

COMMITTEE AGAINST TORTURE

Y. S. v. Switzerland

Communication No. 147/1999

15 May 2001

CAT/C/26/D/147/1999

VIEWS

Submitted by: Y. S. (name deleted) [represented by counsel]

Alleged victim: The author

State party: Switzerland

Date of the communication: 7 October 1999

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

Meeting on 15 May 2001,

Having concluded its consideration of communication No. 147/1999, 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 by the author of the communication and the State party,

Adopts the following decision:

Views

1.1 The author of the communication is Mr. Y. S., a Turkish citizen of Kurdish origin born on 7 June 1953 and currently residing in Switzerland, where he applied for asylum on 18 June 1998. His application having been turned down, he maintains that his forcible repatriation to Turkey would constitute a violation by Switzerland of article 3 of the Convention against Torture. 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 21 October 1999. 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 the author to Turkey while his communication was under consideration by the Committee. In a submission dated 14 December 1999, the State party informed the Committee that steps had been taken to ensure that the author was not returned to Turkey while his case was pending before the Committee.

The facts as submitted by the author

2.1 The author and Ms. S., Turkish nationals of Kurdish origin, married in 1977 and then lived in their home in Elazig, a town in south-eastern Turkey. At that time the author owned two shops selling electrical appliances, one in Elazig and the other in Pertek, a district of the city of Tunceli where he had grown up. In 1991, he closed the shop in Pertek, and at the end of 1994 closed the shop in Elazig because of constant harassment by the police.

2.2 Since the 1980s, the author had been an active supporter of the leftist Kurdish party known as PSK (Socialist Party of Kurdistan), which published a newspaper entitled Oezg.r.l.k.Yolu. The author would read and sell this paper, the name of which was often changed because it was regularly banned. At the same time, he was an activist in the Turkish Human Rights Association (IHD).

2.3 On 21 March 1993, two IHD representatives in Elazig were murdered. Their bodies were found in the street bearing obvious signs of torture: their ears had been cut off and their eyes put out. The author attended their funerals.

2.4 Until 1994 the author was repeatedly harassed by the police because of his opinions and political activities. In 1994, the author's shop was raided by the police, who found a copy of the above-mentioned newspaper and other PSK publications. The author was forced to board a minibus and taken blindfolded to an unknown place. For three days he was severely tortured in an attempt to make him give information to the police and to become an unofficial collaborator. Despite the torture methods used, he refused to give any information or to become an informal collaborator. After three days he was released. He continued to work in his shops despite constant police harassment. At the end of 1994, he decided to close the shop in Elazig.

2.5 From then on, the author and his family had no fixed abode, living in three different places: in Kizilkale, where the author's parents have a farm; in Mersin, where he owns another apartment; and in Elazig, in a dwelling owned by a friend which they rented a few months after fleeing.

2.6 One night in April 1996, the police broke into the rented apartment in Elazig where the author and his family were sleeping. The author was beaten and taken to a place where he was physically and psychologically tortured for two and a half days. He then agreed to work for the police, who said that he could begin working in two weeks' time. On being released, he returned to his home, collected his family and hid them at a friend's home until they left for Istanbul. While his family members were with this friend, the author's eldest son, aged 17, was arrested by the police while on his way to see his grandfather and was held in custody. The police informed him that he would not be released unless

his father came to fetch him in person. On learning of this, the author and his family left for Istanbul, where they stayed at the home of one of his brothers.

2.7 On 4 June 1996, the author, his wife and another son caught a plane and, via Milan, arrived illegally in Switzerland on 5 June 1996. All of them were in possession of their passports.

2.8 On the day of their arrival in Switzerland, the author and his family applied for asylum. Their application was rejected by the Federal Office for Refugees on 27 May 1998. The author argues in particular that, in support of its decision refusing him refugee status, the Federal Office for Refugees maintained that he had given contradictory information concerning his place of residence between 1994 and 1996. The author lodged an appeal against this decision, which was rejected on 3 August 1999 on the grounds that his pleas were unconvincing. In this appeal, he requested a second medical examination, which was refused.

2.9 The author states that he arrived in Switzerland traumatized by the torture he had undergone. He began a course of medical treatment on 9 July 1996 and he was also advised to obtain psychological treatment. On 8 April 1997, the doctors sent the Federal Office for Refugees a report stating that the author should spend three weeks in hospital because of pains in his spinal column. On 18 April 1997, a psychiatric report requested by the Federal Office for Refugees found that he was suffering from post-traumatic stress disorder.

The merits of the complaint

3. The author states that if he were returned to Turkey he would be arrested, would again be tortured and might be killed in an extrajudicial execution.

The State party's observations

4.1 In a note verbale dated 14 December 1999, the State party declares that it does not contest the admissibility of the communication.

4.2 As to the merits of the communication, the State party explains that the Swiss Appeal Commission on Asylum Matters considered that the author's statements concerning the period from 1994 until his second arrest in 1996 were not credible since he had no longer been in Elazig as from 1994. Moreover, it is difficult to believe that the author would have hidden at the home of one of his friends, T.K., since that person was particularly vulnerable politically and his telephone was being tapped by the Turkish security forces. In the opinion of the Federal Office for Refugees, there was no causal link between the author's possible arrest in 1993 and his departure from Turkey in 1996.

4.3 Furthermore, the State party emphasizes that the Swiss Appeal Commission on Asylum Matters, unlike the Federal Office for Refugees, considers that the allegations concerning the author's arrest and subsequent torture are also lacking in credibility. It was highly doubtful that the author would have been able to continue his business activities for a period of 18 months after having been arrested and tortured, given the effectiveness of the repression by the Turkish security forces.

4.4 Similarly, the State party points out that the medical examination of the author simply accepted at face value the author's explanation of the causes of the disturbances from which he was suffering, without questioning them. For that reason the Swiss Appeal Commission on Asylum Matters refused to allow a second medical examination.

4.5 In the view of the State party, the arguments presented by the author in his communication add nothing to those presented to the Swiss authorities. On the contrary, in his communication he claims that he was tortured not in 1993 but in 1994, whereas in the Swiss internal proceedings he repeated on several occasions that the events did take place in 1993, in July at the latest.

4.6 In general, the State party entirely endorses the grounds adduced by the Swiss Appeal Commission on Asylum Matters in support of its decision to reject the author's application for asylum.

4.7 In the light of article 3 of the Convention, the State party points out that, in accordance with the Committee's jurisprudence, this provision provides no protection to the author, who simply maintains that he is afraid that he will be arrested on his return to his country.

4.8 The State party questions the veracity of certain facts to which the author has referred only in his communication, such as the name and address of the friend at whose home he claims to have sought refuge. Furthermore, he gave the Committee this information on a confidential basis and on condition that the Swiss authorities took no action to verify its authenticity. However, the State party could also have obtained this information in the same conditions.

4.9 The State party points out that the inquiries undertaken by the Swiss Embassy in Ankara have shown that the author was not wanted by the police. His name does not appear in any police records in relation to possible criminal or political activities. Moreover, it was not until investigations had been carried out by the Embassy that the author was obliged to admit that he owned a home in Mersin, a fact which he had initially concealed from the Swiss authorities.

4.10 On the question of the medical certificates, the State party considers that they are not sufficient to eliminate the contradictions and implausibilities contained in the author's statements. The Swiss Appeal Commission was by no means convinced that the post-traumatic disturbances from which he claimed to be suffering were the consequence of the acts of torture which he alleges. In this context, it must be emphasized that the person who conducted the medical examination was both the therapist and the person who prepared the expert report.

4.11 With the exception of the alleged arrest of his eldest son in April 1996, the State party considers that the author has never demonstrated that members of his family or members of his wife's family have been sought or intimidated by the Turkish authorities, let alone arrested or tortured. This fact leads to the view that the author and his family would therefore be in no danger of being arrested or tortured in the event of their return to Turkey.¹

4.12 Similarly, the author has never demonstrated that he has engaged in activities which might have been beneficial to PSK. He was not a member of this party but merely a sympathizer and, even in this capacity, he acknowledged that he had never distributed brochures for the party.

4.13 Lastly, the State party considers that the author's explanations concerning the manner of his departure from Turkey with his family are open to question. The Swiss Appeal Commission on Asylum Matters considered it unlikely that a person wanted by the police would have been able to leave Turkey from Istanbul airport without let or hindrance. In view of the extremely strict security checks carried out at this airport, it is likely that a false or forged passport would have been detected. Moreover, the State party considers implausible the contention that the passports were in the possession of a third party.

4.14 The State party accordingly considers that the author's statements do not permit the conclusion that there are substantial grounds for believing, in accordance with article 3, paragraph 1, of the Convention, that the author would be in danger of being subjected to torture if the decision to return him to Turkey were carried out.

The author's comments

5.1 In a communication dated 14 July 2000 the author commented on the State party's observations.

5.2 Concerning the date of the first arrest, he states that his counsel admits having himself made a mistake over the dates, probably because the author, too, confused them at the time of the second interrogation. Nevertheless, while making it clear that this arrest occurred in 1993, the author points out that it was not questioned by the Swiss authorities.

5.3 As to his work within the party, the author wishes to make it clear that, at his second interview, he stated that he shared the party's ideas and supported the party, but that he did not play an active part in it. In addition, he makes it clear that he played a limited role in distributing the party newspaper. Lastly, he recalls that he was arrested in 1993 because party newspapers had been found in his apartment and he had been accused of having distributed pamphlets.

5.4 The author recalls that, in his appeal to the Swiss Appeal Commission on Asylum Matters, he was prepared to give his friend's name and address on condition that that information was not used by the Swiss Embassy in order to carry out inquiries into their relationship.

5.5 Concerning the inquiries carried out by the Swiss authorities in Turkey, the author considers that it is impossible for a Turkish security organization to give such information to Switzerland. As to the apartment in Mersin, the author did not consider that information to be sufficiently important. Furthermore, it was not true that they had moved completely from Elazig to go and live in Mersin, as the Swiss authorities maintained. Consequently, it could not be said that it was impossible for the author to be arrested in Elazig.

5.6 As to the veracity of the medical examination conducted by Dr. M., if the Federal Office for Refugees had not contested the veracity of the torture in 1993, the author wonders why the possibility that he was still traumatized by that torture should be ruled out, when it was known that he had been forced to remain standing in freezing water and that his fingers had been squeezed with pincers. Furthermore, Dr. M.'s description of the report as an "expert report" was motivated by the request made by the Federal Office for Refugees. However, the State party had provided no information as

to the form that the report should take. Similarly, the psychiatric diagnosis of post-traumatic stress disorder does not depend on measurable objective signs. In any judicial procedure, if the medical report is considered to be unsatisfactory, a second report must be requested.

5.7 In the opinion of the State party, the author's brothers have not been persecuted in Istanbul and Izmir because of him. Moreover, the State party considers that the author and his family could return to Turkey without any problem. However, the arrest of the author's eldest son is not contested. In this connection, the author maintains that his brothers and sisters live in Istanbul and that he had little contact with them; furthermore, they were too far from Elazig to be able to give any information about him. As to the author's eldest son, he has not lived in Elazig since the time the author arrived in Switzerland. The year the author left, the son moved to Istanbul to live with his family.

5.8 As to the State party's argument that the author has ceased to work for PSK since his arrival in Switzerland, the author states that PSK is very active in Switzerland, notably in Lausanne and Basel, but not in Bern where he lives. Nevertheless, the author regularly attends its meetings.

5.9 Concerning the State party's doubts that the author had lived with a friend who worked for PKK, the author maintains that his friend had completely concealed his activities from the security forces. The security forces had, however, visited Mr. K. in order to prevent him from participating in certain activities. Mr. K. was quite old and died in 1999.

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. It 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. It also notes that all domestic remedies have been exhausted and that the State party has not contested the admissibility of the communication. It therefore considers that the communication is admissible. As both the State party and the author have provided observations on the merits of the communication, the Committee proceeds with the consideration of those merits.

6.2 The issue before the Committee is whether the return of the author to Turkey would violate the obligation of the State party under article 3 of the Convention not to expel or return a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.

6.3 The Committee must decide, pursuant to article 3, paragraph 1, whether there are substantial grounds for believing that the author would be in danger of being subjected to torture if he was returned to Turkey. In reaching this decision, the Committee must take into account all relevant considerations, pursuant to article 3, paragraph 2, 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. 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 or her return to the country. There must be other grounds indicating 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 might not be subjected to torture in his or her specific circumstances.

6.4 The Committee recalls its general comment on the implementation of article 3, which reads: "Bearing in mind that the State party and the Committee are obliged to assess whether there are substantial grounds for believing that the author would be in danger of being subjected to torture were he/she to be expelled, returned or extradited, 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).

6.5 The Committee notes that the medical examination undergone by the author indicated the presence of post-traumatic stress.

6.6 However, on the basis of information submitted by the author, the Committee notes that the events which prompted his departure from Turkey date back to 1993 and appear to be linked in particular to his relations with PSK. The purpose of the arrests and torture which he says he underwent in 1993 and 1996 seemed to be to elicit information or to induce him to collaborate with the security forces. On the other hand, there is no indication that since his departure from Turkey in 1996 the members of his family, and notably his son, have been sought or intimidated by the Turkish authorities. Moreover, the Committee takes note of the information furnished by the Swiss Embassy in Ankara, which establishes that the Turkish police have no file on the author.

6.7 In these circumstances, the Committee considers that the author has not furnished sufficient evidence to justify his fear of arrest and torture on his return.

6.8 The Committee against Torture, acting under article 22, paragraph 7, of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, considers that the decision of the State party to return the author to Turkey does not constitute a breach of article 3 of the Convention.

Note

¹ Cf. H.D. v. Switzerland, communication No. 112/1998 (para. 6.5), and A.L.N. v. Switzerland, communication No. 90/1997 (para. 8.5).