements to the Swiss embassy in Ankara to the effect that there was no incident at the burial of N.O. are false. The State Security Court's decision of 10 September 1996 shows that the author's brother-in-law was arrested and charged with supporting an illegal organization.

7.3 The author points out that the other Swiss embassy contact in Ankara is the mayor of the village of Balzama and that he had to be somewhat cautious about imparting information since he was not sure for whom it was intended.

7.4 The author considers that the State party should on no account base itself on information to the effect that the author is not wanted, first because of the difficulty of verifying the source and

secondly because the police would not refrain from arresting the author in the event of his return to Turkey for that reason. The author is convinced that he would be arrested upon his return because he based an application for asylum on pro-Kurdish activities. When the border guards conducted their inquiry, they certainly consulted the gendarmerie, who were familiar with the circumstances of his brother's and father's death.

7.5 Lastly, by letter of 11 May 2000, the author transmitted a document according to which information concerning the registration of wanted persons is not disclosed to anyone prior to their arrest apart from the police. The Turkish police thus had no reason to inform the Swiss embassy of their wish to arrest the author.

Issues and proceedings before the Committee

8.1. 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. In this case, the Committee notes that all available domestic remedies have been exhausted and that the State party has not contested its admissibility. The Committee finds therefore that the communication is admissible. The State party and the author have each made observations on the merits of the communication and the Committee therefore proceeds to examine it on its merits.

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

8.3. 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. 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. Other grounds must exist that indicate 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.

8.4. 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).

8.5. The Committee does not doubt the allegations of ill-treatment to which the author was subjected during his 28-day detention after his arrest in 1985, even though the medical reports do not substantiate the author's description of acts of torture or their effects.

8.6. However, in view of the time that has elapsed between the events described by the author, the establishment of the veracity of his claims and the present day (15 years have passed), the current risk for the author of being subjected to torture or "deliberate persecution" on being returned to Turkey does not appear to have been sufficiently well-established.

8.7. In the light of the above, 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 would 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/ The word used in the original communication.

2/ See Vincent Iacopino, "Torture in Turkey and its unwilling accomplices", Physicians for Human Rights, 1996, pp. 4-9.

3/ Public statement by Amnesty International on 11 March 1998.

4/ *Neue Züürcher Zeitung* No. 19/1998, p. 5.

5/ Decision No. 61/1996, *X, Y and Z v. Sweden*, 6 May 1998.

6/ See Selahattin Celik, *Die Todesmaschinerie "Tüürkische Konterguerilla"*, 1999, pp. 40-212.

7/ See Werner Spirig, *Mit verdeckten Karten/Asylrecht im Schatten der Geheimdienste*, 2nd ed., 1996, *passim*.