



**Convention against Torture
and Other Cruel, Inhuman
or Degrading Treatment
or Punishment**

Distr.
RESTRICTED *

CAT/C/28/D/177/2001
22 January 2003

Original: ENGLISH

COMMITTEE AGAINST TORTURE

Twenty-eighth session
(29 April – 17 May 2002)

DECISION

Complaint No. 177/2001

Complainant: H. M. H. I. (name withheld by decision of the Committee)
Represented by: Mr. Simon Jeans
State Party: Australia
Date of complaint: 12 December 2000
Date of present decision: 1 May 2002

[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

TWENTY-EIGHTH SESSION

concerning

Complaint No. 177/2001

Submitted by : H. M. H. I. (name withheld by decision of the Committee)

Represented by: Mr. Simon Jeans

State party: Australia

Date of complaint: 12 December 2000

Date of present decision: 1 May 2002

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

Meeting on 1 May 2002,

Having concluded its consideration of complaint No. 177/2001, 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 complainant, his counsel and the State party,

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

1.1 The complainant is Mr. H. M. H. I. (name withheld by decision of the Committee), a Somali national born in Somalia on 1 July 1960. The complainant alleges that his proposed expulsion to Somalia would violate article 3 of the Convention. The complainant is represented by counsel.

1.2 In accordance with article 22, paragraph 3, of the Convention, the Committee transmitted the complaint to the State party on 25 January 2001. At the same time, the State party was requested, pursuant to rule 108 of the Committee's rules of procedure, not to expel the complainant to Somalia while his complaint was under consideration by the Committee. On 20 September 2001, the State party informed the Committee that the complainant would not be removed until the Committee had considered the complaint.

The facts as submitted by the complainant

2.1 The complainant is a member of the Dabarre sub-clan of the Rahanwein clan. His uncle was a Minister for Higher Education of the former Siad Barre regime. Upon the outbreak of clan violence in 1991, the complainant and his family resided in Baidoa, largely populated by Rahanwein, but controlled by Siad Barre's brother in law, a member of the Marehan sub-clan of the Darod clan. According to the complainant, a competing sub-clan destroyed the city, killing many, only for Rahanwein forces to return, followed by pillaging Marehan forces.

2.2 Following the destruction of the complainant's house, Marehan forces detained the complainant and his wife. Upon learning they were Rahanwein, they were taken prisoner and forced to work on local farms. The complainant alleges that his wife was raped, but they escaped in April 1992. After the death of his brother at the hands of the forces of a militia warlord, Hussain Aideed, of the Hawiye clan, the complainant and his wife reached an area where some of his Dabarre sub-clan lived and where he left his family. He departed the area as Aideed forces had killed many relatives. In November 1992, close to the national border, the complainant heard that his Dabarre sub-clan had been attacked by another sub-clan of the Rahanwein. In December 1994, he heard that his uncle, the former Barre Minister, had died at the hands of Aideed forces.

2.3 On 25 December 1997, the complainant reached Sydney, Australia, via Thailand, without valid documentation. From that point he has remained in immigration detention. On 2 January 1998, the complainant applied for a "protection visa" (refugee status) and was granted legal representation. He claimed to fear treatment amounting to persecution in Somalia (torture or execution) on the basis of either his race, or alternatively on the basis of his nationality, political opinion or membership of a particular social group due to his clan membership and familial ties to a political figure of the former Barre government. On 15 January 1998, the complainant's application was refused.

2.4 On 8 July 1998, following a hearing with the complainant on 9 April 1998, the Refugee Review Tribunal (RRT) refused his application for review of the first instance decision. The RRT found the complainant to be credible and accepted his account of his clan's and sub-clan's experiences. However, it found that the human rights violations he feared were not 'persecution' within the meaning of the 1951 Convention relating to the Status of Refugees, since he was, instead, a victim of civil war.

2.5 On 15 October 1998, the Federal Court of Australia dismissed the complainant's application for review of the RRT's decision. On 9 April 1999, the Full Federal Court upheld the complainant's appeal against the Federal Court decision. On 26 October 2000 a majority of the High Court upheld an appeal by the Minister of Immigration and Multicultural Affairs against the decision of the Full Federal Court, and affirmed the RRT's decision.

2.6 On 30 November 2000 and 2 February 2001, the Department of Immigration and Multicultural Affairs rejected applications for a discretionary Ministerial waiver under the Migration Act of the RRT decision.

The complaint

3.1 The complainant contends that there are substantial grounds to believe that he will be subjected to torture if returned to Somalia, placing the State party in breach of its obligations under article 3 of the Convention. He states that there is no safe place for him in Somalia, as Mogadishu airport and Baidoa are controlled by Aideed's

Hawiye clan. Other Rahanwein sub-clans are in conflict with his sub-clan. Furthermore, he claims to be personally at risk by reason of being a relative of a former Minister in Siad Barre's regime. He fears that upon return to Mogadishu, the Hawiye clan would ascertain his clan membership immediately and attempt to extort money from him. He fears that they will torture him or summarily execute him if he is unable to meet their demand for money. If he avoids detention or execution at the airport, he contends it is simply a matter of time before hostile clans would detain and torture him as he has lost all contact with relatives and friends.

3.2 As to the broader situation, the complainant cites a letter from Amnesty International (Australia) of October 1998, a UNHCR report of September 1999, a CHR Special Rapporteur's report of January 2000, a US State Department Report of February 2000, and a US Committee for Refugees report of August 2000, for the general proposition that persistent and current patterns of gross human rights abuses continue in many areas of the country. As to a personal risk of torture, the complainant argues that his and his family's experiences, including their forced labour, the rape of his wife and the death of his brother-in-law are evidence that the above fears are justified and that he would be tortured if returned to Somalia.

Observations of the State party

4.1. By Note Verbale of 20 September 2001, the State party contested both the admissibility and the merits of the communication.

4.2 As to admissibility, the State party contends that the communication is inadmissible, either as the facts of the claim fall outside the scope of the Convention *ratione materiae* and/or the claims are insufficiently substantiated, contrary to Rule 107(b) of the Committee's Rules. The State party observes that the issues raised have already been extensively examined at all judicial levels and by the Minister. It argues that the complainant's claim for international protection has been exhaustively examined, and that the complainant is attempting to utilise the Committee to review a claim for asylum.

4.3 The State party submits that the communication is inadmissible *ratione materiae* on the basis that the Convention is not applicable to the facts alleged in the communication in a variety of respects. Firstly, the acts the complainant alleges that he will face if he is returned to Somalia do not fall within the definition of torture set out in article 1 of the Convention, which refers to acts involving "a public official or any other person acting in an official capacity". The State party also refers to the *travaux préparatoires* of the Convention for the proposition that torture for the purposes of the Convention requires the responsibility for acts of torture attributable to the State.

4.4 The State party refers to the Committee's jurisprudence for support. In *G.R.B. v Sweden*,¹ the Committee considered that acts inflicted by a non-government entity, without the consent or acquiescence of the State party, fell outside the scope of article 3. In *Elmi v Australia*,² the Committee qualified this principle in the exceptional case of a State without a central government for some time, where the international community had negotiated with warring factions, and some factions operated quasi-governmental institutions, considering that acts of groups de facto exercising prerogatives of government could fall within the Convention.

4.5 The State party emphasises that there are important factual and legal differences that distinguish the current case from the situation in *Elmi*. The State party notes that central government was re-established in Somalia in

¹ Communication No. 83/1997.

² Communication No. 120/1998.

August 2000, 245 members of a Transitional National Assembly (TNA) were elected along strict clan lines with minority as well as dominant clans represented. In October 2000, the new Prime Minister appointed a cabinet of 22 ministers from all major clans. Rahanwein clan members hold several important positions, and a Dabarre sub-clan member is also a minister. Moreover, the current President and Prime Minister were former Ministers in the Barre regime. The Transitional National Government (TNG) is recognised by the international community as the effective government of Somalia, and therefore, as a matter of international law, the TNG is the relevant State authority for the purposes of the Convention. Accordingly, groups acting outside the TNG, which was established in Mogadishu and is seeking to establish effective control over the whole of Somalia and restore complete stability, law and order, cannot be regarded as “public officials or other persons acting in an official capacity” for the purposes of article 1. Nor is there any suggestion that the TNG consents or acquiesces to the acts of these groups.

4.6 The State party emphasises the distinction between private and public acts under international law, and the circumstances under which private acts may be imputed to the State. Citing learned commentary³ and decisions of the International Court of Justice⁴ and the Iran-United States Claims Tribunal,⁵ as well as decisions of high national courts,⁶ the State party points to the close degree of connection with a State, including the knowledge and acquiescence of the State or pursuit of State policy, before the acts of private groups may be attributed to the State.

4.7 Turning to the facts of the case, the State party refers to a variety of documentary evidence⁷ that the incidents alleged by the complainant were the result of factional fighting and civil unrest, rather than on account of his family membership or on the basis of an individual profile. In particular, there is no evidence that the destruction of the complainant’s house was the act of persons carrying out Marehan leaders’ orders to harm former members of the Barre regime, especially since Barre’s brother in law controlled this sub-clan. Similarly, regarding the complainant’s capture by Marehan and forced labour, the evidence is that the circumstances of capture would have been the same even if his identification had been of another tribal affiliation, depending on the affiliations of the time. As to the death of the complainant’s brother, and later his brother-in-law, at the hands of Aideed forces, there is no evidence the complainant was pursued by anyone on account of his family link to the former Barre regime. In any event, such retributions have diminished and are economically rather than politically motivated. Accordingly, the State party submits something further is required to engage article 3 and the allegation of torture as a consequence of return.

4.8 Secondly, the communication should be deemed inadmissible *ratione materiae* as the complainant has failed to substantiate that there are substantial grounds for presently fearing torture in the case of his return. The allegations of extortion are, in any event, not of torture. Moreover, the complainant’s fears are concentrated on a small section of Mogadishu and not to all Somalia, and, in accordance with standard removal practice, the complainant has the option of choosing his destination in Somalia when returned. It is not the State party’s intention to return the complainant to Mogadishu.

³ Jennings, R.; Watts, A. (eds.): *Oppenheim’s International Law (9th edition)*, 1992, at 550.

⁴ *Case Concerning United States Diplomatic and Consular Staff in Tehran*, ICJ Rep. (1980), at 3 (“Tehran Hostages”).

⁵ *Short v Islamic Republic of Iran* 82 (1988) AJIL 140, and *Yeager v Islamic Republic of Iran* 82 (1988) AJIL 353.

⁶ *R v Bow Street Metropolitan Stipendiary Magistrate ex parte Pinochet* [2001] 1 AC 61 (United Kingdom); *Marcos I* 806 F. 2d 358, *Alfred Dunhill of London Inc v Republic of Cuba* 425 US 682, *Sharon v Time Inc* 599 F.Supp. 538, and *Jimenez v Aristeguieta* 311 F.2d 547, *United States v Noriega* 746 F.Supp 1506 (United States of America).

⁷ US State Department Country Report on Human Rights Practices 1992; Refugee Survey Quarterly *Vol 15m No 1*, p. 48-4; *Victims and Vulnerable Groups in Somalia – Research Directorate Documentation, Information and Research Branch*, Immigration and Refugee Board, Ottawa, Canada; Report of the Special Rapporteur on Somalia, submitted in accordance with Commission on Human Rights Resolution 1999/75, 26 January 2000, at 4.

4.9 As to the merits, the State party submits that there are no substantial grounds to believe that the complainant would face a real, foreseeable and personal risk of torture by the new government of Somalia on the basis of his family membership. The State party notes that the general situation is improving and that the assessment of the complainant's claims must be made in the light of current conditions. The State party points again to the new governmental arrangements in Somalia, and the connections with the Barre regime of many member of the government. In the light of the newly established government and the relative stability now emerging in the country, there is no reason to believe that the complainant would face a risk of torture from the government if returned, either on the basis of his family link to Barre or his clan membership or any other reason.

4.10 Nor is there a real, foreseeable and personal risk of torture by Aideed forces or other sub-clans. The State party notes that since the establishment of the new government, prolonged fighting in the capital appears over and it would dispute any claim that current armed factions there exercise any quasi-governmental authority. Since 1999, the Bay area has experienced relative peace and, according to the Independent Expert of the Commission of Human Rights on the Situation of Human Rights in Somalia,⁸ life in Baidoa was resuming normality. There is no evidence, whatever the past situation, of current threats from the Marehan clan or Aideed's forces. Indeed, Aideed is the Chairperson of the Somali Reconciliation and Restoration Council, established in March 2001, of which Rahanwein and other clans are part. Clan strengths and loyalties are much changed from the situation existing at the time of the complainant's flight. The State party argues that, while there remain dangers in Mogadishu and southern Somalia of falling victim to factional violence, with the establishment of central government these risks are faced by the population at large and do not support any allegation of a personal risk of torture.

4.11 Even if the complainant were returned to Mogadishu, which the State party does not propose, the complainant could relocate internally to the relatively stable northwest or northeast of the country. The State party proposes rather that the complainant be returned to Kenya and then, taking advantage of the voluntary UNHCR repatriation program, return to a stable area of the complainant's choice.

Comments by the complainant

5.1 By submission of 27 March 2002, the complainant commented on the State party's submissions. As to the admissibility of the case, the complainant concedes that his claims have been examined in Australia prior to the lodging of the communication, but with the exhaustion of those remedies the Committee should examine the claims. The complainant claims that his case falls within the principle adopted in *Elmi*, contending that the State party's assessment of the Somali political environment flies in the face of generally known facts. He claims there is no central government, and that militia groups are acting in an organised capacity to suppress other clans.

5.2 As to the merits, the complainant rejects the State party's submissions, contending instead that the political and military environment remains unstable and that he risks torture. The complainant disagrees that the situation is sufficiently altered to allay his fears and that most violence now occurring is privately-motivated. The complainant refers to a variety of reports for the proposition that there is a picture of continuing instability and an environment of risk of human rights abuses. The complainant contends that the TNG has limited authority in the country, being rather confined to Mogadishu. The complainant goes on to argue that the State party's statements that there exists a central government are contradicted by recent travel advisories issued by the State party which warn against travel to Somalia.

⁸ Ms. Mona Rishmawi: E/CN.4/2000/110 and Corr.1.

5.3 The complainant also disagrees that he should show direct evidence that he would be subjected to torture in Somalia, contending instead that it is rare that corroboration of specific threats can be provided. The complainant disagrees that he could be relocated to a part of Somalia other than the Bay region where he originates, noting simply that UNHCR does not currently repatriate persons in the complainant's position to either the Puntland or Somaliland regions.

Issues and proceedings before the Committee

6.1 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.

6.2 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 has also ascertained, as it is required to do under article 22, paragraph 5(b), of the Convention, that available domestic remedies have been exhausted.

6.3 The Committee considers that the communication has been substantiated for purposes of admissibility, sufficiently elaborating the facts and the basis of the claim for a decision by the Committee. As to the State party's arguments as to inadmissibility *ratione materiae* of the communication, the Committee considers it preferable to examine issues of the scope of articles 1 and 3, and the application thereof to the instant facts, at the merits stage of the communication. Accordingly, the Committee finds that no obstacles to the admissibility of the communication exist. Since both the State party and the complainant have provided observations on the merits of the communication, the Committee proceeds immediately with the consideration of the merits.

6.4 The Committee recalls its jurisprudence that the State party's obligation under article 3 to refrain from forcibly returning a person to another State where there are substantial grounds of a risk of torture, as defined in article 1 of the Convention, which requires actions by "a public official or other person acting in an official capacity". Accordingly, in *G.R.B. v Sweden*,⁹ the Committee considered that allegations of a risk of torture at the hands of Sendero Luminoso, a non-State entity controlling significant portions of Peru, fell outside the scope of article 3 of the Convention. In *Elmi v Australia*,¹⁰ the Committee considered that, in the exceptional circumstance of State authority that was wholly lacking, acts by groups exercising quasi-governmental authority could fall within the definition of article 1, and thus call for the application of article 3. The Committee considers that, with three years elapsing since the *Elmi* decision, Somalia currently possesses a State authority in the form of the Transitional National Government, which has relations with the international community in its capacity as central government, though some doubts may exist as to the reach of its territorial authority and its permanence. Accordingly, the Committee does not consider this case to fall within the exceptional situation in *Elmi*, and takes the view that acts of such entities as are now in Somalia commonly fall outside the scope of article 3 of the Convention.

6.5 Moreover, the Committee has taken into account all relevant considerations, including the existence in the State party of a consistent pattern of gross, flagrant or mass violations of human rights, although the existence of

⁹ Op.cit.

¹⁰ Op.cit.

such a pattern does not as such constitute sufficient grounds for determining whether the 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. In this case, the Committee considers that the complainant has failed to show that there are substantial grounds for believing that he is personally at a risk of being subjected to torture in the event of return to Somalia.

6.6 The Committee also takes note that the State party does not intend to return the complainant to Mogadishu, and that the complainant will be at liberty to avail himself of the voluntary UNHCR repatriation programme and choose the area of Somalia to which he wishes to return.

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, is of the view that the removal of the complainant from Australia would not entail a breach of article 3 of the Convention.

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