



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

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COMMITTEE AGAINST TORTURE
Fortieth session
(28 April - 16 May 2008)

DECISION

Communication No. 311/2007

<u>Submitted by:</u>	M. X. (not represented by counsel)
<u>Alleged victim:</u>	The complainant
<u>State party:</u>	Switzerland
<u>Date of the complaint:</u>	19 January 2007 (initial submission)
<u>Date of present decision:</u>	7 May 2008

Subject matter: deportation from Switzerland to Belarus (or to Ukraine), with alleged risk of torture and cruel, inhuman or degrading treatment or punishment

Procedural issues: none

Substantive issues: risk of torture and cruel, inhuman or degrading treatment or punishment on deportation

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**

Fortieth session

Concerning

Communication No. 311/2007

Submitted by: M. X. (not represented by counsel)
Alleged victim: The complainant
State party: Switzerland
Date of the complaint: 19 January 2007 (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 7 May 2008,

Having concluded its consideration of complaint No. 311/2007, submitted to the Committee against Torture by M. X. 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 and the State party,

Adopts the following decision under article 22, paragraph 7, of the Convention against Torture.

1.1 The complainant is M. X., a Belarus national born in 1952. He applied for political asylum in Switzerland in 2002; his application was rejected in 2003. He claims that his forced removal to Belarus (or to Ukraine) would constitute a violation, by Switzerland, of his rights under article 3 of the Convention against torture. He is unrepresented.

1.2 When submitting his initial communication, the complainant requested the Committee to ask the State party not to proceed with his removal until his case was being considered. On 30 January 2007, the Special Rapporteur on New Communications and Interim Measures, acting on behalf of the Committee, decided not to accede to the complainant's request for interim measures of protection.

The facts as presented by the complainant

2.1 The complainant affirms that he was a political activist in Belarus since 1998 and as such he participated in several political demonstrations. He worked for a company that

published literature against the regime in place; the materials were printed in the Russian Federation and all payments transited through the company's bank accounts. According to him, from the mid-1998, the authorities started to persecute him, and allegedly a criminal case was opened against him, on an unspecified date, for organisation of disorders, anti-State propaganda, discrediting the authority. This case was subsequently closed.

2.2 The complainant claims that in October 1998, the Belarus authorities had issued him with a foreign passport and asked him to leave the country for Ukraine. He refused and continued to participate in demonstrations and to disseminate printed materials. During a picket in Vitebsk on 18 November 1999, he was allegedly arrested by the police and placed in custody; he was released on 8 February 2000. Allegedly, during the initial interrogation, he was beaten by an investigator, as he refused to provide information on his activities. He also suffered from the overcrowding of the detention centre (there were only 10 beds for 20-25 detainees), and was unable to sleep there because the light was permanently kept turned on. His inmates, ordinary criminals, threatened and beat him because he was a political detainee. He also claims that he suffered from a sexual assault¹ by other inmates during his detention. He contends that the inmates had received orders from the police to intimidate him.

2.3 After his release, the complainant moved to Ukraine. In September 2000, he became a member of the Ukrainian party RUKH. In March 2002, he acted as RUKH electoral observer. He allegedly discovered a number of irregularities and informed the party leadership. Shortly afterwards, he was arrested by the police. According to him, the police advised him not to carry out any political activity in Ukraine. He was asked to sign a record in relation to his arrest and a declaration that he did not have complaints against the police. He considered that the record did not reflect the circumstances of arrest and refused to sign it. As a result, he was allegedly threatened and beaten, to the point that he had lost consciousness.

2.4 In July 2002, he was asked by RUKH to investigate the death of an eminent party member (the Mayor of the city of Khmelnytsky). The complainant concluded that it had been a murder. Shortly afterwards, he allegedly received threats to his life by the Security services. Afraid, he left Ukraine on 25 November 2002, arrived in Switzerland on 28 November 2002, and requested political asylum.

2.5 His asylum request was rejected on 14 May 2003 by the Federal Office for the Refugees (ODR). The complainant appealed to the Asylum Review Board (CRA) on 11 June 2003. His appeal was rejected on 15 November 2006. On 21 November 2006, he was ordered to leave the country before 15 January 2007.

2.6 In a subsequent submission, dated 3 April 2007, the complainant explained that he had presented a request for the renunciation of his nationality to the Belarus Embassy in Switzerland.

2.7 On an unspecified date, he appealed to the Federal Administrative Tribunal. On 7 January 2008, the complainant submitted a copy of a decision of the Federal Administrative Tribunal of 28 February 2007, by which the Tribunal refused to examine his appeal as he had not made his submission in an official language of the Swiss Confederation and given that he had not paid the administrative fee (1200 CHF). He claims that he is unable to pay the fee,

¹ In his initial submission, the complainant only mentioned that while in detention, he was threatened with a sexual assault.

and that in any case, all similar complaints are dismissed on various grounds, even when the complaints were filed by lawyers.

The complaint

3. The complainant claims that if he is forcibly removed to Belarus (or Ukraine), the State party would violate his rights under article 3 of the Convention against torture.

State party's observations

4.1 The State party presented its observations on 10 July 2007. It notes that on 6 March 2007, the complainant was issued a new passport by the Belarus Embassy in Switzerland. No evidence was presented by the complainant to show that the copies of letters, presented on 3 April 2007, by which he purported to renounce his nationality were ever mailed. There is no information on the outcome of the request, and it is not clear whether Belarus law allows for Belarus nationals to become stateless. In any case, it is unclear how these documents would impact on an eventual risk of torture for the complainant in Belarus².

4.2 The State party recalls that before Swiss asylum authorities, the complainant claimed that he was persecuted in Belarus because of political activities. He also affirmed that when he left Belarus, he followed the recommendation of the local authorities. After his illegal return to Belarus, he allegedly continued his official activities. According to the information in the present communication, the complainant's company functioned as a clearing house for the printing of political materials in Russia and for related financial operations. Having being located by the authorities in April 1999, he allegedly had taken residence in Ukraine in August 2000. The complainant met his future spouse in Ukraine. Later, he was arrested by the police there in relation to his activities as an electoral observer. He faced difficulties with the authorities by allegedly contributing to the clarification of the circumstances of a car accident of 2001, in which the Mayor of Khmel'nitsky had died. After having been informed by the Ukrainian Migration Office that his permit to stay had expired, he and his spouse left to Switzerland.

4.3 The State party observes that the complainant never contended before Swiss authorities that he was detained in Belarus. However, in his initial submission in the present communication, he affirms that he was arrested in Vitebsk on 18 November 1999 and was released on 8 February 2000, after the criminal case against him was closed. Allegedly, while in detention, he was ill-treated by other co-detainees. Subsequently, on 25 February 2005, the complainant affirmed that in fact he was humiliated by co-detainees.

4.4 The State party notes that article 3 of the Convention prohibits States parties from extraditing an individual to a State if there are serious grounds to believe that the individual

² As to the complainant's affirmation that he risks to be expelled in Ukraine, the State party notes that the complainant had lived in Ukraine, where he has relatives and his companion is Ukrainian national. Given that he is Belarusian national only, his eventual expulsion can be made only to that country. The CRA has therefore correctly concluded that the complainant's allegations of the persecutions he suffered in Ukraine to be non pertinent. The State party affirms that notwithstanding, it would demonstrate that the complainant does not risk to be persecuted in Ukraine.

would be at risk of torture. It endorses the grounds adduced by the Asylum Review Board (CRA) and the Federal Office for the Refugees (ODR) substantiating their decisions to reject the complainant's application for asylum and to confirm his expulsion. It also recalls that the existence of a consistent pattern of gross, flagrant or mass violations of human rights does not constitute sufficient reason for concluding that a particular individual is likely to be subjected to torture on return to his or her country, and that additional grounds must therefore exist before the likelihood of torture can be deemed to be, for the purposes of article 3, paragraph 1, "foreseeable, real and personal".

4.5 With reference to the Committee's General Comment, the State party contends that the situation in Belarus cannot, per se, constitute a sufficient ground to conclude that the complainant would be at risk of torture. The complainant failed to provide sufficient elements to conclude that he would be exposed to a "foreseeable, real and personal" risk of torture in Belarus. As to the situation in Ukraine, the State party notes that important political changes have occurred after the events invoked by the complainant when claiming that he could face a risk of torture there. The nature of the changes in question is such that the Swiss Federal Council has since qualified Ukraine as "a safe country", for purposes of the Swiss Law on asylum.

4.6 The State party contends that the complainant admitted that in Belarus he had been sentenced to fines on three or four occasions in connection with his political activities. In addition, he claimed that his company's implication in political activities had attracted the attention of the fiscal authorities. The State party notes, however, that the complainant never made any allusion to acts of ill-treatment inflicted on him by Belarus authorities. No such allegations were presented in the complainant's initial submission to the Committee.

4.7 It was only in his submissions of 19 and 25 January 2007, when he affirmed that while detained in Vitebsk, he suffered from degrading and inhuman treatment, without supplying any proof in this regard. At the same time, the fax which according to the complainant confirms his detention in 1999 - 2000, submitted as an annex to the complainant's communication of 19 January 2007, is dated 12 April 2000, but was never submitted to Swiss asylum authorities. The above elements lead the State party to conclude that the complainant's allegations are not credible in respect of his detention and ill-treatment in Belarus.

4.8 The State party further notes that in his asylum claim, the complainant alleged that he was arrested by police in Ukraine when acting as an electoral observer and was detained and ill-treated there from 31 March to 2 April 2002. The State party notes that even if throughout the asylum proceedings, the complainant had stressed the level of gravity of the ill-treatment suffered in Ukraine, it accepts the veracity of his allegations. The ill-treatment was inflicted on the complainant allegedly because he had refused to sign a detention protocol. Thus, according to the State party, the police action constitutes an abuse (of power). But the "real" grounds for the complainant's detention would not result in any risk of the complainant's prosecution on return, let alone acts of torture. According to the State party, these police abuses constitute isolated acts and do not show any systematic persecution of the complainant by the police because of his political activities.

4.9 As to the complainant's political activity in Belarus, the State party notes that in his asylum application, the complainant declared that he had been politically active in Belarus

and was fined for his actions. He had continued his activities in Belarus after his departure for Ukraine. These allegations were dully examined by both the CRA and the ODR.

4.10 The State party notes that in his submission, dated 25 January 2007, the complainant added that his company was also implicated in his political activities. This company was allegedly used to order and print propaganda material. However, in his appeal to the CRA, the complainant mentioned that he had had no intention to use the company for the financing of the mentioned printed materials. The State party notes that such activities would have, without doubt, prompted an immediate reaction by the Belarus authorities, such as the revocation of the printing permit, or the engagement of the complainant's criminal liability and his arrest. At the same time, however, the complainant admits that the company, which was closed at the end of 2000, continued to exist after his departure for Ukraine, and that he only learned later that procedures against him were initiated and he was sought in this respect. In addition, the State party notes that the complainant registered with the Belarus Embassy in Ukraine in 2000; this Embassy issued him a passport in 2002, valid until 2006. In these circumstances, the State party concludes that it is not probable that the complainant in fact conducted any opposition political activities in his country of origin.

4.11 The State next recalls that the complainant has claimed that in May 2000, he and his spouse became members of the RUKH. At the same time he submitted a copy of a certificate drawn up in December 2002, according to which he became a party member only in 2002. At the end of March 2002, he allegedly received a letter from the current president of Ukraine, and this incited him to become politically active in Ukraine, and to act inter alia as an electoral observer for the March 2002 elections. According to the State party, in light of the above, it is questionable whether the complainant was politically active in Ukraine.

4.12 On the complainant's general credibility, the State party recalls that as far as the situation in Belarus is concerned, he presented many grounds before the Committee that were not invoked before Swiss asylum authorities, and were not even invoked in his initial submission to the Committee. The only evidentiary material related to his alleged detention is the confirmation that he allegedly received by fax recently. Given the duration of the detention in question, the State party expresses surprise at the fact that the complainant did not produce any other proof in relation to both the detention and its context, in particular concerning the allegedly degrading and inhumane treatment to which he was subjected in detention.

4.13 The State party further notes factual inconsistencies in the complainant's allegations. It notes first, that the complainant affirmed that the Belarus authorities encouraged him to leave the country in 1998. After his departure to Ukraine however, he continued his activities and regularly returned in Belarus. These returns, during more than two years, show, according to the State party, that the complainant was at any risk of persecution in Belarus, contrary to his allegations.

4.14 The State party also notes that the complainant has submitted to the CRA a letter dated 8 November 2001, issued by the Police Department of Vitebsk, according to which the complainant was not sought in Belarus.

4.15 The State party recalls that the complainant has claimed that he was persecuted by Ukrainian Security Services because of his refusal to share the results of his inquiry in relation to the alleged murder of the Mayor of Kmelnitsky. It notes that the complainant has

not explained either to the Swiss asylum authorities or in his communication to the Committee why and how he was able to conduct a scientific inquiry on the causes and the results and consequences of the accident. The State party expresses surprise at the fact that, given the time elapsed, the complainant never substantiated his allegations earlier, either by specifying the reasons for his inquiry, by indicating the names and the qualifications of the specialists consulted, or by producing the results of his inquiry. The State party concludes that the complainant's allegations about his persecution by Ukrainian Security forces lack credibility. Finally, the State party notes that RUKH is a party with nationalist orientation. At no point of time did the complainant explain why he became a RUKH member and invested himself actively.

4.16 The State party concludes that thus there are no serious reasons to believe that the complainant would be at risk of torture, concretely and personally, in case of his return to either Belarus or Ukraine. In addition, being a Belarusian national, he does not risk to be expelled to Ukraine.

Complainant's comments on the State party's observations

5.1 By letter of 28 September 2007, the complainant reiterates his previous allegations. He recalls that he requested the Belarus Embassies in Switzerland and Ukraine to renounce Belarus nationality. These requests place him at additional personal and foreseeable risk of danger in case of his return to Belarus.

5.2 He further explains that his first asylum interview in Switzerland was very summary. During his second interview, he wanted to develop his explanations, but he felt unable to describe the circumstances of his detention in Belarus, as he was ashamed by the presence of young women, and was afraid that the facts would become known to other asylum seekers. In this context, he provides details on his alleged assault in Belarus: after an interrogation, on an unspecified date, he returned very tired to his cell where there were only three of his cellmates. He felt asleep, and woke up because someone was kicking him; he received kicks on the head and lost consciousness. When he came to, one of his cellmates was « humiliating » him. As the author protested, he was kicked further and lost consciousness again. Once he came to, he was lying on the ground. He had blood on his face and pain on his backside. He assumed that the "worst has happened".

5.3 The complainant contends that he explained to Swiss authorities that in Belarus, he had been arrested on several occasions and brought to the police. After a few hours or days, he had been brought before a court and sentenced to fines.

5.4 The complainant challenges the way the State party assesses the existing evidence in support of his allegations. He reiterates that in case of his forced return to Belarus or Ukraine, his rights under article 3 of the Convention would be breached.

State party's further observations and complainant's comments thereon

6.1 On 8 November 2007, the State party presented further comments and reiterated its previous conclusions. It admits that the complainant has effectively submitted a request to be freed from his nationality, but that from the reply of the Belarusian Embassies in Switzerland and Ukraine, however, it appears that his nationality cannot be waived if he did not obtain another nationality (or if no sufficient guarantees to receive another nationality exist).

6.2 The State party reiterates that after his departure to Ukraine, the complainant was regularly returning in Belarus and was not persecuted there. He also presented a certificate issued by the Vitebsk police in 2001, pursuant to which he was not under search warrant in Belarus. In addition, the Belarusian Embassy in Switzerland had issued him a new passport.

6.3 The State party notes that all persons implicated in asylum proceedings in Switzerland are bound by professional secret, what ensure an effective protection of the asylum seekers' private life. At the same time, asylum seekers have the responsibility to present all elements that would ground their demand. The State party accepts that the sense of decency might have prevented the complainant from exposing the assault at the beginning of the asylum procedure. According to it this does not explain, however, why he never mentioned to the Swiss asylum authorities that he was detained in Belarus, in 1999 - 2000, even when he was asked specific questions in this respect.

7.1 The complainant presented additional comments on 16 November 2007. He first notes that the State party's additional observations repeat in fact the State party's initial observations (July 2007).

7.2 He admits that under Belarusian law the grant of a request to renounce from Belarusian nationality requires the existence of another nationality or guarantees that such nationality would be granted. According to him however, this requirement does not apply in his case, as under international human rights law he has the right to individually determine his personal life.

7.3 According to the complainant, although that the State party seems to admit that he was ill-treated and humiliated in Belarus, at the same time it refuses to believe the fact that he was detained there, in spite of the copies of two official documents that confirm this. He adds that he had sent a request to the Medical service of the detention centre in question, as he was treated there in early January 2000. On 4 December 2007, he submitted a copy of the attestation issued by a detention centre No 2 of Vitebsk, dated 4 December 2007, according to which the detention centre informs the complainant that it cannot provide him with any medical record, as detainees' medical records are destroyed after 5 years. The complainant further reiterates his allegations about the poor conditions of detention in the investigation centre and affirms that this description should be considered as sufficient demonstration that he was really detained.

7.4 The complainant insists that he did not address the issue of the assault with the asylum authorities not only because he was ashamed, but also because he was afraid that this would become known by other asylum seekers and they would neglect, humiliate would subject him to mockeries.

7.5 As to the State party's remark that during his initial interview he omitted to mention that he was detained in Belarus, he explains that he had explained that he was arrested for short periods and was brought to the police. He explains that he had considered that his detention in Belarus for 80 days constituted a short period, and he was in custody (in an investigation detention centre), but not in prison.

Issues and proceedings before the Committee Consideration of admissibility

8. 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. The Committee further notes that it is uncontested that domestic remedies have been exhausted and that the State party does not challenge the admissibility of the communication. Accordingly, the Committee finds the complaint admissible and proceeds to its consideration on the merits.

Consideration on the merits

9.1 The issue before the Committee is whether the complainant's removal to Belarus 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.

9.2 In assessing whether there are substantial grounds for believing that the complainant would be in danger of being subjected to torture if returned to Belarus, 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. The Committee reiterates 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.

9.3 The Committee recalls its general comment 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).

9.4 In the present case, the complainant claimed that he was targeted by the Belarusian authorities after 1998, because of his political activities. He was issued a passport and asked to leave the country. During his detention in 1999 - 2000, he was allegedly sexually assaulted by his co-detainees, at the police request. The Committee notes that the State party has objected that neither the detention nor the alleged assault in question were ever mentioned by the complainant before the Swiss asylum authorities, but were submitted only in the framework of the present communication to the Committee, and even not in the complainant's initial submission. The Committee notes that the complainant has not presented any evidence in relation to his alleged assault, in particular he has presented no medical certificate in this connection.

9.5 The only element in substantiation of these allegations constitutes an attestation issued by the detention Centre, which however only confirms that the complainant was detained there from 18 November 1999 to 8 February 2000. The Committee further notes that the

complainant has submitted an attestation issued by the Vitebsk police to the effect that he is not sought in Belarus. On the issue of the burden of proof, the Committee recalls its jurisprudence to the effect that it is normally for the complainant to present an arguable case and that the risk of torture must be assessed on grounds that go beyond mere theory and suspicion³.

9.6 On the basis of all the information submitted, the Committee is of the view that the complainant has not provided sufficient evidence that would allow it to consider that he faces a foreseeable, real and personal risk of being tortured if he is expelled to his country of origin.

9.7 As to the complainant's allegations that he would be at risk of torture in case of his deportation to Ukraine, the Committee has noted the State party's affirmation that given that the complainant is Belarusian national, he could not be expelled to Ukraine, but only to Belarus. In the circumstances, the Committee considers that it does not need to examine this part of the communication.

10. The Committee against Torture, acting under article 22, paragraph 7, of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, therefore concludes that the return of the complainant to Belarus would not constitute a breach of article 3 of the Convention by the State party.

[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.]

³ See communications No. 256/2004, M.Z. v. Sweden, Views adopted on 12 May 2006, para. 9.3; No. 214/2002, M.A.K. v. Germany, Views adopted on 12 May 2004, para. 13.5; and No. 150/1999, S.L. v. Sweden, Views adopted on 11 May 2001, para. 6.3.