***Communication No 156/2000 : Switzerland. 11/13/2001. CAT/C/27/D/156/2000. (Jurisprudence)***

Committee Against Torture

Twenty-seventh session

12 - 23 November 2001

**[PART OF ANNEX VII OF DOCUMENT A/57/44]**

Views of the Committee Against Torture under article 22 of the

Convention against Torture and Other Cruel,

Inhuman or Degrading Treatment or Punishment

- Twenty-seventh session -

**Complaint No. 156/2000**

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

Alleged victim: The complainant

State party: Switzerland

Date of complaint: 9 February 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 13 November 2001,

Having concluded its consideration of complaint No. 156/2000, submitted to the Committee against Torture under article 22 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,

Adopts the following:

## Views under article 22, paragraph 7, of the Convention

1.1 The complainant is a Sri Lankan national of Tamil origin, born on 13 April 1979. He is currently in Switzerland, where he applied for asylum. His application was turned down and he maintains that his expulsion to Sri Lanka would constitute a violation by Switzerland of article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. He asked the Committee to deal with his case as a matter of urgency, as he was facing imminent expulsion when he submitted his complaint. He was represented by counsel until 9 April 2001.

1.2 On 21 February 2000, in accordance with article 22, paragraph 3, of the Convention, the Committee transmitted the complaint to the State party. At the same time, the Committee, acting in accordance with rule 108, paragraph 9, of its rules of procedure, requested the State party not to expel the complainant to Sri Lanka while his complaint was under consideration. On 23 May 2000, the State party informed the Committee that steps had been taken to ensure that the complainant was not sent back to Sri Lanka while his complaint was under consideration by the Committee.

### The facts as presented by the author

2.1 The complainant states that, like most Sri Lankans of Tamil origin, he was forced to work from a very early age for the Liberation Tigers of Tamil Eelam (LTTE) movement, particularly in building bunkers and putting up propaganda posters. He says that he had to flee from Kilinochchi to Colombo because he refused to be more active in the movement.

2.2 The complainant maintains that he was arrested several times by the government authorities in Colombo and sometimes held for over a fortnight and that he was tortured on the grounds of being a member of the Tamil Tigers. He says that he was taken before the court on several occasions, the first time being on 15 March 1997, before being released shortly afterwards. He adds that he was arrested again on 3 January 1999 by the Colombo police and detained for a month before being brought before the court again on 10 February 1999. According to the complainant, the judge released him only on condition that he report every Saturday to the office of the Criminal Investigation Department (CID) in order to sign a register.

2.3 The complainant states that he fled Sri Lanka on 28 March 1999 with the help of a trafficker. He adds that, as a result of his flight, a warrant was issued for his arrest, with reference to which a document issued by the Colombo police

was produced dated 23 August 1999. He arrived in Switzerland on 29 March 1999.

2.4 The complainant's application for asylum in Switzerland, filed on 30 March 1999, was turned down on 18 August 1999. On 10 December 1999, in response to an appeal lodged by the complainant on 21 September 1999, the Swiss Appeal Commission on Asylum Matters upheld the original decision to refuse asylum. The complainant was given until 15 January 2000 to leave the country, but, on 10 January 2000, requested an extension of the deadline on health grounds. On 20 January 2000, the Federal Office for Refugees found that those grounds did not justify postponement, but decided to extend the deadline until 15 February 2000 to allow the author time to prepare his departure.

## The complaint

3.1 The complainant states that his return to Sri Lanka would heighten the suspicions of the local police that he was a member of the Tamil Tigers, so that he would be in danger of being summarily arrested and tortured on arrival in Colombo. According to the complainant, there is no doubt that any Sri Lankan national of Tamil origin who has fled his country after being persecuted by government forces is more likely to be tortured if he returns to the country.

3.2 The complainant refers to a report by Amnesty International dated 1 June 1999, according to which acts of torture carried out by the security forces are reported on an almost daily basis in the context of the armed conflict with the LTTE. According to the report, the problem also extends to routine policing, with police officers regularly torturing criminal suspects. Thus, again according to the same source, despite existing legal safeguards, torture continues to be practised with relative impunity.

3.3 The complainant concludes that the argument that the persecution he had suffered was not serious enough to entitle him to asylum is worthless when set against the persecution that undoubtedly awaits him if he returns to Sri Lanka.

3.4 The complainant adds that he has been suffering from pleural tuberculosis since May 1999. He states that he received anti-tubercular treatment between May and December 1999 in the department of chest medicine at the teaching hospital of the canton of Vaud, Switzerland. According to the complainant, the doctors in this department believe that his clinical progress should be monitored over the next two years, as the medical condition from which he is suffering must be considered serious. The complainant claims that essential emergency medical treatment might be necessary and that hospital conditions in Sri Lanka, notwithstanding the contrary view of the Swiss Appeal Commission on Asylum Matters, would not permit appropriate medical treatment.

**Observations of the State party on the admissibility and merits of the communication**

4.1 The State party did not challenge the admissibility of the communication and made its observations on the merits in a letter dated 21 August 2000.

4.2 The State party first of all considered the decision by the Swiss Appeal Commission on Asylum Matters.

4.3 The State party notes that, although the Commission considered the appeal to be manifestly ill-founded and hence could have been summarily rejected, it nevertheless undertook to examine it in detail.

4.4 The State party recalls that the Commission, like the Federal Office for Refugees, found that the complainant had not proved he had suffered serious harm that might give him reason to fear, objectively and subjectively, persecution if he returned to Sri Lanka. According to the State party, the complainant has not in fact established that there is a personal, concrete and serious risk that he will be subjected, if sent back to his home country, to treatment prohibited under article 3 of the European Convention on Human Rights and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. According to the State party, it follows from the decision by the Swiss Appeal Commission on Asylum Matters that, in the light of Switzerland's international commitments, the return ("refoulement") of the complainant is lawful. The State party recalls that the Commission rejected the arguments put forward by the complainant, who cited his state of health in objecting to his refoulement.

4.5 Secondly, the State party considered the merits of the Commission's decision in the light of article 3 of the Convention and the Committee's jurisprudence.

4.6 The State party states that the complainant in his complaint merely recalls the grounds he had invoked before the national authorities. According to the State party, the complainant produces no new information that might call into question the decision of the Federal Office for Refugees of 18 August 1999 and the Commission's decision of 10 December 1999. The State party asserts that the complainant provides no explanation to the Committee of the inconsistencies and contradictions in his allegations. On the contrary, according to the State party, the complainant merely confirms them, since, for reasons unknown to the Swiss authorities, he claims to have been arrested again on 3 January 1999 by the Colombo police and then to have been brought before the court on 10 February 1999. The State party recalls that those claims were supposed to be confirmed, according to the complainant, by the Colombo police document dated 23 August 1999.

4.7 The State party finds these claims to say the least surprising, since during the internal procedure, the complainant initially stated spontaneously that he had not been arrested again by the police or the CID after April 1997. During the hearing, however, the complainant claimed to have been arrested by the People's Liberation Organization Tamil Eelam (PLOTE) in February 1998. According to the State party, it was only in his appeal to the Commission that the complainant indicated, in a very vague way and completely contradicting his earlier claims, that he had been arrested or detained by the police or the CID on several occasions between February 1998 and his departure for Switzerland.

4.8 The State party points out that, although the document allegedly drawn up by the Colombo police is dated 23 August 1999, the complainant never said that he had been arrested in 1999 either during the above-mentioned hearings, or in his appeal to the Commission of 21 September 1999, or in his letters to the Commission dated 15 and 19 October 1999. According to the State party, it is even more surprising that the complainant did not refer to this document in his request for an extension of the 10 January 2000 deadline for his departure. The State party points out that, since this document was never produced in the course of the ordinary proceedings, the complainant could have called for a review of the facts, but had not done so. The State party points out that such a review is recognized as an effective domestic remedy within the meaning of article 22, paragraph 5 (b), of the Convention. The State party is of the view that, in any event, this document cannot be taken into account in the present case.

4.9 The State party explains that there is good reason to doubt the origin and content of this document, which, again, was never produced before the national bodies. The State party observes that it might be wondered why the complainant is afraid of being prosecuted by the police when the latter obligingly provide him with a document setting out in chronological order all the occasions on which he claims to have been arrested. According to the State party, it would be a strange police force indeed that was kind enough to provide a person it wished to arrest with the very means of avoiding arrest. The State party concludes that the 1999 arrest is obviously implausible and that the document supposedly issued by the Colombo police, produced in the form of an uncertified copy, has no probative value.

4.10 After recalling the Committee's jurisprudence and its general comment on the implementation of article 3, the State party states that, in the case under consideration, the Swiss Government entirely agrees with the grounds given by the Commission in support of its decision to turn down the complainant's application for asylum and to confirm his expulsion. With regard to article 3 of the Convention, the State party wishes to point out, by way of a preliminary remark, that according to the Committee's jurisprudence (communication No. 57/1996,P.Q.L. v. Canada), this provision affords no protection to a complainant who simply claims to fear arrest upon returning to his country. The same

conclusion applies *a fortiori* to the mere risk of arrest (communication No. 65/1997, I.A.O. v. Sweden). The State party recalls that, in the present case, the complainant in fact claims that he would be arrested for not fulfilling his obligation to report to the CID office once a week.

4.11 The State party asserts that it is because the arguments were persuasive that the Commission considered the complainant's claims to be lacking in credibility. According to the State party, these arguments are not weakened by the mere fact that the complainant is now transmitting to the Committee for the first time a document which was allegedly issued by the Colombo police on 23 August 1999, according to which the complainant had been arrested again on 3 January 1999 and was wanted by the police for having failed to report to the CID office. The State party points out that the complainant should have and could have provided this information to the Swiss authorities during the internal procedure, as an asylum-seeker is bound by a duty to cooperate. The State party finds it particularly surprising that, when the complainant appeared before the Swiss authorities he never mentioned his arrest on 3 January 1999, even though this supposedly took place shortly before he left Sri Lanka. The State party adds that the complainant also argues that he was subjected to torture while under arrest and that the Sri Lankan authorities bound and beat him. However, according to the State party, the Swiss doctors who examined the complainant and administered his anti-tubercular treatment never reported any suspected after-effects of acts of violence.

4.12 The State party explains that, quite apart from these inconsistencies, it should be pointed out that the complainant's allegations in connection with the arrest on 3 January 1999 and the arrest warrant are implausible. During the cantonal hearing, the complainant explicitly stated that, after his arrest in Colombo by the PLOTE in February 1998, he was released "on condition that he return immediately to Kilinochchi", adding that members of the PLOTE "told me not to return to Colombo". If he had returned to Colombo, the complainant would allegedly have been in danger of being "detained for longer, without being brought before a court". According to the State party, however, these assertions with regard to the arrest by the Colombo police on 3 January 1999 and, especially, the judge's order that the complainant be released on condition that he report to the CID office every Saturday clearly lack credibility.

4.13 Lastly, the State party believes that the complainant's explanations concerning the way he left Sri Lanka need, at the very least, to be treated with caution. The complainant does not explain, in particular, how he was able to leave the country from Colombo airport although wanted by the police. According to the State party, the extremely tight security controls in operation at the airport would never have allowed the complainant to check in for the flight and pass through police and border controls. The State party considers it unlikely that he could, as he claims, have been assisted by a trafficker, who

allegedly told him not to speak to the customs officers and would have promised to intervene if questions were asked. According to the State party, the facts show that, on the contrary, there is no evidence that the complainant was being sought by the police on the day of his departure, on 24 or 25 March 1999.

4.14 The State party concludes that there is therefore reasonable doubt as to whether the complainant is wanted by the Sri Lankan authorities. It is also unlikely that the author would be at risk of arrest if he returned to his country. However, according to the State party, even if such a risk existed, it would not be sufficient to conclude that there were substantial grounds for believing that he would be in danger of being subjected to torture (communications Nos. 157/1996 and 65/1997).

4.15 With regard to the health grounds cited by the complainant, the State party points out that the Commission took them into account. On the basis of two medical certificates, it concluded that the basic anti-tubercular treatment had been completed and that the complainant no longer suffered from any life-threatening or health-threatening condition. According to the State party, the new medical certificate dated 6 January 2000, on which the complainant based his argument, merely confirms this conclusion. After consultations, the surgeons who saw the patient decided not to perform a surgical decortication. The State party adds that, even if an operation should prove necessary, which is not the case at present according to the above-mentioned certificate, it could be performed in Colombo. According to the State party, the same is true of the health check-ups and any medical treatment the complainant might require. The State party states that the Commission was therefore right to conclude that the medical services available in Colombo could be considered satisfactory and able if necessary to provide any treatment needed by the complainant.

4.16 In the light of the above arguments, the State party concludes that there is nothing to suggest that there are substantial grounds for fearing that the complainant would actually be personally at risk of torture on returning to Sri Lanka. According to the State party, the complainant's allegations also fail to prove that sending him back to Sri Lanka would expose him to a real, concrete and personal risk of being tortured.

**Comments by the complainant on the State party's observations**

5.1 The complainant points out that the contradictions and inconsistencies found in his allegations and cited by the Swiss Government to confirm the decision of the Swiss Appeal Commission on Asylum Matters should be seen in the context of the way in which he was heard by the Swiss authorities when he arrived. In this respect, the complainant states that he was seriously ill with tuberculosis and that he was in an extremely weak condition when he had to answer all the questions of the Swiss authorities. The complainant asserts that, given his

condition, it is obvious that certain details might have been forgotten or badly explained and that, moreover, six months after his arrival he had needed to be hospitalized for three weeks.

5.2 The complainant then contests the arguments of the Federal Office for Refugees casting doubt on his flight from Colombo, stating that he had called on the services of a trafficker precisely to avoid police and customs controls at Colombo airport.

## Issues and proceedings before the Committee

6.1 Before considering 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 this case, the Committee also notes that all domestic remedies have been exhausted and that the State party has not contested admissibility. It therefore finds the complaint admissible. Since both the State party and the complainant have provided observations on the merits of the complaint, the Committee proceeds with the consideration of the merits.

6.2 The issue before the Committee is whether the expulsion of the complainant to Sri Lanka would violate 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 or she 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 complainant would be in danger of being subjected to torture if returned to Sri Lanka. 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 would be returned. It follows that the existence of a consistent pattern of gross, flagrant or mass violations of human rights in the country does not by itself constitute a sufficient ground for determining that a particular person would be in danger of being subjected to torture upon returning to that country. There must be other grounds indicating that he or she 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 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 as follows: “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 supposition. However, the risk does not have to meet the test of being highly probable” (A/53/44, annex IX, para. 229).

6.5 In the present case, the Committee notes that the State party has drawn attention to inconsistencies and contradictions in the complainant’s account, casting doubt on the truthfulness of his allegations. It also takes note of the explanations provided by counsel in this respect.

6.6 The Committee also notes that it has not been clearly established that the complainant was wanted by the Sri Lankan police or CID or that the Colombo police document be provided as evidence was genuine, it being indeed surprising that this document, dated 23 August 1999, was never shown to the Swiss authorities, even when the complainant applied to have the 20 January deadline for his departure extended.

6.7 Furthermore, the Committee believes that there is insufficient support for the complainant’s allegations of having been tortured in Sri Lanka and that, in particular, his allegations are not corroborated by medical evidence, even though the complainant received medical treatment in Switzerland shortly after his arrival.

6.8 The Committee is aware of the seriousness of the human rights situation in Sri Lanka, and of reports alleging the practice of torture there. However, it recalls that, for the purposes of article 3 of the Convention, a foreseeable, real and personal risk must exist of being subjected to torture in the country to which a person is returned. On the basis of the considerations above, the Committee is of the opinion that such risk has not been established.

6.9 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 decision of the State party to return the complainant to Sri Lanka does not constitute a breach of article 3 of the Convention.