

COMMITTEE AGAINST TORTURE

M. O. v. Denmark

Communication No. 209/2002

12 November 2003

CAT/C//31/D/209/2002*

VIEWS

Submitted by: Mr. M. O. (represented by counsel, Ms. Birte Falkesgaard-Larsen)

Alleged victim: The complainant

State party: Denmark

Date of complaint: 24 May 2002

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

Meeting on 12 November 2003,

Having concluded its consideration of complaint No. 209/2002, submitted to the Committee against Torture by Mr. M. O. 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 complaint, his counsel and the State party,

Adopts the following:

Decision under article 22, paragraph 7, of the Convention against Torture

1.1 The complainant is Mr Milo Otman, an Algerian national, currently residing in Denmark and awaiting his deportation to Algeria. He claims that his forcible return to Algeria would constitute a violation by Denmark of article 3 of the Convention against Torture and Other Cruel, Inhuman or

Degrading Treatment or Punishment. He is represented by counsel.¹

1.2 On 5 June 2002 the Committee transmitted the complaint to the State party. On 7 March 2003, pursuant to rule 108, paragraph 1, of the Committee's rules of procedure, and following a belated request by counsel on 7 February 2003, the State party was requested not to expel the complainant to Algeria, pending consideration of his case by the Committee.

Facts as submitted by the complainant

2.1 The complainant served in the Algerian army between approximately 1991 and 1998, where he served as a corporal in a weapons store. He claims that in 1994, he was contacted by representatives of the Groupe Islamique Algérien (GIA), who asked him to work for them. He refused. In 1994, for reasons not specified, he was sent to a military prison. There is no indication as to whether the complainant was tried or convicted, or of precisely when he was released from prison.

2.2 The complainant claims that in 1996, the authorities learned of the GIA's previous contact with him, and that in 1998 he was again arrested and sent to prison, on suspicion of having supplied the GIA with weapons, ammunition and food. He was allegedly interrogated and tortured by the Algerian security forces, and, unable to bear the torture, admitted to having worked for the GIA. He claims, amongst other things, that he was kicked forcefully in the genitals, that electric shocks were applied to his genitals, shoulders, hands and feet, and that he was threatened with reprisals against his mother if he did not cooperate. He contends that his physical condition became so critical that he had to be transferred to a military hospital, from which he managed to escape. As he was still a member of the armed forces at the time of his escape, this made him a deserter.

2.3 The complainant arrived in Denmark in 1999, and applied for asylum with the Danish Immigration Service (DIS) on 28 December 1999. His application was rejected on 2 March 2001, and on 21 August 2001, the Refugee Review Board (Review Board) upheld the DIS's decision. The Review Board found that the complainant's testimony about his reasons for seeking asylum was unreliable, and that there were discrepancies in his account of events. It found insufficient evidence to establish that the complainant had been tortured in Algeria. The Review Board noted a report prepared by Amnesty International, which found no signs of mental trauma, although marks on the complainant's body were consistent with some of the types of torture described. The Review Board concluded that the evidence did not justify a decision to grant him asylum.

2.4 The Complainant subsequently underwent a psychological examination, which concluded that he suffered from post-traumatic stress disorder and displayed the signs of dissociation often seen in a person who had been subjected to torture. The report noted that the complainant would cease participating in conversation when emotional topics were raised, and that he experienced flashbacks. It noted that the complainant was not able to concentrate on certain questions, because of his fear of being tortured again, and that he found it difficult being questioned by men, as his torturers had been men. The report also concluded that his ability to present a story in an interview had been affected by his post traumatic stress disorder. On 14 September 2002, based on the psychologist's report, he applied

to the Refugee Board to re-open his case. The application was refused on 24 January 2003.

2.5 The complainant attributes the inconsistencies in his story to several factors. First, he says that the interpreter provided to him spoke an 'eastern' form of Arabic which he did not properly understand. His first language is said to be French. Secondly, he claims that, as demonstrated by the psychologist's report, he suffers from post-traumatic stress disorder, and states that, in telling his story to the Danish authorities, he relived his experiences of torture, which caused him great anxiety. He claims that being kept in detention by the Danish authorities traumatized him and made it much more difficult for him to provide a cogent and consistent account of his experiences. He refers to the psychologist's report, which concluded that his apparent untrustworthiness could be attributable to his psychological dissociation.

2.6 Finally, the complainant refers to the UNHCR country report on Algeria dated 11-12 June 2001, which states that torture is widely practiced in Algeria, and that deserters from the army, such as the complainant, face persecution and torture if they are returned to Algeria.

The Complaint

3.1 The complainant claims that he would be at risk of being tortured if he were returned to Algeria, and that his return would constitute a violation of article 3 of the Convention. He states that he has previously been subjected to torture in Algeria, and that, given his false confession to having assisted the GIA, together with the general human rights situation in Algeria, he is in danger of being subjected to torture again if returned.

The State party's observations on admissibility and merit

4.1 In its observations dated 24 March 2003, the State party objects to the admissibility of the claim, and makes submissions on the merits of the claim. In relation to admissibility, it submits that the complainant has failed to establish a prima facie case of a violation of article 3,² and that his complaint should be declared inadmissible.

4.2 In relation to the merits, the State party contends that the complainant's return to Algeria would not contravene article 3 of the Convention. It recalls that on 16 February 2000 he completed an application form, in Arabic, in which he provided information about his reasons for seeking asylum in Denmark. He was counseled as to the importance of providing all relevant information. He was interviewed by DIS officials on 11 December 2000 with the assistance of an interpreter, whom the complainant said he understood. A report produced from this interview was reviewed together with the complainant. On 2 March 2001 the DIS refused the asylum application, and the complainant filed an appeal with the Review Board. In May 2001, the Review Board agreed to stay proceedings so that Amnesty International could arrange for a medical examination of the applicant. This report was submitted on 20 June 2001 (see paragraph 2.3).

4.3 The Refugee Board rejected the appeal on 21 August 2001. It found that the complainant had

not presented his grounds for seeking asylum in a coherent and credible way. He was found to have provided conflicting and fabricated accounts of his departure from Algeria and his treatment by the Algerian authorities, including details relating to his imprisonment, whether or not he had been convicted of any offence, and his military service. This, together with the Amnesty International report, caused the Review Board to dismiss the appeal. There was no evidence before the Board from which it could have been established that the complainant was at risk of persecution if returned to Algeria.

4.4 The State party provides a description of the composition, competence and processes of the Review Board. Decisions of this body are final and not subject to judicial review. This follows from a decision of the Danish Supreme Court in 1997, which noted that the Review Board was an expert body of quasi-judicial character. It reaches its decisions on the basis of an individual assessment of the asylum seeker, considered in light of the general situation in the country of origin. To obtain asylum, an applicant must have a well founded fear of persecution, in accordance with the Refugee Convention of 1951, and this must be supported by objective evidence. The Board attaches importance to whether the applicant can provide a credible account of his or her situation. It also studies reports which deal with the human rights situation in relevant countries. Background information is collated from various sources, including governmental, non-governmental and United Nations sources. Further, the Board considers the fact that a person may have been tortured in the past as a relevant but not necessarily decisive consideration in deciding whether to grant asylum.

4.5 The State party submits that the complainant is seeking to have the Committee conduct a review of the relevant evidence supporting his claim for asylum, whereas it is well established that the Committee is not an appellate, quasi-judicial or administrative body. The Review Board has had the benefit of direct contact with the complainant, and of reviewing all of the relevant evidence in detail. It has not found the complainant's evidence to be credible, and finds no objective basis to fear that he will be subjected to torture if returned to Algeria. The State party refers to the Committee's jurisprudence on article 3, which acknowledges that considerable weight should be given to the findings of fact made by government authorities.

4.6 The State party argues that, in relation to a claim under article 3 of the Convention, the burden of proof is on the applicant to present an arguable case. It refers to the Committee's General Comment 1, which states that for the purposes of assessing whether there are "substantial grounds for believing that a person would be in danger of being subjected to torture," the risk of torture must be "assessed on grounds that go beyond mere theory or supposition", although it does not have to meet the test of being "highly probable". The applicant must establish that he would be in danger of being tortured, and that the danger is "personal and present".

4.7 The State party contends that the above is not born out in the present case. It notes that, according to the Committee's General Comment No 1 and its case law, it is appropriate to take into account the complainant's credibility and any discrepancies in his/her evidence. The State Party addresses in some detail the various discrepancies in the complainant's accounts of his experiences. For example, the complainant first stated that he flew to Moscow, then Berlin, and paid some friends to hide him in a freight lorry to Denmark. He later said that, after flying to Russia, he took a ferry first to

Germany, and then to Denmark. As to his military service, the complainant stated in his asylum application that he was in the army from 1991 to 1994. However, in his interview with the DIS, he said he was in the army from 1990 to 1998. Further, the complainant first told the Danish authorities that he fled Algeria after being released from imprisonment and returning to the military, but subsequently stated that he fled the country directly from the military hospital. For the State party, such discrepancies cannot be described as minor; they are material discrepancies of fact which the Government is entitled to rely on in assessing credibility.

4.8 The State party adds that at no time did the complainant raise any language difficulties with the authorities. He filled out his application form in Arabic, and could have done so in French if he had indicated such a preference. It also notes that the psychologist's report was taken into account by the Refugee Board in its decision not to reopen the complainant's case, and that it did not add new material or information.

4.9 The State party states that it could not establish that the complainant had been subjected to torture, but that, according to the Committee's case law, even if it had, this would be only one element in considering his case. And in this instance, particularly in view of the complainant's lack of credibility, there was no evidence to suggest that he risked being subjected to torture if returned to Algeria.

The complainant's comments on the State party's observations

5.1 In his comments on the State party's observations, dated 30 May 2003, the complainant challenges the government's interpretation of the Amnesty International report. He claims that the report, prepared by doctors and not psychologists, found there were no 'immediate' signs of mental problems. The Amnesty International test was not directed at assessing his psychological state, but evaluating the physical markings on his body, and these were found to be consistent with the torture he had described. He states that the Review Board was wrong to conclude that the psychologist's report did not contain any new material warranting a reopening of the case; this report is not only new evidence, but the only evidence in relation to his psychological state. He reiterates that the inconsistencies in his accounts are explained by the psychologist's report.

Issues 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 considered under another procedure of international investigation or settlement. The Committee notes that the exhaustion of domestic remedies is not contested by the State party. The State party objects to admissibility on the grounds that the complainant has not established a prima facie case of a violation of article 3, but the Committee is of the view that the author has provided sufficient information in substantiation of his claim to consider his complaint on the merits. As the Committee sees no further obstacles to the admissibility of the communication, it declares the complaint admissible and proceeds to a consideration of the merits.

6.2 The Committee must determine whether the forced return of the complainant to Algeria would violate the State party's obligations under article 3, paragraph 1 of the Convention not to expel or return (□*refouler*□) an individual to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture. In reaching its conclusion, the Committee must take into account all relevant considerations, including the existence in the relevant State of a consistent pattern of gross, flagrant or mass violations of human rights. However, the aim is to establish whether the individual concerned would be at personal risk of torture in the country to which he or she would be returned. In accordance with the Committee's jurisprudence, the existence of a consistent pattern of gross, flagrant or mass violation of human rights in a country does not of itself constitute sufficient grounds for determining whether the person in question would be at risk of being subjected to torture upon return to that country. Nor does the absence of such a situation mean that a person cannot be considered at risk of being subjected to torture.

6.3 The Committee recalls its General Comment on article 3, which states that the Committee must assess whether there are □substantial grounds for believing that the author would be in danger of torture' if returned, and that the risk of torture □must be assessed on grounds that go beyond mere theory or suspicion'. The risk involved need not be □highly probable', but it must be □personal and present'. In this regard, in previous decisions, the Committee has consistently determined that the risk of torture must be □foreseeable, real and personal.

6.4 In assessing the risk of torture in the present case, the Committee notes that the complainant claims to have been tortured and imprisoned previously by the Algerian authorities. The findings of the medical examination carried out on him are consistent with these claims, although they do not discount other possible causes for the complainant's injuries. In relation to the psychologist's report, the Committee notes that the complainant was found to suffer from post-traumatic stress disorder, and that this was said to be consistent with his claim of having been subjected to torture in the past. The report also found that past torture could account for the discrepancies in the complainant's story. The Committee notes the complainant's submission that this report constitutes the only formal psychological evidence about his mental condition. It also notes that this report was considered by the Danish authorities in connection with the complainant's application to have his case reopened, and was found not to contain new information.

6.5 The relevant evidence in the case was fully considered by the Danish authorities. and, consistent with the Committee's case law, due weight must be accorded to findings of fact made by government authorities. In the present case, the complainant's account of his experiences to the Danish authorities contained numerous discrepancies. The Danish authorities made conclusions about the complainant's credibility which, in the Committee's view, were reasonable and by no reckoning arbitrary. In this regard, the Committee notes paragraph 8 of its General Comment No 1, pursuant to which questions about the credibility of a complainant, and the presence of relevant factual inconsistencies in his claim, are pertinent to the Committee's deliberations as to whether the complainant would be in danger of being tortured upon return.

6.6 The complainant's initial submission and his subsequent explanations of his inconsistencies

noted by the State party in its submission do not permit the Committee to make any informed decision on the likelihood of him being subjected to torture on his return to Algeria. In light of the foregoing, the Committee finds that the complainant has not established that he would face a foreseeable, real and personal risk of being tortured, within the meaning of article 3 of the Convention.

7.1 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 Algeria would not constitute a breach of article 3 of the Convention.

[Adopted in English, French, Spanish and Russian, the English text being the original version. Subsequently to be issued in Arabic and Chinese as part of the Committee's annual report to the General Assembly.]

* Made public by decision of the Committee against Torture.

Notes

1. By letter dated 21 November 2002, the complainant's initial counsel advised that he no longer represented him. The complainant's present counsel issued an appearance by letter dated 26 November 2002, and provided further details of the complainant's allegations. New Counsel is properly authorized.
2. Reference is made to the Committee's General Comment on the implementation of article 3, dated 21 November 1997.