

## COMMITTEE AGAINST TORTURE

### S.H. v. Norway

Communication No 121/1998

19 November 1999

CAT/C/23/D/121/1998

### ADMISSIBILITY

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

*Alleged victim: The author*

*State party: Norway*

*Date of communication: 23 October 1998*

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

Meeting on 19 November 1999

Adopts the following:

#### **Decision on admissibility**

1.1 The author of the communication is S. H., an Ethiopian citizen born in 1965 currently residing in Norway, where he has applied for asylum. His application, however, has been rejected and he is at risk of expulsion. He alleges that his forced return to Ethiopia would constitute a violation by Norway of article 3 of the Convention. He is represented by counsel.

1.2 In accordance with article 22, paragraph 3, of the Convention, the Committee transmitted the communication to the State party on 19 November 1998. At the same time the State party was requested, pursuant to rule 108, paragraph 9, of the Committee's rules of procedure, not to expel S. H. to Ethiopia while his communication was under consideration by the Committee. In a submission of 19 January 1999 the State party informed the Committee that S. H. would not be deported to his country of origin until further notice.

## The facts as submitted by the author

2.1 The author belongs to the Amhara ethnic group. In 1991 his father, a doctor, disappeared after having been arrested and has not been seen again. The author believes that his father's arrest and disappearance were due to his ethnic background and accusations that he was a supporter of the Mengistu regime. In 1993 the author joined the All-Amhara People's Organization (AAPO)<sup>1</sup>. By then he was working as an agriculture adviser in Debre Birhan, an Amhara district. Within the AAPO he was entrusted with two kinds of activities: on the one hand, propaganda and recruitment and, on the other hand, smuggling weapons, organizing attacks to capture weapons and making arrangements for their distribution.

2.2 In 1995 the author was arrested by the security forces during a clandestine meeting he had organized near Debre Birhan. Two days later he was taken to a secret detention centre where he was heavily tortured. After nine months in detention his family bribed a guard who helped him to escape. He stayed in hiding for some time in Addis Ababa, until he travelled to Norway in November 1995.

2.3 Upon applying for asylum he was interviewed at the Asker and Baerum Police Department on 3 and 22 November 1995. The Directorate of Immigration rejected his application on 15 December 1995. The author was not found to be credible for the following reasons: (a) he did not know anything about the arrest of other members of his party; (b) two photographs of the author at liberty bore dates which were during the time when he claimed to have been in detention; (c) the author did not bear visible marks of torture.

2.4 The author filed an appeal with the Ministry of Justice on 5 January 1996 in which he responded to the reasons given by the Directorate in the following manner: he knew about the arrest of several members of his party but he did not know their names; the automatic dating system of the camera used to take the above-mentioned photographs was not working properly because of a flat battery; he had scars as a result of torture but the Norwegian police showed no interest in looking at them.

2.5 On 6 November 1997 the Ministry of Justice rejected the appeal. The Ministry did not find the explanations given by the author convincing. Moreover, the Ministry was informed through the Norwegian Embassy in Nairobi that the author was not known to the AAPO leadership; that, according to that leadership, the meeting at which the author claimed to have been arrested never took place; and that two documents provided by the author with his application for asylum were found to be false.

2.6 The author claims that he was not given the opportunity to comment on the report of the Norwegian Embassy, a report which was based on an inquiry made by a lawyer in Addis Ababa whose identity was never revealed to him. The lawyer had gone to Debre Berhan and found AAPO offices there. He therefore concluded that no AAPO meeting had taken place on 27 January 1995 and that it could not be verified whether the applicant had been arrested. The lawyer also found that even when the AAPO was operating in Debre Berhan the chairman and vice-chairman were not the people indicated by the author in his application.

2.7 On 21 December 1997 the author filed a request for the reconsideration of the case in which he commented on the verification report and the Ministry's interpretation of it. He alleged that his arrest

and detention had been conducted in an irregular manner, therefore he could not be expected to produce documentary evidence concerning them. He added that he had never referred to an AAPO office in Debre Berhan, but to the fact that he himself had had links with the office in Addis Ababa. The names of other AAPO members referred to in the verification report had been spelled wrong and in any case were so common that other elements of identification should have been used. Their positions in AAPO had been misunderstood. He noted that the head of AAPO, Askat Weldeyes, was imprisoned for his underground activities. He further stated that the Norwegian authorities had shown no interest in seeing his scars and that, under article 17 of the Administration Act, it was their responsibility to seek medical advice.

2.8 The author provided the Ministry of Justice with a copy of a medical report of 4 February 1998 by an expert on torture victims. The report referred to the methods of torture described by the author, who claimed that every day for about two weeks he had been beaten with sticks, especially on the knees, head and soles of the feet, and needles were inserted under his feet while he was laying on his back with his hands tied. The report listed a number of physical and psychological problems that could be linked to such treatment, such as pain in the right knee and left foot, walking difficulties, headaches, pains when urinating, depression and sleep disorders. The doctor concluded that the author had been subjected to torture and referred him to a rheumatologist and the psycho-social team for further examination.

2.9 The Psycho-Social Team for Refugees in Northern Norway issued a report on 20 April 1998 indicating that based upon the interviews conducted it was clear that the author had been subjected to torture and had been traumatized by his experiences in prison. He showed all the signs of post-traumatic stress disorder and needed lengthy psychotherapeutic treatment. The report was sent to the Ministry of Justice on 21 April 1998.

2.10 On 10 September 1998 the Ministry rejected the request to reconsider the case. The Ministry refused to accept that the author's current health problems were the result of his experiences in Ethiopia. Since his allegations concerning his political activities were not credible, his injuries could not be the result of such activities. On 14 September 1998 author's counsel sent a fax to the Ministry requesting that the decision to expel the author be postponed on the basis of article 42 of the Administration Act, according to which if a complainant intends to go to court or has taken his case to court, the Administration can defer execution of a decision until a final judgement is made. On 16 September 1998 the Ministry responded that the execution of the decision of 6 November 1997 would not be deferred in view of the fact that no new facts had been presented.

2.11 The author argues that the Norwegian authorities repeatedly failed to investigate his torture allegations, despite the obligation under article 17 of the Administrative Act to examine all aspects of the case. Such failure is also contrary to articles 15 to 17 of the Aliens Act. He notes that the Ministry rejected the request to reconsider the case without referring to the medical reports and avoiding all comments thereon.

2.12 The author further claims that his story is consistent and disagrees with most of the arguments presented by the Ministry in rejecting his application. For example, in its decision of 10 September 1998 the Ministry stated that the International Committee of the Red Cross (ICRC) had access to most regular places of detention in Ethiopia and had reported on the occurrence of torture and other

forms of physical mistreatment of political detainees. The reports, however, did not refer to torture of AAPO members held in secret detention centres. That such detention centres exist is reflected in reports of NGOs, in particular Amnesty International.

2.13 The Ministry also states that the available information does not indicate the use of torture except against persons connected to rebel groups and that detention of persons connected to the more peaceful opposition groups like AAPO is infrequent and does not involve a risk of torture. The author disagrees and provides a copy of a 1995 Amnesty International report according to which hundreds of AAPO supporters were arrested in 1994 and early 1995. He also provides a copy of an article published in the Ethiopian Register magazine in which co-defendants in the trial against the AAPO president accused of participating in an armed uprising described the torture to which they had been subjected after their arrest in 1994, including in the Debre Berhan region. According to the author, their stories are consistent with his own allegations.

2.14 The Ministry states that AAPO has denied having an underground organization. The author replies that very seldom does such an organization publicize its secret work.

2.15 Finally, the author complains about the police interrogation report, which did not fully reflect the information he had provided, in particular with respect to the kind of torture to which he had been subjected.

### The complaint

3. The author claims that in view of the fact that he was tortured, as a result of which he is undergoing medical treatment, and that there is a pattern of grave violations of human rights in Ethiopia, it is very likely that he will be tortured again if he is returned to that country.

### State party's observations on the admissibility of the communication

4.1 In a submission dated 19 January 1999 the State party objects to the admissibility of the communication as domestic remedies had not been exhausted and asks the Committee to withdraw its request under rule 108 (9) of its rules of procedure. It contends that, when making decisions under the 1988 Immigration Act, the immigration authorities take into consideration Norway's international obligations,<sup>2</sup> including those enshrined in the Convention. Furthermore, article 15 of the Act stipulates that a foreigner must not be sent to an area where he may fear persecution of such kind that would justify recognition as a refugee, or where he/she will be at risk of being sent on to such an area. Corresponding protection shall apply to any foreign national who, for reasons similar to those given in the definition of a refugee, is in considerable danger of losing his life or of being made to suffer inhuman treatment. According to the State party, article 15 of the Immigration Act corresponds to article 3 of the Convention. Although the Act does not refer explicitly to the Convention the latter is applied by the immigration authorities and will be applied by the courts if invoked.

4.2 Asylum-seekers who find their applications for asylum turned down by the administration have the possibility of presenting an application before the courts for judicial review. In accordance with chapter 15 of the 1992 Enforcement of Judgements Act, a concerned party may apply to the courts

for an injunction, either when a case has already been brought or in cases not yet before the courts, asking the court to order the administration to defer the deportation of the asylum-seeker. An injunction may be granted if the plaintiff can demonstrate that the challenged decision will probably be annulled when the main case is to be adjudicated. In the case under consideration, the fax dated 16 September 1998 by which the Ministry informed the author that stay would not be granted cannot be interpreted as if the Ministry would carry out the deportation even if the author had brought his case before the court. Moreover, the author did not indicate that he intended to bring the case to court.

4.3 Since 1987 more than 150 cases concerning the legality of decisions denying asylum have been brought before Norwegian courts. A majority of those cases have contained a request for injunction. Courts have their own power to order a stay. If an applicant demonstrates that the requirements for injunction are fulfilled, the Ministry cannot go ahead with the deportation and is bound to obey the court. Experience shows that the Ministry itself, in the majority of asylum cases brought before the courts, decides administratively to stay its decision until the court of first instance, following an oral hearing, decides on the request for injunction.

4.4 The State party also refers to the author's claim that his financial situation does not permit him to go to court. Even if that is the case, the argument cannot serve to make the requirement of article 22 (5) (b) of the Convention inoperative. The wording of the provision is clear and does not allow for this defence. Furthermore, the State party notes that the author is indeed represented by counsel before the Committee.

4.5 In cases like the one under consideration, national courts are better placed than international bodies to assess evidence. This is especially so when it comes to the hearing of parties and witnesses on questions of reliability and truthfulness. In court oral testimony will be subject to examination by both parties and possibly the court itself. Such a procedure is not undertaken by the Committee. The facts of the case as they emerge from the documents are complex and detailed. Details have to be understood in the light of oral testimony presented in court. The requirement of exhaustion of local remedies is therefore even more compelling.

#### Counsel's comments

5. Counsel claims that the Ministry of Justice tends not to allow asylum-seekers to stay in the country while they prepare a judicial complaint or while the court examines their case. He refers to the statement by the State party according to which more than 150 cases concerning the legality of decisions denying asylum have been brought before Norwegian courts and argues that 150 cases in 12 years is a rather low figure, which demonstrates how difficult it is to have access to the courts. Finally, he claims that the author was unable to raise funds in order to bring his case before the courts.

#### Additional information submitted by the State party

6.1 By an additional submission dated 29 October 1999, the State party informs the Committee that according to the Immigration Act, an asylum-seeker has right to free legal advice in relation to the administrative proceedings. This right is limited to five hours of a lawyer's time in relation to the

application in the first administrative instance and an additional three hours on administrative appeal. These limits are based on an evaluation of what is needed to ensure proper assistance. It is possible to apply for an extension of such assistance.

6.2 As to the proceedings before the courts, an application for free legal aid is to be made to the County Governor in accordance with the Legal Aid Act No. 35 of 13 June 1998. The condition for receiving such aid is that the applicant's income does not exceed a certain limit, which is normally not the case for asylum-seekers even if they are receiving employment income in addition to the benefits granted by the State. If legal aid is granted, the aid covers counsel's fees in whole or in part. In addition, the aid covers court fees and other costs related to the proceedings, such as the cost of an interpreter. The State party also states that those granted free legal aid in court proceedings must themselves pay a part of the total costs, consisting of a moderate fixed fee amounting to approximately 45 US dollars, and an additional share of 25 per cent of the total financial cost beyond the basic fee. However, this amount shall not be paid if the person concerned has an income below a certain threshold.

6.3 The State party states that it is not aware of whether the author has applied for free legal aid in connection with contemplated court proceedings, but notes that the fact that free legal aid is not unconditional when an applicant appeals an administrative decision before the courts cannot exempt the author from the requirement to exhaust domestic remedies.

#### Issues and proceedings before the Committee

7.1 Before considering any claims contained in a communication, the Committee must decide whether or not the communication is admissible under article 22 of the Convention.

7.2 The Committee notes that the State party challenges the admissibility of the communication on the grounds that all available and effective remedies have not been exhausted. It further notes that the legality of an administrative act may be challenged in Norwegian courts, and asylum-seekers who find their applications for political asylum turned down by the Directorate of Immigration and on appeal by the Ministry of Justice have the possibility of requesting judicial review before Norwegian courts.

7.3 The Committee notes that according to information available to it, the author has not initiated any proceedings to seek judicial review of the decision rejecting his application for asylum. Noting also the author's claim about the financial implications of seeking such review, the Committee recalls that legal aid for court proceedings can be sought, but that there is no information indicating that this has been done in the case under consideration.

7.4 However, in the light of other similar cases brought to its attention and in view of the limited hours of free legal assistance available for asylum-seekers for administrative proceedings, the Committee recommends to the State party to undertake measures to ensure that asylum-seekers are duly informed about all domestic remedies available to them, in particular the possibility of judicial review before the courts and of being granted legal aid for such recourse.

7.5 The Committee notes the author's claim about the likely outcome were the case to be brought

before a court. It considers, nevertheless, that the author has not presented enough substantive information to support the contention that such remedy would be unreasonably prolonged or unlikely to bring effective relief. In the circumstances, the Committee finds that the requirements under article 22, paragraph 5 (b), of the Convention have not been met.

8. The Committee therefore decides:

(a) That the communications as it stands 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 and the author.

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

#### Notes

1/ According to reports by Amnesty International, the AAPO was formed in 1992 as a registered political party which opposed the Government through solely peaceful means.

2/ 2 Article 4 of the Immigration Act stipulates that "the Act shall be applied in accordance with international rules by which Norway is bound when these are intended to strengthen the position of a foreign national".