

COMMITTEE AGAINST TORTURE

E. H. v. Hungary

Communication No 62/1996

10 May 1999

CAT/C/22/D/62/1996

ADMISSIBILITY

Submitted by: E. H. (name withheld)[represented by counsel]

Alleged victim: The author

State party: Hungary

Date of communication: 29 October 1996

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 1999,

Adopts the following:

Decision on admissibility

1. The author of the communication is E. H., born on 20 October 1976, a Turkish citizen belonging to the Kurdish minority, currently residing in Hungary where he has applied for asylum. He alleges that his forced return to Turkey would constitute a violation by Hungary of article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The author is represented by the Hungarian Helsinki Committee, a non-governmental organization based in Budapest.

Facts as submitted by the author

2.1 The author states that on 12 March 1992 he participated in a demonstration organized on the occasion of a Kurdish celebration. The event degenerated into violence and Turkish security forces arrested several demonstrators, including the author, who were held in

detention for seven months awaiting trial. The author alleges that he was tortured twice during that period. Since no witnesses heard during the court proceedings could identify him the author was released following the trial. He was nevertheless placed under police surveillance.

2.2 In 1993 the author joined the armed wing of the Kurdistan Worker's Party (PKK) and underwent six months of combat training. As the head of a unit comprising 70 combatants he was involved in military activities in south-eastern Turkey until October 1995. By then, the author's superior officer had committed suicide. The new commander held his subordinate officers responsible for the incident and ordered two squadron commanders, including the author, to be executed. The author states that he fled the unit to escape arbitrary execution, and because he had come to doubt the PKK ideology.

2.3 The author states that he first went into hiding in Istanbul but, fearing persecution by both the PKK and the Turkish authorities, he managed to obtain a false passport and to flee to Bulgaria, where he arrived in November 1995. He spent two weeks in Bulgaria and then went to Romania. After two months he attempted to go to Austria via Hungary, but was arrested by Hungarian border police when trying to cross the border illegally. Subsequently, he applied for asylum.

2.4 On 3 March 1996, the Aliens Police Department of the Győr Border Guards Directorate issued an expulsion order against the author. The execution of the expulsion order was by the same decision suspended given the fact that the author had applied for asylum.

2.5 On 3 July 1996, the Bicske local agency of the Office for Refugees and Migration Affairs denied the author asylum, on the grounds that he had no reason to fear discrimination or persecution by the Turkish authorities. According to the Office, the author's trial and detention and the feared revenge of the PKK did not constitute persecution as defined in the 1951 Convention relating to the Status of Refugees.

2.6 The author submitted an appeal to the second instance of the Office for Refugees and Migration Affairs which was rejected on 16 September 1996. In its decision the Office referred to the exclusion clause in article 1, section F, of the 1951 Convention and stated that, as a high-level officer of a terrorist organization, the author was not entitled to protection as a refugee. The author argues that the decision was based primarily on a statement made by the Budapest Branch of UNHCR which did not attend sufficiently to the case and delivered a summary opinion without having interviewed the applicant or tried to know as much as possible about his case.

2.7 On 30 September 1996, the author lodged an application for review of the administrative decision with the Pest Central District Court, on the grounds that the Office for Refugees and Migration Affairs had, *inter alia*, not proceeded with due care in the examination of the case and that it had not taken into account article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. On 10 October 1996, the Pest Central District Court rejected the author's request and found that the administrative authorities had acted in accordance with existing procedural regulations.

2.8 On 29 October 1996 the Aliens Police Department of the Győr Border Guards Directorate annulled the pending expulsion order and the prohibition of stay and entry into Hungary against the author on the grounds that the decision ordering expulsion had been taken in violation of the existing procedure, prior to a final decision regarding the author's application for asylum.

2.9 On 6 November 1996, the author further appealed for judicial review to the Budapest Municipal Court, referring to the fact that the reasoning in the administrative decisions of the first and second instance was entirely different, which proved that the facts of the case had not been properly examined. Furthermore, in his appeal the author underlined that during the administrative examination of his case, a final expulsion order against him had been pending. According to the author, the expulsion order contravened article 32, paragraph 1, of the Aliens Act which stipulates that "(n)o alien shall be refouled or expelled to a country or to the frontiers of a territory where he would be threatened with persecution on account of his race, religion, nationality, membership of a social group or political opinion, or to the territory of a state or frontiers of a territory where there are substantial grounds for believing that the refouled or expelled aliens would be subjected to torture, inhuman or degrading punishment ...". The author maintained that the unlawfulness of the expulsion order had not been examined by the Office for Refugees and Migration Affairs. At the time of the author's initial submission to the Committee, the appeal for judicial review was still pending before the Budapest Municipal Court.

The complaint

3.1 The author submits that Turkey is a country where torture is systematically practised and that there are substantial grounds for believing that he would be subjected to torture, inhuman or degrading treatment or punishment in view of his past imprisonment and treatment as well as his subsequent involvement with the armed wing of the PKK.

3.2 The author claims that the Hungarian immigration authorities have not examined his case and the conditions prevailing in his country of origin with the necessary care. The judicial authorities took into consideration the Convention relating to the Status of Refugees, as incorporated in domestic law, but not the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and its absolute prohibition of return or expulsion of a person to a State or to the frontiers of a territory where there is danger that the person would be subjected to torture or other cruel, degrading or inhuman treatment.

3.3 The author further claims that the appeal for judicial review, pending at the time of his initial submission to the Committee, could not be considered as an effective remedy since the review of administrative decisions by Hungarian courts is limited to examining whether there has been a violation of procedure or substantive domestic legal regulations and the international practice is not taken into account. If the rejection of his application for asylum is confirmed he could theoretically nevertheless be granted temporary permission to stay in the country, in accordance with the principle of non-refoulement. However, the author draws the attention of the Committee to the fact that aliens who cannot be expelled solely on the basis of non-refoulement have no further rights, including to employment, income or social

benefits, or temporary residence permits.

State party's observations on the admissibility of the communication

4.1 On 14 February 1997 the Committee transmitted the communication to the State party for comments. The State party challenged the admissibility of the communication in submissions dated 18 November 1998 and 14 December 1998.

4.2 The State party explains that the basic provisions concerning the right of aliens to enter or to remain in Hungary are contained in the Act of 1993 on the Entry, Stay in Hungary and Immigration of Foreigners (Aliens Act), section 27 of Government Decree No. 64/1994 and section 44 of Minister of Interior Decree No. 9/1994. It submits that since the submission of the author's communication, Act CXXXIX on Asylum (1997) and several ministerial decrees have been enacted. As a result, it can be asserted that the Hungarian legal system does provide for an effective protection against refoulement and ensure the enforcement of the provisions of the Convention.

4.3 The State party states that the author crossed the Hungarian-Romanian border illegally on 20 February 1996. His purpose was to continue, via Austria, to Germany, where he has relatives. On 1 March 1996, he was arrested by Hungarian border guards upon attempting to cross the Hungarian-Austrian border with false documents. The Alien Police Department of the Győr Border Guard Directorate seized the documents and sent them to the agencies that had apparently issued them through the Ministry for Foreign Affairs. On 3 March 1996, the Directorate issued an expulsion order effective 7 March 1996. The author submitted an application to the asylum authorities, after which the Directorate suspended the implementation of the expulsion order.

4.4 Throughout the Hungarian immigration process, the author advanced essentially the same allegations as those he submits in support of his communication to the Committee. In its decision of 4 April 1996, the Budapest Local Agency of the Office for Refugees and Migration Affairs, the asylum authority of the first instance, found that the author's application for asylum was motivated by his collaboration with the PKK and his fear of reprisals, and not by fear of discrimination or persecution by the Turkish authorities. His application was therefore denied.

4.5 The State party confirms the author's account of the asylum procedure, i.e. that the second instance of the Office for Refugees and Migration Affairs rejected the author's appeal on 16 September 1996 and that his application for judicial review to the Pest Central District Court was denied on 10 October 1996.

4.6 It is further submitted that at the time of the author's submission to the Committee, his appeal for judicial review was still pending before the Budapest Municipal Court. The Court rejected the appeal on 23 January 1997 on the grounds, inter alia, that it did not contain any new circumstances that would warrant alteration of the ruling of the court of first instance and that the administrative authorities had applied the law correctly when rejecting the author's asylum claim.

4.7 The author initiated additional procedures before the Hungarian immigration authorities. Thus, on 21 May 1998, he submitted a new application for asylum to the Győr Department of the Office of Refugee and Migration Affairs which was denied on 10 July 1998 on the grounds that it did not contain any new elements with respect to his former application. The State party points out that an application for review of that decision is pending.

4.8 As to the expulsion order issued against the author, the State party explains that prior to the completion of the first judicial review procedure, the Alien Police Department of the National Headquarters of the Border Guard examined the case of the author ex officio. It annulled the expulsion order issued by the Alien Police Department of the Győr Border Guard Directorate, on the grounds that the Directorate had acted in error since, pursuant to the Aliens Act, expulsion cannot be ordered against aliens who apply for asylum unless their applications have been rejected in a final decision. The State party underlines that the expulsion order was annulled before the date of the author's initial submission to the Committee.

4.9 On 24 May 1997, following the final rejection of the author's application for asylum, the Office of Refugee and Migration Affairs informed the Alien Police authorities that despite the fact that the author had not been granted asylum, the Office considered that at present the author could not be returned to his country of origin on the basis of the provisions of section 32(1) of the Aliens Act. According to those provisions no alien shall be refouled or expelled to a country or to the frontiers of a territory where he would be threatened with persecution on account of his race, religion, nationality, membership of a social group or political opinion, or to the territory of a State or frontiers of a territory where there are substantial grounds for believing that the refouled or expelled aliens would be subjected to torture, inhuman or degrading punishment. On the basis of the statement of the Office for Refugee and Migration Affairs, the Alien Police authorities issued a temporary certificate allowing the author to stay in the country.

4.10 The State party underlines that, apart from refugee status, the law provides other possibilities for an alien to stay in Hungary. In the present case, although denied asylum, the author was accorded temporary permission to stay in accordance with the principle of non-refoulement. The State party admits that the author's comments regarding deficiencies relating to the regulation of temporary permission to stay were in fact well founded, but draws the attention of the Committee to the fact that, since the submission of the author's complaint, new legislation has been adopted in that respect. Act CXXXIX on Asylum, which entered into force on 1 March 1998, contains provisions on the admission of refugees and the recognition of persons under temporary protection in accordance with European standards. Governmental Decree No. 24 and 25 (II.18) Korm. of 1998 on the implementation of the Act contains detailed rules relating to, inter alia, persons under temporary protection and persons authorized to stay, and defines the various forms of benefits and assistance for aliens applying for asylum, recognized refugees, persons under temporary protection and persons authorized to stay.

4.11 In conclusion, the State party submits that the domestic legal framework of Hungary contains guarantees for the protection of the rights of asylum-seekers in accordance with

European standards and the international obligations undertaken by Hungary. In addition, the State party considers that the complaint of the author is unfounded, and that the communication should be considered inadmissible due to the fact that domestic remedies have not been exhausted.

Counsel's comments

5.1 With respect to the exhaustion of domestic remedies, counsel submits that no national procedures are currently pending, since the author's application for review of the decision by the Győr Department of the Office of Refugee and Migration Affairs was rejected on 6 January 1999.

5.2 Counsel further states that although the legal environment in Hungary concerning the rights to asylum and the refugee determination procedure has undergone substantial positive changes, the case under consideration has not been affected by those changes and the author can still not benefit from protection by the Hungarian authorities. The author submitted one application to the Office for Refugee and Migration Affairs and one to the Capital Court after 1 March 1998, when the new Act on Asylum entered into force. They were both rejected, on the grounds that the author had relied on the same facts as in his earlier applications. Counsel claims, however, that neither the first, nor the second refugee determination procedure examined the treatment and possible punishment in Turkey of rejected and subsequently returned Kurdish asylum-seekers who have allegedly been members of the PKK.

5.3 The Hungarian legal system contains guarantees for the enforcement of the provisions of the Convention and other human rights treaties. Under the new Act on Asylum the author could indeed benefit from protection against refoulement by being granted "authorised to stay" status. That status provides protection to persons who would, for example, face treatment contrary to article 3 of the Convention. The examination of whether a foreigner, if expelled from Hungary, would have to face, *inter alia*, the threat of treatment contrary to article 3 of the Convention is carried out ex officio by the Office for Refugee and Migration Affairs. However, in its decision of 20 July 1998 the Office did not mention whether the prohibition of refoulement applied in the author's case, although in practice it includes a statement concerning the possibility of refoulement in decisions rejecting an applicant for refugee status.

5.4 Although the refugee determination procedure ended with the decision of 6 January 1999, the author is unaware of a new expulsion procedure being initiated in his case. Even if it is determined that he may not be returned to Turkey on non-refoulement grounds, his status and legal situation in Hungary will remain unresolved. The applicant would be issued a certificate entitling him to temporary residence, which is not the same as a residence permit. He would not be entitled to a work permit or to social benefits. This legal "limbo" would in itself constitute inhuman and degrading treatment contrary to the Convention.

5.5 With respect to the State party's argument that the expulsion order had already been annulled at the time of the author's initial submission, counsel contends that the decision of

the Alien Police was communicated to the author after he had filed the communication with the Committee. Had there not been an expulsion order in force at that time, it would have been senseless for the author to lodge the complaint.

Issues and proceedings before the Committee

6.1 Before considering any of the allegations in a communication, the Committee against Torture must decide whether or not the communication is admissible under article 22 of the Convention.

6.2 The Committee notes the State party's assertion that on 24 May 1997, following the rejection of the author's first application for asylum, the Office of Refugee and Migration Affairs informed the Alien Police authorities that, despite the fact that the author had not been granted asylum, the Office considered that he could not be returned to his country of origin. It also notes that, on the basis of that statement, the Alien Police issued a certificate allowing the author to stay in the country temporarily. The Committee finds that the information provided by the author does not show that the above-mentioned certificate is not valid at the present time. The Committee further notes that the author is unaware of an expulsion procedure being initiated against him after the final judicial decision rejecting his second application for asylum. In the circumstances, the Committee considers that the author is in no immediate danger of expulsion and, therefore, the communication, as it stands, is inadmissible under article 22, paragraph 2, of the Convention as incompatible with the provisions of article 3 of the Convention.

7. Accordingly, the Committee decides:

- (a) That the communication is inadmissible;
- (b) That this decision may be reviewed under rule 109 of the Committee's rules of procedure upon receipt of a request by or on behalf of the author containing information to the effect that the reasons for inadmissibility no longer apply;
- (c) That this decision shall be communicated to the State party, the author and his representative.

[Done in English, French, Russian and Spanish, the English text being the original version.]