

COMMITTEE AGAINST TORTURE

S. T. v. The Netherlands

Communication No. 175/2000

23 November 2001

VIEWS

Submitted by : S. T (name withheld) [represented by counsel]

State party: The Netherlands

Date of communication: 27 November 2000

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

Meeting on 23 November 2001,

Having concluded its consideration of communication No. 175/2000, 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, his counsel and the State party,

Adopts its Views under article 22, paragraph 7, of the Convention.

Views under article 22, paragraph 7, of the Convention

1.1. The petitioner is Mr. S. T., a citizen of Sri Lanka, born on 3 January 1979, currently residing in a shelter for asylum-seekers in the Netherlands. He claims that his forcible return to Sri Lanka would constitute a violation by the Netherlands of article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. He is represented by counsel.

1.2. On 5 December 2000, the Committee forwarded the communication to the State party for comments and requested, under Rule 108, paragraph 9 of the Committee's rules of procedure, not to return the petitioner to Sri Lanka while his petition was under consideration by the Committee. The State party acceded to this request.

Facts as submitted by the petitioner

2.1 The petitioner is a Tamil from the area of Jaffna in the North of Sri Lanka. For two months in 1994, he claims to have worked for the Tamil Tigers ("LTTE") in an auto-repair shop in Killinochi. During this time he also took care of the wounded and distributed food supplies.

2.2 In 1996, he moved to Vavuniya. In April 2000, there was an attack by the LTTE on a PLOTE (an organisation that works closely with the Sri Lankan army) camp. The petitioner, along with many others in the area, was detained by PLOTE forces after this incident. He was allegedly tortured using hot instruments which caused scars on his body. He did not bring this event nor the fact that he had scars as a result of this alleged ill-treatment to the attention of the Dutch authorities until his appeal.

2.3 On 10 October 2000, the petitioner was detained for one day by PLOTE, interrogated regarding his involvement with the LTTE and assaulted.

2.4 On 15 October 2000, he was arrested and detained by the Sri Lankan army for one day. During the day he was allegedly kicked, hung upside down and beaten. He allegedly still has pain in his stomach from this incident particularly when he bends over. He bears no scars from this incident. A member of his family intervened and - after payment - he was freed. Upon release he went to stay with his aunt.

2.5 On 17 October 2000, a PLOTE soldier called at the petitioner's home inquiring about his whereabouts. On 24 October 2000, the petitioner travelled to Colombo.

2.6 On 25 October 2000, and because of the incidents of 10 and 15 of October, the petitioner left Sri Lanka and on 26 October 2000, arrived in the Netherlands, having passed through another country. The petitioner does not know which country he passed through. When he arrived in the Netherlands he called his sister, who told him that the Sri Lankan army and PLOTE were again making inquiries about his whereabouts.

2.7 On arrival in the Netherlands, the petitioner applied for asylum, whereupon he had his first interview with the Immigration and Naturalisation Service ("IND"), which is under the responsibility of the State Secretary for Justice. On the basis of this interview and with reason to believe that the application was unfounded, the IND decided to deal with the asylum request in an accelerated procedure. The petitioner was, however, detained while his application was being considered. He was released from detention on 26 February 2001, and since then has been residing in a shelter for asylum-seekers.

2.8 On 27 October 2000, the petitioner had a second interview with the IND. On 28 October 2000, his request for asylum was refused on the grounds that it was manifestly unfounded. On the same day, the petitioner's lawyer lodged an appeal against this decision and against the decision to keep him in custody. By judgement of 13 November 2000, The Hague District Court, declared the appeal unfounded. According to counsel, this decision was unfair for the following main reasons:

The Court indicated that the petitioner's scars alleged to have been caused in April

2000, but not mentioned by the petitioner or his lawyer until the appeal hearing, did not prove that the petitioner would be personally at risk of torture, as the incident occurred as part of a general enquiry into the death of PLOTE soldiers. Counsel, however, contends that scars on one's body constitute a risk factor, since they can cause suspicion of LTTE involvement by the Sri Lankan authorities. Counsel explains that the incident in April 2000 was not mentioned prior to the appeal as it was not because of these incidents but the incidents in October that the petitioner had fled Sri Lanka. Apparently, in his interview with the Ministry the petitioner had been asked what had made him flee.

Counsel also submits that such misunderstandings are unavoidable when the accelerated procedure is employed. He says that this procedure, where an asylum application may be considered in 48 hours from the time of arrival, where the exhausted asylum-seeker is detained with little privacy and spends only three hours with a legal advisor after the first interview with the Ministry, during which there are inevitably problems with interpretation, is obviously not conducive to receiving a correct version of the facts of the case from the asylum-seeker.

The complaint

3. Counsel claims that, in view of the earlier treatment received by the petitioner at the hands of PLOTE and the Sri Lankan army, there are substantial grounds for believing that he would be personally in danger of being subjected to torture on return to Sri Lanka and, therefore, the Netherlands would be violating article 3 of the Convention if he were returned there. Counsel points out that according to respected sources, "a consistent pattern of gross, flagrant or mass violations of human rights", prevails in Sri Lanka, and refers in this regard to article 3(2) of the Convention. Counsel also claims that given the human rights situation in Sri Lanka, it is inappropriate to decide on such cases in an accelerated procedure.

The State party's observations on admissibility and merits

4.1 On 1 June 2001, the State party submitted its comments on the admissibility and merits of the communication. The State party does not contest the admissibility of the communication.

4.2 As to the merits, the State party begins by describing the refugee determination process in the Netherlands. Asylum applications are dealt with by the IND. If an application for admission as a refugee can be assessed within 48 hours, it is dealt with at the application centre, of which there are four. Asylum seekers are interviewed with the aid of a questionnaire, which contains no questions regarding the applicant's reasons for seeking asylum. An interpreter is also made available if necessary.

4.3 The next step consists of an in-depth interview prior to which the applicant has an opportunity to prepare with the assistance of a legal advisor for two hours. If the preparation for the second interview takes more than two hours the time limit of 48 hours within which a decision must be taken on the application is extended commensurately. The second interview focuses mainly on the reasons for leaving the country of origin. The applicant is given an opportunity to correct or add information

to the report of this interview with the assistance of his/her legal advisor and with a preparatory time of three hours, but this period may be extended, if necessary. Subsequently, an officer from IND takes a decision on the application.

4.4 The State party submits that to assist IND officials in assessing asylum applications, the Minister of Foreign Affairs regularly issues country reports on the situation in countries of origin. In drawing up these reports, the Minister makes use of published sources and reports by non-governmental organisations, as well as reports by Dutch diplomatic missions in the countries of origin.

4.5 The State party states that asylum seekers staying at an application centre have access to medical care. Basic facilities are also available at such centres, including a dormitory, daytime activities and the provision of hot and cold meals. The State party, states that if an application is refused the asylum-seeker may request the Minister of Justice to review the decision and then appeal to the District Court. In cases where the individual has been deprived of his/her liberty or whose liberty has been restricted, the petitioner may lodge an appeal immediately with the District Court.

4.6 With respect to the general human rights situation in Sri Lanka, the State party submits that the current policy on asylum-seekers from Sri Lanka is based on the Minister of Foreign Affairs' country report of 28 July 2000, which describes recent developments there. The State Secretary for Justice concluded from this report that the return of rejected asylum-seekers is still a responsible course of action. Though the ethnic conflict in Sri Lanka did intensify significantly in October/November 1999, creating a very unstable situation in the north and east of the country, in government-controlled areas, Tamils can still find alternative places of residence.

4.7 The State party also states that the UNHCR takes the view that asylum-seekers from Sri Lanka whose application for asylum are refused after careful consideration can be returned to their country of origin. According to the State party, the Minister's country report of 22 August 2000 indicates that this position has not changed. In addition, the State party quotes from the Minister's report, dated 27 April 2001, which discusses the risk of detention, prolonged or otherwise, that Tamils with scars are exposed to. It states that "All sources consulted say that external scars can prompt further interrogation, but not on their own. None of the sources consulted was of the opinion that a scar would constitute a risk factor for someone who had the necessary documents and a credible reason for being in Colombo.."

4.8 The State party refers to the Committee's jurisprudence that an individual must provide specific grounds indicating that he/she would be personally at risk of being tortured if returned to the receiving country.¹ The State party contests the allegation that the petitioner would be so at risk. It states that the petitioner has failed to demonstrate that he would be under suspicion by either the authorities or PLOTE, especially since his alleged work for the LTTE took place more than seven years ago. The State party does not consider it plausible that the petitioner would now encounter problems as a result to these alleged activities.

4.9 The State party argues that after his arrest by PLOTE and the Sri Lankan army in October 2000, he was released on both occasions after only one day. The State party finds it implausible that

the petitioner would have been released after such a short time if he had been suspected of being involved with the LTTE. In addition, the State party finds it significant that the petitioner travelled to Colombo and then to the airport with the permission of the authorities after being held in detention in October 2000 and being checked twice during this trip without any difficulties from the authorities. The petitioner then left the country using his own authentic passport. This sequence of events, it is submitted, does not suggest that the Sri Lankan authorities bear any ill-will towards the petitioner personally or suspect him of being involved with the LTTE.

4.10 The State party further submits that the petitioner's statement that due to the brevity of the procedure at the application centre he was unable to discuss his scars, does not detract from the correctness of the decision on the application for asylum. It is of the opinion that the procedure provides sufficient guarantees that an application for asylum will be dealt with carefully as described from paragraphs 4.2 to 4.5 above. With respect to the assessment of the petitioner's case, the State party submits that he prepared for the second interview with the assistance of a legal advisor, that it was made clear to him that he should disclose all information relevant to his application, he was notified of the importance of the report of this interview to the asylum procedure and informed not to withhold any information relating to his application for asylum. During this interview, the petitioner was specifically asked if he had scars from the maltreatment he had undergone and he responded in the negative. The petitioner discussed the report of the second interview with his legal advisor - which went on for more than three hours - whereupon corrections and additions to the report were submitted. These corrections and additions made no mention of the alleged arrest in April 2000 or of the scars obtained as a result of maltreatment during that arrest. Thus, the State party is of the opinion that the petitioner was sufficiently notified of the necessity to make a complete statement and that his asylum application was dealt with carefully at the application centre.

4.11 Further, on the issue of the petitioner's scars, the State party is of the view that the petitioner has not demonstrated that he was detained and maltreated in April 2000 and that his scars are a result of this maltreatment. These claims have not yet been corroborated by means of a medical report, and it would not be unreasonable, the State party submits, to expect such a report, given the duration of the petitioner's stay in the Netherlands. The State party also points out that it has not been established that the alleged scars, gave rise to suspicion of involvement in the LTTE during the two alleged arrests in October 2000, and that the petitioner himself was not of the opinion that the scars constituted a risk factor, since his alleged arrest and maltreatment in April 2000 were not the reason for his departure from Sri Lanka.

4.12 The State party also adds that in a letter, dated 1 February 2001, the petitioner was given an opportunity to submit another application for asylum, in which the statements regarding his arrest in April 2000 could have been included. He would have been allowed to remain in the Netherlands pending the results of this application. The petitioner did not make use of this opportunity.

Petitioner's comments on the State party's submission

5.1 In his response, on 24 July 2001, to the State party's submission the petitioner reiterates the claims made in the initial submission, including the claim about the unfairness of the accelerated asylum procedure. In this regard, he also submits that although a legal advisor may be present at the

first interview he cannot participate by asking questions himself nor assist the asylum-seeker in the preparation of this interview. In practice, the legal advisor has no time even to attend this first interview. This is very important, as it is after this first interview that the decision is made whether to deal with the case by the accelerated procedure or not and whether the asylum-seeker will be kept in detention. The petitioner further states that he had three different lawyers acting for him at different times and that neither of his first two lawyers were familiar enough with the situation in Sri Lanka to ask him the appropriate questions, including a question as to the possibility of scars on his body. It was only the petitioner's third lawyer that recognised the importance of this issue in Sri Lanka.

5.2 The petitioner contests the State party's view of the general human rights situation in Sri Lanka. He questions the sources referred to in the Ministry's report of July 2000 and states that, the statement in this report that the situation gives cause for concern is an understatement. He also refers to a report by the UNHCR which states that if Tamil asylum-seekers with scars are returned to Sri Lanka they may be more prone to adverse identification by the security forces and taken for rigorous questioning and potential ill-treatment. The petitioner also refers to other reports from international organisations to support his view that the presence of scars on the body of returned Tamils to Sri Lanka puts them at particular risk. He states that if returned to Colombo he runs the risk of an identity and background check as he does not have a valid reason for wanting to stay in Colombo, has no police-registration in Colombo and does not have a National Identity Card with him.

5.3 On the State party's point that if the petitioner had been a suspect he would not have been able to travel to Colombo and flee from the country having being checked in twice by the authorities on an authentic passport, he states that there is no evidence showing that the authorities have a central system to register all those suspected of involvement with the LTTE. He says also that this fact was confirmed by the July 2000 report of the Ministry of Foreign Affairs.

5.4 On the State party's point that a second asylum application could have been lodged he states that this would have been pointless as the District Court was informed about his scars and still decided that there was no risk involved by removing him to Sri Lanka. Thus, there were no new facts or circumstances to present on his behalf. He goes on to say that he did show his scars to the Court, including the prosecution, and therefore a medical report is an unnecessary requirement.

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. In this respect 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 the State party has not contested the admissibility of the communication. As the Committee sees no further obstacles to admissibility, it declares the communication admissible and proceeds immediately to the consideration of the merits.

6.2 The Committee must decide whether the forced return of the petitioner to Sri Lanka would violate the State party's obligation, 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 order to reach its conclusion the Committee must take into account all relevant considerations, including the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights. The aim, however, is to determine whether the individual concerned would personally risk 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 sufficient grounds for determining whether the particular person would be in danger of being subjected to torture upon his return to that country; additional grounds must be adduced to show that the individual concerned would be personally at risk. Conversely, 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.

6.3 The Committee has noted the petitioner's claim that he is in danger of being subjected to torture if he is returned to Sri Lanka due to his previous involvement with the LTTE, that he has allegedly already been maltreated twice by the authorities, and that he has scars on his body which the authorities would likely assume to have been caused by fighting for the LTTE. It has also considered the claim that, because of the brevity of the accelerated procedure, the petitioner was prevented from informing the authorities early on in the procedure that he had scars from earlier maltreatment and that this information may have allowed the authorities to consider his application more favourably. The Committee has also noted the State party's description of the procedure, its detailed account of the measures in place, including regular contact with a legal advisor and the possibility of appeal, to allow for due process of the asylum applications. It also notes, that the Court of Appeal did consider the question of the petitioner's scars and that it was not solely on this issue but on a consideration of all the facts at its disposal that the Court decided not to grant asylum.

6.4 Although the State party appears to concede that, the petitioner was arrested and detained by the authorities twice in October 2000, the Committee notes that it was not of the view that the petitioner is suspected of involvement with the LTTE, considering the fact that he was held for only one day on each occasion of his arrest and was never actually a member of this organisation. The Committee observes that the petitioner does not contend that he was a member of the LTTE nor does he contend that he was involved in any political activity. In addition, the Committee notes that the petitioner only worked for two months for this organisation, six years prior to his first arrest. In the Committee's view, the petitioner has not alleged any other circumstances, other than the presence of scars on his body, which would appear to make him particularly vulnerable to the risk of being tortured. For the abovementioned reasons, the Committee finds that the petitioner has not provided substantial grounds for believing that he would be in danger of being tortured were he to be returned to Sri Lanka and that such danger is personal and present.

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 petitioner's removal to Sri Lanka by the State party would not constitute a breach of article 3 of the Convention.

Notes

¹ The State party refers to *A v. The Netherlands*, Case No. 91/1997, adopted on 13 November 1998, *E.A. v. Switzerland*, Case No. 28/1995, adopted on 10 April 1997, and *K.N. v. Switzerland*, Case No. 94/1007, adopted on 15 May 1998.