

COMMITTEE AGAINST TORTURE

M. P. S. v. Australia

Communication No. 138/1999

30 April 2002

CAT/C/28/D/138/1999

VIEWS

Submitted by: M. P. S. (name deleted) [represented by counsel]

Alleged victim: The author

State party: Australia

Date of communication: 4 June 1999 (initial submission)

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

Meeting on 30 April 2002,

Having concluded its consideration of complaint No. 138/1999, 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 complainant and the State party,

Adopts this Decision under article 22, paragraph 7, of the Convention.

1.1 The complainant is Mr. M.P.S., a Sri Lankan national of Tamil ethnicity, who, at the time of submitting his complaint, was detained at the Villawood Detention Centre in Sydney, Australia. He claims that his removal to Sri Lanka entailed a violation of article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment by Australia. He is represented by counsel.

1.2 In accordance with article 22, paragraph 3, of the Convention, the Committee transmitted the

complaint to the State party on 21 June 1999 at 2.35 p.m. Geneva time. At the same time, acting under rule 108 of its rules of procedure, the Committee requested the State party not to expel the complainant to Sri Lanka while his complaint was being considered. The Committee notes the information from the State party that the complainant was removed from Australia on 21 June 1999. The Secretary-General's note verbale was received by the Permanent Mission of Australia when the complainant had allegedly already been deported to Sri Lanka.

The facts as submitted by the complainant

2.1 On 9 September 1997, the complainant arrived in Australia without a passport or other identification papers. On 15 September 1997, he applied for refugee status (protection visa) to the Department of Immigration and Multicultural Affairs. His application was rejected on 25 September 1997. The decision not to grant a protection visa was confirmed by the Refugee Review Tribunal (RRT) on 30 October 1997, after conducting a hearing, where a legal adviser and an interpreter assisted the complainant. Upon decision of the Federal Court of 13 May 1998, the matter was referred back to the RRT for re-determination. On 20 August 1998, the Tribunal decided again not to grant a protection visa, after hearing the complainant. On 3 February 1999, the federal Court dismissed the complainant's appeal against the second RRT decision. An appeal to the Full Court of the Federal Court was dismissed on 14 May 1999. On 3 November 1997, 20 August 1998 and 18 June 1999, his case was considered not to satisfy the requirements for granting a visa to remain in Australia on humanitarian grounds. Counsel submits that all effective domestic remedies have been exhausted.

2.2 Counsel submits that the complainant lived in Nuwara Eliya, an area in the south of Sri Lanka. In 1989, when fighting broke out between the pro-Sinhalese movement Janatha Vimurthi Peramuna (JVP) and the Government in the Nuwara Eliya area, the complainant was arrested and detained for six to seven months in the Diyatalawa Army Camp on suspicion of being a member of JVP. During this time, the complainant was allegedly questioned and subjected to torture by army officers. The complainant's father paid a large amount of money to secure his release.

2.3 From 1992 to 1995, members of the Liberation Tigers of Tamil Eelam (LTTE), friends of his wife's family, visited frequently and the complainant was obliged to provide food and accommodation. On the last occasion, in October 1995, several members of the LTTE came to stay with his family for 15 days. During this time, the oil tanks in Kolonawa, Colombo, were bombed and the police believed that the people staying with the complainant's family had been involved. The complainant was allegedly taken to the police station in Nuwara Eliya, interrogated and tortured. It is submitted that the complainant had only been released after three days upon payment of a large amount of money to the police officer in charge.

2.4 In February 1996, the LTTE accused the complainant of providing the Government with information on the oil tank attack. Counsel submits that the complainant was beaten and threatened with death. After intervention by his family and his wife, he was spared.

2.5 Towards the end of February 1996, the complainant was arrested by the police and taken to Diyathalawa Army Camp, detained for three days, and allegedly tortured. Counsel submits that the

father of the complainant paid a large amount of money for his release. Immediately after his release, the complainant fled Nuwara Eliya for fear of the Sri Lankan authorities and the LTTE. He stayed with friends in Kandy and later in Hatton for some months, before he went to Colombo.

2.6 Later in 1996, the Maradana police arrested the complainant in Colombo, detained him for one week and questioned him on his relationship with the LTTE. It is submitted that the complainant was beaten every night by police officers and that he was not given proper food. In March 1997, the complainant managed to flee Sri Lanka to Cambodia, Bangkok and Sydney.

2.7 Counsel submits that in view of the two arrests of the complainant with regard to the Kolonawa bomb blast, there is a real chance that he would be arrested again should he return to Sri Lanka. Counsel believes that the documents, which have been taken away from the complainant by the police, have been supplied to the secret police (NIB) and, therefore, the authorities will be in a position to trace the complainant wherever he lives. Counsel argues that the complainant had been arrested and come to the attention of the security forces for providing a safe place to LTTE members who allegedly were involved in what is considered to be one of the major assassinations committed by the LTTE. The complainant would very likely be detained and interrogated at the airport upon his return to Colombo.

2.8 Counsel further submits that there are substantial grounds for believing that the complainant would be in danger of being subjected to torture by Sri Lankan police, security forces and the LTTE if he returned to Sri Lanka. The complainant experienced torture and ill-treatment by the authorities and the LTTE before he left the country. Counsel quotes Human Rights Watch reports and reports by the United States Department of State of 1996 as evidence of a consistent pattern of gross and systematic violations of human rights in Sri Lanka. Counsel argues that under the Prevention of Terrorism Act and Emergency Regulations the police can arrest on the basis of mere suspicion, often based on the presumption of guilt arising merely from a person coming from the north or east of the country. In such an atmosphere, counsel sees every chance that the complainant, as a Tamil-speaking young man from the Eastern Province of Sri Lanka, will be harassed and mistreated by the authorities on mere suspicion. Counsel quotes from Sri Lankan newspaper headlines and articles in this regard.

The complaint

3.1 Counsel submits that the evaluation of evidence in asylum procedures in Australia is deficient. Counsel argues that the Australian immigration authorities expect an applicant to give the full facts on his claim upon his arrival. Counsel submits that this is not justified, as asylum-seekers behave initially in an irrational and inadequate way, do not trust the authorities and are only ready to tell the true and complete story after having been in the country for some time. Therefore, the opinion of the Australian Government that whatever is invoked later is not trustworthy is considered absurd by counsel, as in cases such as the complainant's new statements have to be accepted by the RRT in spite of the fact that the story was incoherent, inconsistent and contradictory in the beginning.

3.2 Counsel claims that the deportation of the complainant to Sri Lanka violated article 3 of the Convention against Torture and Other Inhuman or Degrading Treatment or Punishment. Counsel

argues that there were substantial grounds for believing that the complainant would be in danger of being subjected to torture if deported. Given the absolute prohibition to expel a person where he risks being subjected to torture, counsel submits that the complainant should not have been removed.

3.3 Counsel claims that the evidence of a consistent pattern of gross and massive violations of human rights in Sri Lanka prohibits the Government of Australia from expelling the complainant.

State party's observations on admissibility and merits

4.1 The State party submits that it has been its practice to comply with requests for interim measures by the Committee whenever it has been in a position to do so. However, the complainant was removed from Australia on 21 June 1999 at 4.30 a.m. Geneva time. The text of the complaint and the Committee's request was received after the complainant had been removed from Australia, i.e. in the ordinary mail at the Permanent Mission of Australia in Geneva in the late morning of 21 June 1999, and, subsequently, on the same day at 2.36 p.m. Geneva time on the Mission's fax machine.

4.2 The State party contests the allegations of procedural shortcomings with regard to the handling of evidence when considering the case of the complainant. The State party submits that the complainant has provided no evidence that the alleged procedural irregularities amount to a breach of any of the provisions of the Convention and, therefore, this claim should be dismissed as inadmissible *ratione materiae*. Alternatively, the State party submits that, except in limited circumstances, it is beyond the competence of the Committee to review findings of fact or the interpretation of domestic legislation by national organs of the State party. Furthermore, the State party submits that any issue arising from possible errors of law by the first RRT decision would have been rectified subsequently. The complainant failed to refer to the second and third decisions of the Federal Court in this regard.

4.3 The State party contests that there are substantial grounds for believing that the complainant would be in danger of being subjected to torture if returned to Sri Lanka. The State party submits that the risk of ill-treatment by the LTTE alleged by the complainant does not raise an issue for consideration by the Committee, because the complainant failed to provide any evidence that the LTTE would act with the consent or acquiescence of the Sri Lankan authorities. Furthermore, the complainant failed to demonstrate that the LTTE are exercising quasi-governmental authority over an area to which he is to be returned and, therefore, could be regarded as an agent for the purposes of article 3 of the Convention. Alternatively, the State party submits that the complainant has failed to submit that he is at risk of being tortured by the LTTE. In this regard, the State party requests that the complaint be declared inadmissible *ratione materiae*. With regard to the risk of being tortured by Sri Lankan authorities, the State party submits that the complainant's evidence lacks credibility or, alternatively, is not sufficient to establish a real, foreseeable and personal risk of being subjected to torture.

4.4 The State party requests that the complaint be declared inadmissible *ratione materiae* as far as the complainant relies on an interpretation of article 3 of the Convention that a pattern of gross violations of human rights in the receiving State is sufficient to trigger the international protection of article 3.

4.5 Finally, the State party notes that the right not to be tortured is protected under domestic law in Sri Lanka. Furthermore, Sri Lanka ratified the Convention and is a party to the International Covenant on Civil and Political Rights.

Issues and proceedings before the Committee

5. The Committee notes that the Federal Court had dismissed the complainant's claim on 18 June 1999, thus leaving the complainant with only three days to avail himself of article 22 of the Convention.

Considerations of the admissibility

6.1 Before considering any claims contained in a communication, the Committee against Torture must decide whether the communication 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.

6.2 The Committee notes the State party's claim that the communication is inadmissible *ratione materiae* (see paras. 4.2-4.3). The Committee, however, is of the opinion that the State party's arguments raise substantive issues which should be dealt with at the merits and not the admissibility stage. The Committee, therefore, considers that the conditions laid down in article 22, paragraph 5 (b), of the Convention have been met. Since the Committee sees no further obstacles to admissibility, it declares the communication admissible.

Consideration of the merits

7.1 The issue before the Committee is whether the forced return of the complainant to Sri Lanka violated the obligation of Australia 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 or she would be in danger of being subjected to torture.

7.2 The Committee must decide, pursuant to article 3, paragraph 1, of the Convention whether there were substantial grounds for believing that the alleged victim would have been in danger of being subjected to torture upon return to Sri Lanka. In reaching this decision, the Committee must take into account all relevant considerations, pursuant to article 3, paragraph 2, of the Convention, 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.

7.3 In the present case, the Committee notes the State party's argument that it is beyond its competence to review findings of fact or the interpretation of domestic legislation by national organs of the State party. The Committee agrees that it cannot overturn an authoritative domestic organ's interpretation of the application of domestic legislation, but reiterates that it is not bound by findings of fact that are made by organs of the State party and instead has the power, provided for by article 22, paragraph 4, of the Convention, of free assessment of the facts based upon the full set of circumstances in every case¹. The Committee recalls that, even though there may be some remaining doubt as to the veracity of the facts adduced by a complainant, it must ensure that his security is not endangered². In order to do this, it is not necessary that all the facts invoked by the complainant should be proved; it is sufficient that the Committee should consider them to be sufficiently substantiated and reliable.

7.4 With regard to the complainant's claim that he was in danger of being subjected to torture by the LTTE, the Committee recalls that the State party's obligation to refrain from forcibly returning a person to another State where there are substantial grounds for believing that he or she would be in danger of being subjected to torture is directly linked to the definition of torture as found in article 1 of the Convention. For the purposes of the Convention, according to article 1, "the term 'torture' means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity". The Committee recalls its previous jurisprudence that the issue whether the State party has an obligation to refrain from expelling a person who might risk pain or suffering inflicted by a non-governmental entity, without the consent or acquiescence of the Government, falls outside the scope of article 3 of the Convention³.

7.5 The Committee notes with concern the reports of torture by public officials in Sri Lanka, including those submitted by the complainant, but points out that, for the purposes of article 3 of the Convention, substantial grounds must exist that create a foreseeable, real and personal risk of torture in the country to which the complainant is to be returned. On the basis of the facts as submitted by the complainant, the Committee is of the opinion that such grounds have not been established. Therefore, the Committee considers that the complainant has not substantiated his claim that he was personally at a real risk of being subjected to torture, if returned to Sri Lanka.

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 removal of the complainant to Sri Lanka, on the basis of the information submitted, did not constitute a breach of article 3 of the Convention.

Notes

¹ General Comment No. 1, sixteenth session (1996), para. 9 (b).

² See Mutombo v. Switzerland, case No. 13/1993, Views adopted on 27 April 1994, para. 9.2.

³ G.R.B. v. Sweden, case No. 83/1997, Views adopted on 15 May 1998, para. 6.5.