

Distr.
RESTRICTED*

CAT/C/37/D/265/2005
21 November 2006

Original: ENGLISH

COMMITTEE AGAINST TORTURE
Thirty-seventh session
(6-24 November 2006)

DECISION

Communication No. 265/2005

<u>Submitted by:</u>	A. H. (represented by counsel)
<u>Alleged victim:</u>	The complainant
<u>State party:</u>	Sweden
<u>Date of complaint:</u>	8 February 2005 (initial submission)
<u>Date of present decision:</u>	16 November 2006

Subject matter: Risk of deportation of the complainant to Azerbaijan

Procedural issues: N/a

Substantive issues: Principle of non-refoulement

Articles of the Convention: 3

[ANNEX]

*Made public by decision of the Committee against Torture.

ANNEX

**DECISION OF THE COMMITTEE AGAINST TORTURE UNDER ARTICLE 22 OF THE
CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR
DEGRADING TREATMENT OR PUNISHMENT**

Thirty-seventh session

concerning

Communication No. 265/2005

Submitted by: A. H. (represented by counsel)
Alleged victim: The complainant
State party: Sweden
Date of complaint: 8 February 2005 (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 16 November 2006,

Having concluded its consideration of complaint No. 265/2005, submitted to the Committee against Torture by A. H. 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 Committee against Torture.

[Note: Explanatory footnotes in square brackets will be removed from the text of the final decision.]

1.1 The complainant is A. H., an Azeri national born in 1971, currently detained in Sweden awaiting deportation to Azerbaijan. He claims that his return would constitute a violation of article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. He is represented by counsel. The Convention entered into force for Sweden on 26 June 1987.

1.2 In accordance with article 22, paragraph 3, of the Convention, the Committee transmitted the communication to the State party on 8 February 2006. Pursuant to rule 108, paragraph 1, of the Committee's rules of procedure, the State party was requested not to expel the complainant to Azerbaijan while his case was pending before the Committee. The State party acceded to such request.

The facts as presented by the complainant

2.1 The complainant belongs to the Talysh minority group in Azerbaijan. After his graduation in mechanical engineering in Russia and upon completion of his military service in Germany, he joined the Talysh separatist movement lead by Alakram Hummanov, which strived to establish a Talysh republic. In 1994, he left this group and moved to Baku, where he lived until he fled to Sweden.

2.2 The complainant declares to have been an active member of the Azerbaijani Democratic Party (ADP), a registered opposition party to the current regime. He contends that his political activities were carried out in the district of Khatai and included, among others, organising demonstrations against the regime. He claims to have been seen on television on several occasions in the framework of these activities.

2.3 In 2001, the complainant was summoned by the police in several occasions and interrogated about the leader of the Talysh separatist movement, Hummatov. On 15 June 2001, policemen dressed in plainclothes searched the complainant's home in Baku and seized some documents and recordings. He was arrested and taken to premises of the Ministry of National Security in Baku, where he was repeatedly beaten. He was then taken to a "police house" and locked in a cell in the basement, where he was kept for approximately a year. He contends that, during his detention, he was beaten on numerous occasions and that he was not allowed to go out or speak to anyone and was never informed of the duration of his detention. He further contends that his case was never tried by a court and that no lawyer was appointed to him.

2.4 In May 2002, he fell ill and was brought to a KGB hospital, which also treated prisoners. The complainant states that, while he was in hospital, his father and the secretary general of the ADP, Sardar Jalaloglu, organised his escape and obtained, through bribery, a party membership card and a driver's license in his name. A visitor delivered these documents to the complainant.

2.5 On the 14 November 2002, the complainant walked out of hospital dressed in military clothes, with the help of a soldier connected to Jalaloglu, while guards were busy with phone calls and visitors. That night he crossed the Azeri border to the Russian region of Dagestan. He arrived in Sweden via Kaliningrad on 19 November 2002, with a forged Dutch passport. The day after his arrival, he applied for asylum.

2.6 By decision of 4 July 2003, the Swedish Migration Board ("Migrationsverket") rejected the complainant's application. The Board denied the existence of pronounced discrimination against Talysh population in Azerbaijan and questioned the complainant's credibility as to how he had managed to escape from hospital and how his driver's licence had been issued.

2.7 On 8 July 2003, the complainant appealed to the Aliens Appeals Board. On 10 October 2003, this Board received a letter from the German authorities, in reply to a request for information made under the Dublin Convention, where it was stated that the complainant had applied for asylum in Germany on 25 July 1995.

2.8 On 10 October 2003 and 3 March 2004, the complainant presented submissions to the Board, enclosing medical reports from the Crisis and Trauma Centre at Danderyd hospital, issued on 18 and 19 February 2004, respectively. These reports confirmed that he had been

subjected to acts of torture as described by him, including systematic beatings, electroshocks and sitting on iron bars for a long time. It concluded that the complainant's scars and injuries corresponded to acts of torture suffered in 2001.

2.9 In a further submission to the Board, on 17 December 2004, the complainant stated that his brother had arrived in Sweden and applied for asylum and that Jalaloglu had been arrested in Azerbaijan and the complainant, among others, was being searched by the Azerbaijani authorities. A wanted notice, including a photo of the complainant, had been issued by the Ministry of Internal Affairs, Department of Criminal Investigations of Baku, and posted at police stations around Baku. He was allegedly accused of "belonging to the ADP and of having left the country and instigating rebellion for having disseminated oppositional ideas". He contended that his brother had informed him that their father had also been arrested in Baku two months after the complainant's departure from Azerbaijan.

2.10 On 4 February 2005, the Aliens Appeals Board rejected the complainant's appeal. While it accepted that the complainant had been imprisoned and subjected to torture as indicated in the medical reports, it considered that "these incidents could not be attributed to Azeri authorities but should be viewed as criminal acts performed by certain individuals overstepping their powers." It further questioned the duration of the complainant's detention and the circumstances of his escape and found that he had not been able to demonstrate neither that he was wanted on political grounds nor that he had been politically active at such high level that he would risk being persecuted by Azeri authorities.

The complaint

3. The complainant maintains that if he were to be returned to Azerbaijan, he would risk detention and torture again, on grounds of his tight connection with the ADP and especially considering that a wanted notice has been issued and distributed in police stations around Baku. He submits that the current political situation in Azerbaijan is particularly tense due to the parliamentary elections of 6 November 2005. In this regard, over 300 opposition activists, *inter alia* from the ADP, were arrested on 21 May 2005 in an attempt to crush political opposition. In light of the facts and the evidence submitted, the complainant claims that his deportation to Azerbaijan would constitute a violation of article 3 of the Convention.

State party's submissions on admissibility and merits of the complaint

4.1 By letter of 10 May 2005, the State party contests the admissibility of the communication, arguing that it does not meet the basic level of substantiation required for the purposes of admissibility. On a subsidiary basis, it claims that the case is without merit. It argues that, although numerous human rights abuses are still being reported, Azerbaijan has made some progress towards improving the human rights situation since it became a member of the Council of Europe and has signed major international and European human rights treaties. In particular, the State party notes that some political prisoners have been released, including Hummatov, the leader of the former Talysh separatist group. Therefore, the human rights situation in Azerbaijan in itself does not suffice to conclude that the complainant's forced return would violate article 3.

4.2 The State party further contends that the national authorities are best positioned to assess the author's credibility. The Migration Board held two interviews with the complainant and concluded that, while his statements relating to his personal circumstances

and his membership in the Khatai branch of the ADP were confirmed as correct by the Swedish Embassy in Ankara, other statements were not considered credible. The State party notes that, although the complainant's ADP membership card and his driver's license were considered valid, the way in which these documents were delivered to the complainant was not credible. The State party notes that the secretary-general of the ADP, Jalaloglu, who had allegedly helped the author to escape from hospital, later declared that he did not know the author. According to the Embassy's interpreter, the wanted notice is false and only consists of a "chaotic composition of words full of mistakes". It adds that, according to the information obtained from the Ministry of Internal Affairs, the complainant has never been subject to any criminal investigations nor has he been imprisoned.

Complainant's comments on State party's observations

5.1 By letter of 14 July 2005, the complainant submits that he encountered difficulties during interviews with the Swedish Migration Board, due to the fact that the first interview was conducted without an interpreter. He therefore acknowledges that some minor contradictions may have arisen. In particular, he did not understand whether he had previously applied for asylum in a State party to the Dublin convention. He confirms that he applied for asylum in Germany in 1995, where he stayed for six months, and that he returned to Azerbaijan before any decision had been adopted by the German authorities.

5.2 He questions the way in which the Swedish government obtained Jalaloglu's declarations, especially considering that he was in prison at the time where the investigations were carried out. He reiterates that he knew Jalaloglu personally and that it was precisely him who had helped him to escape from hospital, through a soldier connected to Jalaloglu. He insists that both his driver's licence and ADP membership card could be obtained through bribery, with Jalaloglu's help. He claims that Azerbaijan is a corrupt country and that bribery is common.

5.3 He notes that, as his imprisonment was illegal, it is unlikely that Azeri authorities would acknowledge that he had ever been imprisoned. As to the wanted notice, the complainant insists that it is a genuine document issued by the Ministry of Internal Affairs and containing his photo, probably obtained from an old passport.

5.4 He concludes that, on account of his tight link with the ADP and his past record of imprisonment and torture, he would be detained and tortured if returned to Azerbaijan, especially since he has information about the persons that detained him in 2001.

Additional comments by the State party on the author's comments

6.1 By letter of 28 September 2005, the State party states that the Azeri administration is bureaucratic and prefers to register a person detained on false charges than to keep him secretly detained without any record of his detention. In this regard, it states that there are no reasons to doubt the information obtained from the Ministry of Internal Affairs of Azerbaijan.

6.2 It further maintains that the Swedish Embassy is assisted, in investigations, by people who are well acquainted with the Azeri judicial system and have contacts with the relevant authorities, including the Ministry of Internal Affairs. One of these persons allegedly met Jalaloglu personally, who declared that he did not know the complainant.

6.3 By letter of 16 November 2005, the State party submits that, since a new remedy to obtain a residence permit came into force under temporary legislation, the complaint should be declared inadmissible for non-exhaustion of domestic remedies, or at least be adjourned awaiting the outcome of the application of this new procedure. On 9 November 2005, temporary amendments were enacted to the 1989 Aliens Act. On 15 November 2005, these amendments entered into force and were to remain in force until a new Aliens Act entered into force on 31 March 2006. These temporary amendments introduced additional legal grounds for granting a residence permit with respect to aliens against whom a final refusal-of-entry or expulsion order had been issued. According to the new Chapter 2, section 5 b of the Aliens Act, if new circumstances come to light concerning enforcement of a refusal-of-entry or expulsion order that has entered into force, the Swedish Migration Board, acting upon an application from an alien or of its own initiative, may grant a residence permit, *inter alia*, if there is reason to assume that the intended country of return will not be willing to accept the alien or if there are medical obstacles to enforcing the order.

6.4 Furthermore, a residence permit may be granted if it is of urgent humanitarian interest for some other reason. When assessing the humanitarian aspects, particular account shall be taken of whether the alien has been in Sweden for a long time and if, on account of the situation in the receiving country, the use of coercive measures would not be considered possible when enforcing the refusal-of-entry or expulsion order. Further special considerations shall be given to a child's social situation, his or her period of residence in and ties to the State party, and the risk of causing harm to the child's health and development. It shall further be taken into account whether the alien has committed crimes and a residence permit may be refused for security reasons.

6.5 No expulsion order will be enforced while a case is still under consideration of the Migration Board. Decisions made by the Migration Board under Chapter 2, Section 5 b, as amended, are not subject to appeal. Applications lodged with the Migration Board under the new legislation, which are still pending by 30 March 2006, will continue to be handled according to the temporary amendments of the 1989 Aliens Act. The same applies to cases that the Board has decided to review on its own initiative.

6.6 By letter of 29 March 2006, the State party informs the Committee that, after having examined whether the complainant qualified for a residence permit in Sweden under the abovementioned temporary amendments, the Swedish Migration Board found, by decision of 3 March 2006, that the complainant was not entitled to such a permit.

Additional comments by the complainant on the State party's submission

7. By letter of 11 April 2006, the complainant notes that the State party has not provided sufficient information on how the Swedish Embassy in Ankara carried out its investigation. It further notes that there is a risk that his identity as an asylum seeker in Sweden was disclosed to the Azeri authorities. He adds that his wife and two sons live under very poor conditions in Baku and suffer reprisals from the Azerbaijani authorities.

Additional submissions from the State party

8. On 5 July 2006, the State party provides the Committee with a translation of the wanted notice. It notes that the author submitted this document incomplete to the Swedish Migration Board and that, therefore, it has not been able to provide a full copy of this document.

Additional comments by the complainant on the State party's submission

9.1 By letter of 14 July 2006, the author stresses that the State party has confirmed his being a member of the Khatati branch of ADP. He notes that the membership card produced was also confirmed to be valid by the State party. This card was however issued while he was at hospital, with the help of Sadar Jalaloglu and his father. He contends that it was not difficult to obtain such a card with Jalaloglu's help. The author received this card just before fleeing to Sweden. He adds that he is well acquainted with Jalaloglu, who is a good friend of his father. He met Jalaloglu several occasions through his father and he has even a dedicated book by him. He contends that he has been in contact with Jalaloglu, who acknowledged that he was questioned by Azerbaijani police and denied knowing him because Jalaloglu himself was in trouble with the authorities and did not want to worsen his situation.

9.2 The author notes that, according to the interpreter of the Swedish Embassy in Ankara, the wanted notice was incomprehensible. However, this notice has in fact been translated and seems both logic and comprehensible.

Additional submissions from the State party

10. On 28 September 2006, the State party notes that, in order to obtain a translation of the notice, it requested assistance from the Swedish Embassy in Ankara. This embassy reported that, for the purposes of investigating matters relating to Azerbaijan, it generally engages an international organisation operating in Baku. This organisation has in turn several legal consultants linked to its office, who can provide information obtained from Azerbaijani authorities. The investigations of the Embassy undertaken with the assistance of legal consultants lead to considering the wanted notice as a false document. It reiterates that it consists of a "composition of words that is void of meaning" and that no information has been found with the relevant national authorities to corroborate that the author has been charged with a criminal offence. It adds that it has not been possible to find a second page of the document because it is false and that, in any case, the burden of proof relies on the author, who should be the one to produce a full copy of this document. It adds that the English translation of the notice does not offer support to the complainant's claim that he is wanted in Azerbaijan for being a Talysh member of ADP, having left the country illegally and instigating rebellion.

Issues and proceedings before the Committee

11.1 Before considering any claims contained in a complaint, 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 further notes that domestic remedies have been exhausted since the decision adopted by the Swedish Migration Board on 3 March 2006 under the temporary amendments, and that the

complainant has sufficiently substantiated his claim for purposes of admissibility. Accordingly, the Committee finds the complaint admissible and proceeds to its consideration of the merits.

11.2 The issue before the Committee is whether the complainant's removal to Azerbaijan would constitute a violation of the State party's obligation, under article 3 of the Convention, not to expel or return a person to a State where there are substantial grounds for believing that he would be in danger of being subjected to torture.

11.3 In assessing whether there are substantial grounds for believing that the complainant would be in danger of being subjected to torture if returned to Azerbaijan, the Committee must take account of all relevant considerations, including the existence of a consistent pattern of gross, flagrant or mass violations of human rights. However, the aim of such an analysis is to determine whether the complainant runs a personal risk of being subjected to torture in the country to which he would be returned. It follows that the existence of a pattern of gross, flagrant or mass violations of human rights in a country does not as such constitute sufficient reason for determining that a particular person would be in danger of being subjected to torture on 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 flagrant violations of human rights does not mean that a person might not be subjected to torture in his or her specific circumstances.

11.4. The Committee recalls its General Comment No. 1, on the implementation of article 3, that "the risk of torture must be assessed on grounds that go beyond mere theory or suspicion. However, the risk does not have to meet the test of being highly probable" (A/53/44, annex IX, para. 6).

11.5 The Committee notes that the State party has questioned the author's credibility with regard to his position within ADP, his imprisonment and the State party's responsibility for his torture, based on expert evidence obtained by its consular services in Ankara. This evidence included, *inter alia*, an interrogation of the ADP leader, Sardar Jalaloglu, while at prison, who declared not to know the author. The State party has further questioned the authenticity of the wanted notice allegedly issued by the Ministry of Internal Affairs, an incomplete copy of which was submitted by the complainant to the Swedish Migration Board.

11.6 Bearing in mind the above and in light of first hand information before the Committee, it notes that, although it is undisputed that the complainant was a member of ADP and that he was subjected to acts of torture in 2001 and 2002 as confirmed by the medical reports submitted by him, he has failed to provide evidence about his high position within the party or the conduct of any political activity of such significance that he would face foreseeable, real and personal risk of being subjected to torture upon his return to Azerbaijan. The Committee further notes that the author has not been able to provide, as requested by the Committee, a full copy of the wanted notice presented to the Swedish Migration Board. Additionally, it notes that the notice presents numerous incoherences and does not reveal, in any case, that the complainant is being searched in Azerbaijan. The Committee considers that the complainant has failed to disprove the State party's findings in this regard, and to validate

the authenticity of the document in question. It recalls its jurisprudence that it is for the complainant to collect and present evidence in support of his account of events.¹

11.7 With regard to the general human rights situation in Azerbaijan, the Committee takes note of the State party's argument that, although human rights abuses are still being reported in Azerbaijan, this country has made some progress towards improving the human rights situation since it joined the Council of Europe and that efforts are being made towards releasing political prisoners.

11.8 In light of all the above, the Committee is not persuaded that the complainant would face a real, personal, and foreseeable risk of torture if deported to Azerbaijan.

12. 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 complainant to Azerbaijan 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.]

¹ *Vid. S.L. v Sweden*, Communication No. 150/1999, Views adopted on 11 May 2001, para.6.4 ; and *M.Z. v Sweden*, Communication No. 256, Views adopted on 17 May 2006, para. 9.5.