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COMMITTEE AGAINST TORTURE
Twentieth session
(4-22 May 1998)

VIEWS

Communication No. 94/1997

Submitted by:	K.N. (name withheld) [represented by counsel]
Alleged victim:	The author
State party:	Switzerland
Date of communication:	30 October 1997
Date of adoption of Views:	19 May 1998

[See annex]

* Made public by decision of the Committee against Torture.

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Annex

VIEWS OF THE COMMITTEE AGAINST TORTURE UNDER ARTICLE 22, PARAGRAPH 7, OF THE CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT - TWENTIETH SESSION

concerning

Communication No. 94/1997

Submitted by: K.N. (name withheld) [represented by counsel]

Alleged victim: The author

State party: Switzerland

Date of communication: 30 October 1997

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 May 1998,

Having concluded its consideration of communication No. 94/1997, 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 author of the communication, his counsel and the State party,

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

1. The author of the communication is K.N., a national of Sri Lanka, seeking asylum in Switzerland. He claims that his forced return to Sri Lanka by Switzerland would constitute a violation of article 3 of the Convention. He is represented by counsel.

Facts as presented by the author

2.1 The author states that he was born on 13 March 1972 and that he is a Tamil and a Christian. He lived with his family in the northern province of Jaffna. In 1990, during the war between the “Indian Peace Keeping Forces” and the Tamil Tigers, the author was forced to work for the Tigers. He was detained for a few days by the Indian army and then released. However, in 1994, the author's brother joined the Tamil Tigers and when the Sri Lankan armed forces reconquered Jaffna in October 1995, they were allegedly searching for the author and his brother. The author states that he has no news from his brother since he joined the Tigers.

2.2 On 13 September 1995, the author fled to Kilinochi, further south, a town controlled by the Tigers. In autumn 1996, when the Sri Lanka army approached the town, the author fled to Colombo since he had been informed by his parents that the army had come to their house on three occasions to look for him. On 5 September 1996, he flew to Rome.

2.3 The author arrived in Switzerland on 10 September 1996. On 30 October 1996, the Office fédéral des réfugiés (ODR) rejected his application for recognition as a refugee. The Commission suisse de recours en matière d'asile (CRA) rejected the author's appeal on 22 January 1997. The author was ordered to leave Switzerland before 28 February 1997.

2.4 On 31 July 1997, the author through his attorney requested the CRA to review its decision, arguing that the fact that the Sri Lanka army had searched for him had been overlooked. On 8 August 1997, the CRA rejected the application as out of time.

2.5 At the end of July, beginning of August 1997, the author received a letter from his father, dated 10 July 1997, in which he warned him not to come home because the security forces were looking for him. The author presented the letter with an application to the ODR on 5 September 1997, after having had it translated. On 10 September 1997, the ODR rejected the author's application, considering the letter one of convenience. The author appealed against this decision, but in a letter of 13 October 1997 he was informed by a judge of the CRA that he considered the appeal as devoid of any chance of success; consequently, no suspensive effect was given to the appeal and the author was requested to pay SF 900 if he wanted the ODR to consider his case. The author, in a letter of 29 October 1997, explained to the judge that he did not consider the appeal to be an effective remedy, since it had no chance of success. He further considered the requirement to pay SF 900 excessive and constituting a deterrent, since he had no income whatsoever. The author recalls that the Committee's rules of procedure state that a remedy need not be exhausted where it is unlikely to bring effective relief to the alleged victim.

The complaint

3.1 It is argued that the rejection of the author's application as out of time is in violation with article 3 of the Convention, which constitutes an absolute prohibition on refoulement. He further argues that he only discovered on 29 July 1997, that the officers had overlooked the fact, so that his application should be considered in time, since it was submitted within three months of the discovery.

3.2 The author claims that he runs a serious danger of being detained and tortured in Sri Lanka by the security forces, should he be returned. It is submitted that the Sri Lanka army is known for its poor human rights record.

State party's observations

4. On 18 November 1997, the Committee, acting through its Special Rapporteur for New Communications, transmitted the communication to the State party for comments and requested the State party not to expel the author while his communication was under consideration by the Committee.

5.1 In its observations, dated 19 January 1998, the State party informs the Committee that the necessary measures have been taken to suspend the author's expulsion. While recognizing the importance of interim measures of protection to guarantee a person's effective recourse to the Committee under article 22 of the Convention, the State party notes that the possibility of demanding interim measures is not foreseen in the Convention itself and that article 108 (9) is just a rule of procedure. According to the State party, the individual communication to the Committee is and should remain an exceptional remedy, not the automatic follow-up after exhaustion of domestic remedies. The regular issuing of requests under rule 108 (9) could interfere with the subsidiary nature of the communications procedure.

5.2 The State party is of the opinion that the Committee should only use the procedure under rule 108 (9) when there is a prima facie important and serious risk that someone would be subjected to torture if deported. The State party expresses its concern about the fact that the Committee has requested to suspend the expulsion in nine out of the 16 cases concerning Switzerland. It notes that the exception thus has become the rule. The State party considers that this use of rule 108 (9) is unjustified in the majority of cases, and shows a lack of understanding of the seriousness with which the Swiss authorities examine the applicant's situation. In the instant case, the State party fails to understand the reasons which made the Committee issue a request for interim measures.

6. With regard to the admissibility of the present communication, the State party states that it is not aware of the case having been submitted to another instance of international investigation or settlement. The State party does not contest the admissibility for failure to exhaust domestic remedies either.

7.1 Concerning the merits of the communication, the State party recalls the text of article 3 of the Convention, as well as the Committee's jurisprudence in this respect. It notes that the author bases his complaint mainly on his short detention by the Sri Lanka security forces on suspicion of belonging to the Tamil Tigers LTTE and on reports that the Sri Lanka security forces were looking for him, after his brother joined the LTTE. According to the author, he would risk to be subjected to torture because he belongs to the Tamil minority, and because of his age he would be recruited into the LTTE. Further, he would be suspected of belonging to the LTTE because of his brother's membership.

7.2 The State party submits that the facts as presented by the author have not been the object of a thorough examination by the authorities, as his request for asylum was rejected following the existing case law, since he mainly invoked the situation in his country as ground for asylum and no personal grounds of persecution. The fact that the authorities have not challenged the facts as presented by the author can thus not be taken to indicate that they accepted them as established. Indeed, the ODR, in its decision of 30 October 1996, expressed doubt with regard to the likelihood of some of the events recounted by the author.

7.3 According to the State party, the facts as presented by the author in any event fail to show the existence of grounds for believing that he would be personally in danger of being subjected to torture upon his return to

Sri Lanka. In this connection, the State party notes that the author has never given precise information with regard to his arrest or the circumstances of his detention, despite an invitation to do so by the ODR. In the State party's opinion, the author's description of these events are vague and full of gaps, raising doubts about their reality.

7.4 Furthermore, the author has never claimed to have been subjected to torture. In this context, the State party refers to the Committee's decision in communication No. 38/1995, [1] where it took into consideration the fact that the author had never claimed that he had been tortured in reaching its decision that his case showed no violation of article 3. Moreover, the State party points out that the alleged arrest and detention in the instant case date back more than seven years, and that it would therefore be difficult to admit a link between this event and the author's present fear of persecution. During the hearing before the immigration authorities, the author declared that since his release he had lived in Kilinochi for 11 months without any problem, as well as in Colombo.

7.5 With regard to the author's claim that the security forces are looking for him because his brother is a member of the LTTE, the State party considers that his statements in this regard are not credible. During the hearing, he was asked whether he had encountered problems because of his brother, to which he replied that he was taken in for questioning in 1994, which was disturbing, but did not cause any problems. In his communication to the Committee, the State party notes that the author states that the Sri Lanka army is looking for him, because of his brother, a claim contradictory to what he told the Swiss immigration authorities. With respect to the letter from the author's father, of 10 July 1997, the State party contends that it does not constitute sufficient evidence, since it gives no support to the author's claim of arrest and detention, and coming from a close relative, has little evidentiary value. In the State party's opinion, if the army were in reality looking for the author, he could not have left Kilinochi to go to Vavuniya, since the area is closely controlled by the army; nor could the author have easily obtained an army pass to go to Colombo. The State party concludes that the author has not substantiated his claim that the army is looking for him and that he consequently risks to be subjected to torture.

7.6 The State party notes that the author now claims that he risks persecution by the army, whereas before the immigration authorities he claimed that “different movements” had stopped and interrogated him. In this context, the State party refers to the hearing before the immigration authorities, where the author replied to the question what he would risk upon return to his country, that he risked being taken by the movement for which he would have to work. The State party concludes that the author's asylum request was mainly based on the threat by the LTTE, whereas before the Committee he claims risk of persecution by the army. The State party recognizes the possibility that a person is threatened by the State and an opposition movement at the same time, but does not believe that this is so in the author's case. Rather, the State party considers it likely that the author has changed his story in view of the text of article 3 of the Convention, that the risk of torture must be originating in State authority. Again referring to the minutes of the hearing before the immigration authorities, the State party notes that the author indicated as reasons for his departure the problems with the movement and bombardments.

7.7 The State party concludes that the author has failed to show that he would risk to be subjected to torture upon return to Sri Lanka. The State party adds that the situation of human rights in a country cannot bring a person within the protection of article 3 in the absence of a personal risk. According to the State party, the human rights situation in Sri Lanka has improved considerably since October 1994, after the installation of the Human Rights Task Force. It also points out that the author could reside in a part of Sri Lanka that does not suffer from civil war.

The author's comments

8.1 In his comments, the author maintains that the Sri Lanka army is looking for him since his brother joined the LTTE, and that he told the Swiss authorities about this. The fact that he also had problems with the Tamil movements, does not contradict his problems with the army. In this connection, counsel for the author notes that the ODR and the CRA never pointed to any contradictions in the author's story. Counsel explains that the author's fear for the LTTE has not been mentioned in his communication to the Committee, because the LTTE controls only the northern part of Sri Lanka, and the author could hide from them in Colombo if he wanted. This does not imply that he has changed his story for the benefit of the application of article 3 of the Convention.

8.2 Counsel submits that the author is threatened by serious persecution from the Sri Lanka security services, since the war is still continuing and since the LTTE have increased their activities in Colombo.

8.3 With regard to the State party's concern that the Committee is being used as a regular supervisory body, counsel submits that the State party's concern is groundless, in view of the fact that Swiss immigration authorities handle about 30,000 cases a year. Counsel notes that the author's case was examined by one ODR official and the appeal was heard by a single judge. In counsel's opinion, the judges are not really independent since they are appointed by the Government and not by Parliament.

Issues and proceedings before the Committee

9. Before considering any claims contained in a communication, 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. The Committee finds that no further obstacles to the admissibility of the communication exist and proceeds with the consideration of the merits of the communication.

10.1 The Committee has considered the communication in the light of all the information made available to it by the parties, in accordance with article 22, paragraph 4, of the Convention.

10.2 The Committee must decide, pursuant to paragraph 1 of article 3, whether there are substantial grounds for believing that the author would be in danger of being subject to torture upon return to Sri Lanka. In reaching this

decision, the Committee must take into account all relevant considerations, pursuant to paragraph 2 of article 3, 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 be adduced 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.

10.3 The author has claimed that he was arrested once in 1990 by the Indian armed forces, that his brother became a member of the Tamil Tigers in 1994 and that for this reason the army is looking for him and has searched his family's house on several occasions. The Committee notes that the only substantiation in support of the author's claim is a letter from the author's father, in which it is stated that the army came to the house to look for him and his brother. The Committee notes, however, that the letter does not give any details about either the author's or his family's situation. The author has not presented any other evidence in support of his claim. He does not claim that he has been tortured in the past.

10.4 The Committee has carefully examined the material before it and finds that it appears that the author's main reason to leave his country was that he felt caught between the two parties in the internal conflict. There is no indication that the author himself is personally targeted by the Sri Lankan authorities for repression.

10.5 The Committee is aware of the serious situation of human rights in Sri Lanka and notes with concern the reports of torture in this country. The Committee recalls however that, for the purpose 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 is of the opinion that such risk has not been established.

11. The Committee against Torture, acting under article 22, paragraph 7, of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, is of the view that the facts as found by the Committee do not reveal a breach of article 3 of the Convention.

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

Note

1.Babikir v. Switzerland, Views adopted on 9 May 1997.
