

## COMMITTEE AGAINST TORTURE

### K. K. v. Switzerland

Communication No. 186/2001

11 November 2003

CAT/C/31/D/186/2001

### VIEWS

*Submitted by: Mr. K. K. (represented by counsel)*

*Alleged victim: The complainant*

*State party: Switzerland*

*Date of complaint: 3 July 2001 (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 11 November 2003

Having concluded its consideration of complaint No. 186/2001, submitted to the Committee against Torture by Mr. K. K. 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**

1.1 The complainant is K. K., a Sri Lankan national of Tamil origin, born in 1976, currently detained in Zug (Switzerland), awaiting his deportation to Sri Lanka. He claims that his forcible return to Sri Lanka would constitute a violation by Switzerland 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 8 August 2001, the Committee forwarded the complaint to the State party for comments and requested, under Rule 108, paragraph 1, of the Committee's rules of procedure, not to return the complainant to Sri Lanka while his complaint was under consideration by the Committee. The State party acceded to this request.

### The facts as submitted

2.1 The complainant is from Jaffna in the North of Sri Lanka. When his parents' house was bombed by the Sri Lankan army in October 1995, he and his family fled to the then LTTE<sup>1</sup>-controlled city of Killinochi, from where he left for Colombo in May 1996, together with his mother. On their way to Colombo, he was separated from his mother and arrested, at a checkpoint of the Sri Lankan army and the Eelam People's Revolutionary Liberation Front (EPRLF) near Vavuniya, together with several other Tamil men suspected of LTTE-membership.

2.2 The complainant was subsequently detained in a room of a school from where he was brought to the Criminal Investigation Department (CID) in Thandikulam for interrogations about his LTTE connection. During that time, he was allegedly tortured by Tamil members of the EPRLF who burned his genitals with cigarettes, while he was naked with his hands tied behind his back. The complainant also received blows with a rod and was threatened with execution if he refused to admit his LTTE-membership. During detention, he was only given sandy rice to eat and smelly water, or urine, to drink. After 12 days, the complainant was released because of repeated interventions of his mother and because a remote relative from Colombo, Mr. J. S., had provided guarantees for him.

2.3 Shortly after his arrival in Colombo, where he stayed in a [Tamil] lodge, the complainant was arrested and handed over by the army to the police. The following day, he was brought before a judge who, by decision of 2 August 1996, acquitted him of all charges of terrorist activity, for lack of evidence. Despite his acquittal, he was kept in detention at the CID, in a cell occupied by Sinhalese drug addicts and alcoholics who allegedly beat him. After one week, he was brought before court again, where he managed to secure his release with the assistance of a lawyer.

2.4 Shortly thereafter, the complainant was again arrested by the CID on grounds of being a suspected LTTE activist. At the CID office in Boralle, he allegedly was given half an hour to confess his LTTE-membership, failing which the CID officer threatened to execute him. During his subsequent interrogation with two other suspects, Mr. J. S. and his sister, K. S., the complainant received blows on his head with a sand-filled plastic pipe ("S'Lon Pipe"). He was then detained at the CID building for seven days until he was released, together with the two other suspects, after they had paid 15.000 Rupees as bribe.

2.5 In September 1996, the complainant was again arrested by the CID, after a bomb attack on a train in Dehiwala, Colombo, and after weapons and explosives had been found next to the house of his relatives and co-suspects, J. S. and K. S.. During detention, where he was allegedly beaten, forced to exhibit his genitals and given poor food, the complainant was twice visited by delegates of the International Committee of the Red Cross (9 and 19 September 1996). When the police arrested the real perpetrator of the bomb blast, he was released after 22 days' detention, together with Mr. and Ms. Selvarasa, after his mother had paid a bribe of 45.000 Rupees. He was told to leave Colombo

within one month.

2.6 On 29 October 1996, the complainant left Sri Lanka using a false passport. He arrived in Switzerland on 30 October 1996, where he applied for asylum the same day. After two hearings by the Federal Office for Refugees (BFF) on 14 November 1996 and 6 March 1997, and one hearing by the immigration police in Zug on 9 December 1996, the Federal Office rejected his asylum application by decision of 23 October 1998, at the same time ordering his deportation to Sri Lanka. While considering documents submitted by the complainant as evidence<sup>2</sup> as being authentic, the BFF observed that several contradictions in his statements undermined his credibility. In particular, while he had told the immigration police in Zug that the ICRC delegates had visited him during his second detention in Colombo, he stated during his second hearing by the BFF that he had received these visits during his third and final detention in Colombo. This incoherence, which he could not explain, raised doubts as to whether he had actually been detained three times in Colombo. His statement during the second BFF hearing that he had left Colombo only 12 days after his final release from detention was considered unrealistic, thereby further undermining his credibility. Moreover, the fact that the complainant had been acquitted by a Sri Lankan court and released from police detention several times indicated that he was at no real risk of persecution. The instances of torture alleged by him could not be attributed to the Sri Lankan Government, which had made considerable efforts to improve the domestic human rights situation, but constituted abuses of authority by individual policemen. The medical problems claimed by the complainant (problems to urinate, stomachache, loss of memory) had not affected his ability to travel.

2.7 On 24 November 1998, the complainant appealed the decision of the BFF to the Swiss Asylum Review Commission (*Asylrekurskommission*), arguing that the apparent contradictions about the timing of the ICRC visits resulted from a misunderstanding, since he had referred to his second arrest by the CID rather than his second detention in Colombo during his second BFF hearing. As to the short time for organizing his departure from Colombo, he claimed that this journey had been planned by his mother and uncle well before his final release from detention, after they had come to the conclusion that he was no longer safe in Sri Lanka. Furthermore, the complainant denied that acts of torture by individual members of the police could not be attributed to the Government and that the human rights situation had considerably improved in Sri Lanka. The fact that he had been arrested and tortured subsequent to his acquittal by court only showed that the acquittal did not protect him from being arrested and tortured.

2.8 Subsequently, the complainant submitted two medical reports, one dated 7 December 1998, stating that his genitals displayed four burns likely to have been caused by cigarettes, and one psychiatric report dated 17 January 1999, confirming that he displayed clear symptoms of post-traumatic stress disorder. By submission of 29 January 1999, the BFF challenged the lack of transparency, scientific accuracy, plausibility and impartiality of the psychiatric report.

2.9 By judgment of 18 September 2000, the Asylum Review Commission dismissed the appeal, essentially based on the same contradictions already highlighted by the BFF. In addition, the Commission expressed doubts about the complainant's identity, since his brother had previously applied for asylum in Switzerland under the same name and because the complainant had given different dates of birth on different occasions. The Commission also excluded the possibility that,

during his second hearing by the BFF, the complainant referred to his final detention when he mentioned a seven-day (instead of a 22-day) detention in connection with the visits of the ICRC delegates. Moreover, his claim that he voluntarily went to the CID when his mother informed him that he was a suspect in the Dehiwala bomb blast was not credible, assuming that he had been tortured by CID officers during previous detention. As to the medical evidence submitted by the complainant, the Commission, while conceding that the burns diagnosed in the medical report could have been caused by cigarettes, considered it unlikely that these injuries had been inflicted under the circumstances alleged by the complainant, based on the fact that he had clearly exaggerated the quantity of burns before the immigration police. Similarly, the Commission noted that the psychiatric report was submitted at a late stage of the proceedings, and considered it inconclusive on the question of whether the complainant had been tortured. While not excluding that the complainant could be arrested and beaten by the police upon return to Sri Lanka, the Commission concluded that no concrete risk of torture existed, as the Sri Lankan authorities could be reasonably expected to punish such incidents. It also considered the medical treatment available in Sri Lanka sufficient for the complainant's needs and confirmed the decision as well as the deportation order issued by the BFF.

2.10 On 23 July 2001, the complainant was arrested and detained by the immigration police in Zug, after he had tried to evade his expulsion scheduled for 24 January 2001 by going into hiding.

### The complaint

3.1 The complainant claims that his forcible return to Sri Lanka would constitute a violation by the State party of article 3 of the Convention, since he would face a high risk of torture if he were deported to that country, as a young single male Tamil who had previously been arrested and tortured several times as a suspected LTTE activist.

3.2 The complainant submits that Sri Lankan security forces carry out daily raids against Tamils, who can be arrested for up to 18 months, under the Prevention of Terrorism Act (PTA), without an arrest warrant and without being informed of the charges against them. Under the Emergency Regulations (ER) supplementing the PTA, this period may repeatedly be prolonged for 90 days by a judicial commission whose decisions are not subject to appeal. During this time, detainees are frequently interrogated about their contacts with the LTTE and are often subjected to torture, ill-treatment or even extra-judicial execution.

3.3 By reference to several reports on the human rights situation in Sri Lanka,<sup>3</sup> the complainant submits that the risk of torture for Tamils has not diminished significantly over the past years.

3.4 The complainant argues that, because of his post-traumatic stress disorder, he is likely to show uncontrolled reactions in situations of danger such as raids and street inspections, which would further increase the risk of arrest and subsequent torture by the police. Moreover, no adequate medical and therapeutic treatment exists in Sri Lanka for traumatized persons.

3.5 The complainant claims that he has exhausted domestic remedies and that the same matter has not been, and is not being, examined under another procedure of international investigation or settlement.

### The State party's observations on admissibility and merits

4.1 On 18 September 2001, the State party conceded that the complaint is admissible and, on 8 February 2002, submitted its observations on the merits of the complaint. It endorses the arguments advanced by the Federal Office for Refugees and the Asylum Review Commission, and concludes that the author has failed to substantiate that he would be at a real and personal risk of being subjected to torture upon return to Sri Lanka

4.2 The State party recalls important contradictions in the complainant's statements, conveying the impression that he had not been tortured as gravely as he claims, which could not simply be explained by the lack of accuracy typically shown by victims of torture. Even if the complainant had been ill-treated in the past, this was but one element to be considered in determining his present risk of torture. It did not automatically follow from his alleged past experiences that he would be at a substantial risk of persecution by the Sri Lankan authorities. In addition, UNHCR assessed the risk of Sri Lankan asylum seekers whose application was rejected within fair asylum proceedings as being tolerable.

4.3 According to the State party, Tamils arrested during police round-ups were in most cases released within the 24 hours following their arrest, after their identity had been checked. The only Tamils facing longer periods of detention were those suspected of LTTE membership or whose family members were suspected LTTE members. Normally, residents of Tamil lodges were not arrested at all, as long as they could prove their identity. Having declared that he never participated in any political activities and that none of his family members belongs to the LTTE, the complainant could be presumed to be relatively safe from arrest by the security forces, given that he is also in possession of a copy documenting his acquittal by a Sri Lankan court, which he could easily produce during police controls. Moreover, the fact that he was released twice after payment of bail showed that he was not seriously suspected of being an LTTE member.

4.4 The State party submits that the protection of detainees in Sri Lanka was strengthened with the establishment of a Committee of Inquiry into Undue Arrest and Harassment, to which all arrests under the Prevention of Terrorism Act and the Emergency Regulations must be reported, and which can examine complaints about ill-treatment by the security forces. The Committee adopted its directives on 7 September 1998, providing that no person shall be arrested without being informed about the charges against him, without his family being informed about these charges and the place of detention, or in the absence of incriminating evidence. According to governmental sources, these requirements have enhanced respect for human rights during identity controls, as well as detention.

4.5 As to the complainant's medical situation, the State party submits that several institutions with an appropriate capacity for the treatment of traumatized victims existed in Sri Lanka, such as the Colombo-based Family Rehabilitation Centre which runs other branches in the country, and which offered appropriate medication as well as therapeutic treatment.

4.6 Lastly, the State party argues that, on 14 February 2001, the complainant himself agreed to

benefit from the repatriation programme offered by the Federal Office for Refugees.

#### Complainant's comments on the State party's submissions

5.1 On 16 July 2002, counsel commented on the State party's merits submission, arguing that contradictions in the complainant's statements before the Swiss authorities resulted from a "diffusion of reality". Traumatized persons often experienced difficulties in remembering the details and chronology of their history. That the complainant changed essential details of his statements, such as the time of the visits of the ICRC delegates, during one and the same interview before the BFF only reflected the seriousness of his post-traumatic stress disorder. A healthy person intending to lie to the authorities would have presented a more coherent story.

5.2 The complaint's psychological disorder is said to increase his risk of being arrested, and subsequently tortured, by the Sri Lankan security forces, as he panics and tries to escape whenever he sees a policeman. That such behaviour would be considered suspicious by the police was reflected by the fact that the complainant provoked his own arrest at the train station of Zug on 23 July 2002, when he had recognized a policeman dressed in civilian and tried to run away. Once arrested, the Sri Lankan authorities could reasonably believe that the complainant was an LTTE activist, because of the scars on his body.

5.3 The complainant submits that the Federal Office for Refugees had merely challenged the objectivity of the psychiatric report and did not comply with its duty of investigation by ordering his examination by another psychiatrist. Similarly, the BFF had simply expressed doubts about the origin of the burns on his genitals, without investigating into the causes.

5.4 By reference to a judgment of the Administrative Court of Dresden (Germany) of 12 December 2000, the complainant submits that facilities for the treatment of traumatized persons in Sri Lanka are not sufficient to meet the demand of the tens of thousands of victims of torture in need. According to the Family Rehabilitation Centre itself, returned Tamil asylum seekers suffering from post-traumatic stress disorder have little chances to receive appropriate and sustained treatment.

5.5 The complainant contends that he only signed up for the repatriation programme in February 2001 because he suffered from depression at that time, due to the repeated rejection of his asylum claim by the Swiss authorities.

5.6 On 23 July 2002, the complainant submitted another psychiatric report dated 19 July 2002 and issued by the Zürich Institute for Psychotraumatology (IPZ), diagnosing symptoms of social disintegration coupled with abuse of alcohol, depressive symptoms and the likelihood of a post-traumatic stress disorder linked to the complainant's past experiences in Sri Lanka. The report confirms that the contradictions in the complainant's statements before the immigration authorities should not be used to undermine his credibility, since such inconsistencies are part and parcel of the psycho-reactive symptoms of post-traumatic stress disorder which the complainant displays.

#### Issues and proceedings before the Committee

6.1 Before considering any claim 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 the present case, the Committee also notes that all domestic remedies have been exhausted and that the State party has not objected to the admissibility of the communication. It therefore considers that the communication is admissible and proceeds to the examination to the merits of the case.

6.2 The Committee must decide whether the forced return of the complainant 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 reaching 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 (article 3, paragraph 2, of the Convention).

6.3 The Committee has taken note of the reports cited by the complainant as well as the State party, which deny or confirm significant improvements in the protection of the rights of Tamils during identity controls, arrest and detention in Sri Lanka. The Committee notes from recent reports on the human rights situation in Sri Lanka that, although efforts have been made to eradicate torture, instances of torture continue to be reported, and that complaints of torture are often not dealt with effectively by police, magistrates and doctors. However, the Committee equally notes the ongoing peace process in Sri Lanka which led to the conclusion of the cease-fire agreement between the Government and the LTTE of February 2002, and the negotiations between the parties to the conflict which have taken place since. The Committee further recalls that, on the basis of the proceedings concerning its inquiry on Sri Lanka under article 20 of the Convention, it concluded that the practice of torture is not systematic in the State party.<sup>4</sup> The Committee finally notes that a large number of Tamil refugees returned to Sri Lanka in 2001 and 2002.<sup>5</sup>

6.4 The Committee recalls, however, that the aim of its examination is to determine whether the complainant would personally risk torture in the country to which he would return. It follows that, irrespective of whether a consistent pattern of gross, flagrant or mass violations of human rights can be said to exist in Sri Lanka, such existence would not as such constitute sufficient grounds for determining that the complainant would be in danger of being subjected to torture upon his return to Sri Lanka. Additional grounds must be adduced to show that he would be personally at risk. Conversely, the absence of a consistent pattern of gross violations of human rights does not necessarily mean that the complainant cannot be considered to be in danger of being subjected to torture in the specific circumstances of his case.

6.5 As regards the personal risk of the complainant to be subjected to torture at the hands of the Sri Lankan security forces, the Committee has noted his claim that the fact that he was arrested and tortured in the past as a suspected LTTE activist, as well as the after-effects of this torture, would expose him to an increased risk of renewed arrest and torture, based on his uncontrolled behaviour in stressful situations, and the suspicion likely to be created by such behaviour, as well as the scars

on his body. It has noted the State party's arguments about the contradictions in the complainant's statements before the Swiss immigration authorities, his acquittal by a Sri Lankan court due to lack of evidence of LTTE involvement, and the legal safeguards introduced by the new Committee of Inquiry into Undue Arrest and Harassment since 1998 (see para. 4.4).

6.6 The Committee considers that, assuming that, based on the medical and psychiatric evidence submitted by the complainant, his case has been made out, considerable weight must be given to his allegations that he was tortured during past detention at the CID. However, the Committee notes that these alleged instances of torture did not occur in the recent past.<sup>6</sup>

6.7 Insofar as the complainant argues that his post-traumatic stress disorder would result in uncontrolled behaviour in stressful situations, thereby increasing his risk of arrest by the Sri Lankan police, the Committee observes that the fact that the complainant benefited from a court decision which acquitted him of terrorism charges, as well as his low political profile, can in turn be adduced as factors which are likely to lower any risk of serious consequences should he be arrested again.

6.8 With regard to the alleged absence of adequate psychiatric treatment for the complainant's post-traumatic stress disorder in Sri Lanka, the Committee considers that the aggravation of the complainant's state of health possibly resulting from his deportation to Sri Lanka would not amount to torture within the meaning of article 3, read in conjunction with article 1, of the Convention, which could be attributed to the State party itself.<sup>7</sup>

6.9 The Committee therefore is of the view that the complainant has not adduced sufficient grounds which would allow the Committee to conclude that he would be in danger of being subjected to a substantial, present and personal risk of torture if returned to Sri Lanka.

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

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

## Notes

1. Liberation Tigers of Tamil Eelam.
2. The documents include the Sri Lankan court decision of 2 August 1996 acquitting the complainant and a prison card issued by the ICRC.
3. Reference is made, *inter alia*, to an Amnesty International report of 20 July 2000 (ASA 37/022/2000).

4. Report A/57/44, Chapter IV.B, at para. 181.
5. See Communication No. 191/2001, *S. S. v. the Netherlands*, Decision adopted on 5 May 2003, at para. 6.3.
6. See CAT, General Comment 1: Implementation of article 3 of the Convention in the context of article 22, 21 November 1997, at para. 8 (b).
7. See, *mutatis mutandis*, Communication No. 83/1997, *G. R. B. v. Sweden*, Decision adopted on 15 May 1998, at para. 6.7.