

COMMITTEE AGAINST TORTURE

M. S. v. Australia

Communication No. 154/2000

23 November 2001

CAT/C/27/D/154/2000

VIEWS

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

Alleged victim: The petitioner

State party: Australia

Date of communication: 25 January 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. 154/2000, 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 petitioner and the State party,

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

1.1 The petitioner is M.S., an Algerian national, currently detained in the Immigration Detention Centre in Chester Hill, Australia. He claims that his removal to Algeria would entail a violation of article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment by Australia. He is represented by the Refugee Advice and Casework Service (Australia) Inc.

1.2 In accordance with article 22, paragraph 3, of the Convention, the Committee brought the Communication to the attention of the State party on 28 January 2000. At the same time, acting

under rule 108, paragraph 9, of its rules of procedure, the Committee requested the State party not to expel the petitioner to Algeria while his communication was being considered.

The facts as submitted by the petitioner

2.1 On 24 August 1998, coming from South Africa, the petitioner arrived in Australia without valid travel documents. In his interview at the airport he requested the State party's protection as a refugee.

2.2 On 3 September 1998, the petitioner made an application for refugee status (protection visa) with the Department of Immigration and Multicultural Affairs under the Migration Act. On 2 October 1998, a delegate of the Minister for Immigration and Multicultural Affairs delivered a decision denying a protection visa. On 14 December 1998, the Refugee Review Tribunal (RRT) affirmed this decision. On 30 April 1999, the Federal Court of Australia dismissed the petitioner's request for judicial review.

2.3 On 22 March 1999, the petitioner requested the Minister for Immigration and Multicultural Affairs to intervene and set aside the decision of the RRT in the public interest, pursuant to section 417 of the Migration Act. In an undated letter, the Minister responded that he decided not to exercise this power. On 13 September 1999, counsel again wrote to the Minister requesting that the petitioner be permitted to submit a second application for a protection visa pursuant to section 48B of the Migration Act. Counsel has not received a response to this request.

2.4 The petitioner submits that he was involved in the social assistance activities of the Front islamique du salut (FIS) since 1990, i.e. after work, the petitioner used to go to the local FIS office and assess what to give to families in need. In January 1992, after the results of the general election for the National Peoples' Assembly were cancelled, the local FIS office was closed and the petitioner was called by the police (gendarmerie) and questioned for more than two hours. The petitioner submits that after his release, he was required to report to the gendarmerie on a daily basis and not to leave his hometown, Ngaos. On 16 September 1994, supported by a friend, he left Algeria for the Syrian Arab Republic by plane. The day after his departure, and again in October, the gendarmerie questioned his father about the residence of the alleged victim. It is further submitted that the petitioner's father subsequently advised him not to return to Algeria because the police accused him of avoiding his military recall.

2.5 The petitioner submits that he left Algeria in 1994 after he heard of an official decree calling up reservists who had only served 18 months of military service for an extra six months. The petitioner had served in the National Republic Army from May 1988 to March 1990. The petitioner submits that in March 1994 it was reported that the Algerian Minister of the Interior announced the Government's intention to draft thousands of army reservists and that these reports were not before the RRT when it reviewed the case.

2.6 The petitioner submits that, in 1996, he obtained a copy of a court verdict, dated 17 November 1996, convicting him of forming a terrorist group and, in absentia, sentencing him to death.¹

The complaint

3.1 The petitioner contends that his deportation to Algeria would violate article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The petitioner argues that there are substantive grounds for believing that he would be in danger of being subjected to torture when deported to Algeria, because he has been perceived as an FIS sympathiser.

3.2 The petitioner claims that, upon his return, he would be targeted as a draft-evader and anti-Government opinions would automatically be attributed to him for avoiding military service.

3.3 The petitioner claims further that upon his return he would be arrested and tortured in connection with the court verdict of 1996. It is submitted that the judgement is consistent with counsel's knowledge of penalties for desertion in connection with perceived affiliation with the Islamists.

3.4 The petitioner claims that, upon his return, he will be interviewed at the airport about his time spent outside Algeria and his activities. He may be questioned on whether he applied for refugee status outside Algeria. The petitioner quotes a British newspaper report of June 1997 on the death of a refused asylum-seeker deported to Algeria.

3.5 The petitioner claims that Algeria is committing gross violations of human rights, which take place not only with total immunity, but are also sanctioned at the highest level. Recalling events that have occurred in Algeria since 1992, he further claims that there is a customary disregard by Algeria of its obligations under international human rights treaties.

3.6 The petitioner claims that all available domestic remedies have been exhausted. Notwithstanding the outstanding response from the Minister for Immigration and Multicultural Affairs and pursuant to the Migration Act, the alleged victim could be deported from Australia as soon as reasonably practical.

State party's observations on admissibility and merits

4.1 In its reply of 14 November 2000, the State party submits that the application is inadmissible, because it lacks the minimum substantiation as required by article 22 of the Convention.

4.2 Should the Committee find that the application is admissible, the State party submits that it lacks merit, as grounds for believing that the alleged victim would be subject to torture upon his return to Algeria are neither substantial, personal nor present.

4.3 While the State party acknowledges the seriousness of the human rights situation in Algeria, it submits that recent reports indicate that the situation has improved. The State party refers to the adoption of the Civil Harmony Law in 1999 and the agreement of the Algerian Ministry of the Interior to investigate cases of disappearances. The State party submits that Amnesty International, Human Rights Watch and the United States Department of State reported ad idem that the number of disappearances, arrests, torture, and extrajudicial killings carried out by agents of Algeria declined

in 1999. The State party notes that Algeria acceded to the International Covenant on Civil and Political Rights, the Convention against Torture, with the declaration under articles 21 and 22, and the African Charter on Human and Peoples' Rights.

4.4 The State party submits that there is no substantial reason for believing that the petitioner will be subjected to torture upon his return to Algeria resulting from his claimed involvement with the FIS. The State party requests the Committee to accord appropriate weight to the findings of the RRT in this regard, since the petitioner did not provide new information in respect to this claim. The State party recalls the findings of the RRT that the petitioner has never been a member of the FIS and had no interest or involvement in its political activities and that the Algerian police had no interest in him whatsoever. The RRT argued that the petitioner's submission that he was required to report to the police and restricted in his travel was not plausible in the light of the evidence of the treatment of FIS members during the time in question. Furthermore, in the light of recent developments in Algeria, the State party submits that sympathy with the FIS is unlikely to draw the attention of the Algerian authorities.

4.5 With regard to the military recall of the petitioner, the State party points at the findings by RRT that there was no military recall until March 1995. Country information received by the State party indicates that there was an earlier recall of reservists in 1991, but no further recall until March 1995. The State party recalls further that there was no evidence that the petitioner was recalled at all, while independent evidence indicated that a notice would have been sent to the petitioner's home. Even in the event that the petitioner had failed to respond to a recall of reservists, the alleged victim did not produce any specific information that he is likely to be subjected to torture. The State party points to UNHCR guidelines in respect of Algerian asylum-seekers and submits that the likelihood of arrest alone does not support allegations of the likelihood of torture.

4.6 The State party submits that the copy of the court verdict presented by the petitioner is unlikely to be genuine, given that the petitioner's own account of when the order was issued is inconsistent with the date of the order and the sentence imposed is inconsistent with information received concerning penalties imposed on reservists for the failure to respond to recall, i.e. arrest and imprisonment for a period of between 3 months and up to 10 years, depending on the circumstances. The State party further recalls Amnesty International's reports that Algeria has had a moratorium on carrying out death sentences since December 1994 and that none has been carried out since that time.

4.7 Insofar as the petitioner claims that he is at risk of being subjected to torture because of a suspicion that he has applied for refugee status or sought asylum, it is submitted that the alleged victim did not provide any evidence to support the observation that Algerian authorities have been made aware of his applications in Australia or South Africa. Country information received by the State party indicates that, even if the Algerian authorities were aware of the petitioner's applications, there is no substantial reason for believing that he would be subjected to torture.

Comments by the petitioner

5.1 The petitioner submits that the human rights situation in Algeria remains critical. He argues that Algeria continues to ignore or is unable to respond to allegations of torture and ill-treatment of those

people arrested on suspicion of having links with armed groups. The petitioner recalls the note in the concluding observations of the Human Rights Committee in 1998 that there were numerous sources of information that torture, disappearances and summary executions occurred in Algeria. In addition, the petitioner notes Amnesty International's continuing concern regarding torture of those, who have been interrogated about possible contacts with members of armed groups.

5.2 The petitioner submits that the distinction made between his involvement with FIS and active membership in the organization is artificial. In addition, no evidentiary basis is presented for the conclusion that social assistance activities, which have obvious political significance, are not regarded as political by the Algerian authorities.

5.3 The petitioner submits that, in the light of recent developments, it is too simplistic to argue that the petitioner's sympathy with the FIS is unlikely to draw the attention of the Algerian gendarmerie to his case. It is argued that those who have not claimed the amnesty or who fall outside its terms as provided for by the Civil Harmony Law are likely to be pursued rigorously.

Issues and proceedings before the Committee

6.1 The Committee notes the information from the State party that the deportation of the petitioner has been suspended, in accordance with the Committee's request under rule 108, paragraph 9, of its rules of procedure.

6.2 Before considering any claims contained in a communication, the Committee against Torture must decide whether the communication 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. The Committee notes that the State party considers the communication inadmissible for lack of sufficient substantiation. However, the State party did not submit further arguments in this regard, but arguments on the merits should the Committee find the communication admissible. The Committee, therefore, is of the opinion that the State party's arguments raise only substantive issues, which should be dealt with at the merits and not the admissibility stage. Since the Committee sees no further obstacles to admissibility, it declares the communication admissible.

6.3 The Committee must decide, pursuant to article 3, paragraph 1, of the Convention, whether there are substantial grounds for believing that the petitioner would be in danger of being subjected to torture upon return to Algeria. In reaching this decision, the Committee must take into account all relevant considerations, pursuant to article 3, paragraph 2, of the Convention, including the existence of a consistent pattern of gross, flagrant or mass violations of human rights. The aim of the determination, however, is to establish whether the individual concerned would be personally at risk of being subjected to 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 a sufficient ground for determining that a particular person would be in danger of being subjected to torture upon his return to that country; additional grounds must exist to show that the individual concerned would be personally at risk. Similarly, 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.

6.4 In the present case, the Committee notes that the petitioner's social activities for the FIS date back to the beginning of 1992, at which time he was detained and interrogated for two hours. It is not submitted that the petitioner was tortured or prosecuted for his activities for FIS before leaving for Syria.

6.5 The Committee notes that the petitioner invokes the protection of article 3 on the grounds that he is personally in danger of being arrested and tortured in connection with the disputed court verdict of 1996. However, the petitioner does not submit any information supporting the claim that the petitioner will be exposed to the risk of torture. The Committee considers that, even if it were certain that the petitioner would be arrested on his return to Algeria because of a prior conviction, the mere fact that he would be arrested and retried would not constitute substantial grounds for believing that he would personally be in danger of being subjected to torture.²

6.6 With regard to the claim that the petitioner will be targeted and that an anti-Government opinion will automatically be attributed to him, the Committee notes that the petitioner did not present evidence that there was, in fact, a military recall of the petitioner at all. From the evidence before the Committee, it also cannot be established that the petitioner is at risk of being tortured if interviewed at the airport upon his return to Algeria.

6.7 The Committee recalls that, for the purposes of article 3 of the Convention, a foreseeable, real and personal risk must exist of being tortured in the country to which a person is returned. On the basis of the considerations above, the Committee considers that the petitioner has not presented sufficient evidence to convince the Committee that he faces a personal risk of being subjected to torture if returned to Algeria.

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 removal of the petitioner to Algeria, on the basis of the information submitted, would not entail a breach of article 3 of the Convention.

Notes

¹ The translated text of the decision submitted by the petitioner reads in its relevant part: "The Court has in default sentenced accused 'M.S.' to death..."

² See P.Q.L. v. Canada, communication No. 57/1996, para. 10.5.