



**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. 301/2006

<u>Submitted by:</u>	Z. K. (represented by counsel, Confrere Juristbyrå)
<u>Alleged victim:</u>	The complainant
<u>State party:</u>	Sweden
<u>Date of the complaint:</u>	22 August 2006 (initial submission)
<u>Date of present decision:</u>	9 May 2008

Subject matter: Deportation 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

Article 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. 301/2006

Submitted by: Z. K. (represented by counsel, Confrere
Juristbyrå)

Alleged victim: The complainant

State party: Sweden

Date of the complaint: 22 August 2006 (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 9 May 2008,

Having concluded its consideration of complaint No. 301/2006, submitted to the Committee against Torture by Z. K. 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 the following decision under article 22, paragraph 7, of the Convention against Torture.

1.1 The complainant is Z. K., an Azeri born in 1961, currently awaiting deportation from Sweden. He claims that his deportation to Azerbaijan would constitute a violation by Sweden of article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. He is represented by counsel.

1.2 In accordance with article 22, paragraph 3, of the Convention, the Committee transmitted the communication to the State party on 22 August 2006 and requested it, under rule 108, paragraph 1, of the Committee's rules of procedure, not to expel the complainant to Azerbaijan while his complaint was under consideration by the Committee.

The facts as presented by the complainant

2.1 The complainant lived in the village of Zerrab, working as a lorry driver. A branch of the Azerbaijani People's Party (APP) was set up in the city of Oghuz (40 kms from his home)

in 1989 and the complainant became an active member of the party, holding seminars and meetings. In December 1992 the Oghuz department of the Musavat party was established and the complainant received his party membership card on 20 October 1996 . He was the vice-chairman of Musavat in the region, recruiting members and organizing demonstrations. He also worked as an electoral adviser. His brother was the chairman of Musavat in the Oghuz region.

2.2 On account of his participation in a demonstration on 12 September 1998 he was arrested and kept in custody for three days. He was beaten badly by military staff and police both during the demonstration and in detention, and sustained injuries on his back and kidneys. When he was finally released, he was in very poor physical and mental condition.

2.3 His brother stood for the general election held on 5 November 2000, and the pre-election campaign led to the complainant and his brother being threatened that they would lose their jobs. On the day of the general election, the complainant acted as an electoral observer, and was arrested by the police. In detention, the police tried to make him falsify the electoral protocol, which he refused to do. They arrested the complainant and he was kept in custody for one day.

2.4 The complainant continued with his political activities and once again worked as an electoral adviser during the general election on 15 October 2003. On that day he was questioned by the local authorities and ordered to go to the chief of police at the local police station in Oghuz. He refused and was arrested from 8:30am until 4pm. In detention he was physically abused by the police. Foreign observers entered the police station and, as a result, the complainant was released. The chief of police told the complainant that he would be dealt with later.

2.5 After his release, he was informed that there was a demonstration in Baku, organized by Musavat, which he decided to attend. He left for Baku the next morning and arrived there at 3.50 pm, by which time the demonstration had degenerated and the situation was chaotic. The complainant witnessed the beating of a female journalist, and tried to help her. He was as a result beaten very badly by police using truncheons, arrested and brought to the nearest police station. The physical abuse continued and he was beaten and whipped on the soles of his feet. He was released between 9 and 10 p.m. that day, as a Norwegian observer had intervened and also because his injuries could result in internal bleeding. Following his release he was transported to his brother's home in Baku. An ambulance was called and administered first aid as his condition required immediate medical attention. When the ambulance personnel learned that he had participated in a demonstration, they refused to take him to hospital. The complainant's brother then asked a family friend, a doctor, to examine him.

2.6 On 17 October 2003 the complainant left Baku and returned to Oghuz, together with his brother and other party members. At the border between two regions, the mini-bus was stopped by policemen, they were arrested and taken to Oghuz police station. The complainant's brother, nephew and cousin were taken to the court office, while the complainant remained at the station. He was fined 220,000 Manat, and was detained for two days with others, without receiving any food. On 19 October 2003, international observers arrived and the complainant and other party members were released. By order of the

authorities the complainant was fired from his job on 20 October 2003, so he decided to go into hiding as he feared for his life.

2.7 During his period of hiding, local police went to his home several times, threatening his wife and children. He received a summons dated 1 March 2004 from the Oahu Police Department and a summons dated 31 August 2004 from the Baku Yasmal Police district, which was sent to his brother's address. The complainant's wife received threats, including one from the governor of the Oghuz region. The complainant therefore decided to leave Azerbaijan on 1 September 2004. He arrived in Sweden with his wife and two children on 4 October 2004, and applied for asylum. After his departure from Azerbaijan, the author received an additional summons dated 30 December 2004.

2.8 After three interviews (the complainant states he struggled to understand the interpreter but was afraid to complain) and written submissions by counsel, on 25 May 2005 the Migration Board rejected his asylum application.

2.9 The complainant appealed to the Aliens Appeals Board, which rejected the appeal on 14 September 2005, supporting the findings of the Migration Board. The expulsion order therefore became effective, and his case was returned to the Migration Board for enforcement.

2.10 He lodged a new application for a residence permit with the Aliens Appeals Board on 23 September 2005. He asserted that he wanted to stay in Sweden until 20 November 2005, when elections were due to be held in Azerbaijan, hoping the country would become democratic. The Aliens Appeals Board rejected the application on 28 September 2005. The complainant left Sweden on 10 October 2005 and traveled to Germany to seek asylum. Pursuant to the Dublin Convention he was returned to Sweden and applied there for asylum again on 5 December 2005. The Migration Board held an interview with the complainant, where he submitted a list of persons in Sweden considered by Musavat in need of protection. The Migration Board rejected his second application on 21 February 2006, and held that the decision should be enforced, as it had already considered the complainant's reasons for seeking asylum and the list did not change its decision. In addition, his kidney condition did not warrant a residence permit on humanitarian grounds.

2.11 On 1 March 2006, he appealed to the Aliens Appeals Board, arguing that other persons on the list had been granted asylum in Sweden and that the Migration Board, in those decisions, had not questioned the credibility of the list. His appeal was rejected on 21 March 2006, as the need for protection had already been considered by the Board. He also applied for permanent residence permit pursuant to the interim legislation then in force (Chapter 2, section 5 b of the 1989 Aliens Act). This was rejected on 19 June 2006 by the Migration Board as the complainant had not been in Sweden long enough to qualify for a resident permit pursuant to the interim legislation. On 26 June 2006, the complainant applied for asylum again pursuant to the new legislation entered into force on 31 March 2006 (Aliens Act 2005:716). According to Chapter 12, section 19, it is possible for the Migration Board and newly created Migration Courts to re-examine the matter of a residence permit and issue an order staying the enforcement.

2.12 On 29 June 2006, the Migration Board decided not to grant a residence permit as the conditions in the new law were not fulfilled. The Migration Court rejected the appeal on 14 July 2006. The complainant appealed to the Migration Court of Appeal on 21 July 2006,

which decided on 28 July 2006 not to grant leave to appeal and, thus, all available domestic remedies were exhausted.

2.13 In April 2005, the complainant participated in a demonstration in Stockholm against the Azeri government. Representatives of the Azeri Embassy took photos of the participants. The complainant's name is mentioned in articles in the *Musavat* journal and in the Azeri newspaper *Mirze Xezerin*. His participation in that demonstration would make his situation in Azerbaijan more difficult.

The complaint

3. The complainant alleges that his deportation to Azerbaijan would constitute a violation of article 3 of the Convention, as he risks being arrested, torture and killed, in relation to his political activities and his role as an electoral observer during past general elections. It is also possible that he will be considered to be working against the present regime and that he will be regarded as an "enemy of the state".

State party's observations on the admissibility and the merits

4.1 On 19 February 2007, the State party commented on the admissibility and merits of the communication. It sets out the relevant legislation, pointing out that several provisions reflect the same principle as that laid down in article 3, paragraph 1, of the Convention. The complainant's case was assessed primarily under the 1989 Aliens Act, including the temporary legislation, but the 2005 Aliens Act was also applied.

4.2 On admissibility, the State party maintains that the complainant's assertion that he is at risk of being treated in a manner that would amount to a breach of the Convention if deported to Azerbaijan fails to rise to the basic level of substantiation required, for purposes of admissibility. Accordingly, the communication should be declared inadmissible as manifestly ill-founded.

4.3 On the merits and as to the general human rights situation in Azerbaijan, the State party submits that Azerbaijan became a party to the Convention Against Torture in 1996 and has made the declaration under article 22. It has been a member of the Council of Europe (CoE) since January 2001 and is a State party to the European Convention on Human Rights and other major international human rights instruments. The CoE has been monitoring the human rights situation in that country, and some progress has been made. However, the State party admits that although positive results have been achieved, Azerbaijan is still reported as committing numerous human rights abuses, including arbitrary detentions, beating and torture of individuals in custody, to extract confessions. It concedes that, while it does not wish to underestimate these concerns, they do not in themselves suffice to establish that the return of the complainant would entail a violation of article 3 of the Convention.

4.4 On the interviews conducted by the Migration Board, the State party contends that national authorities are in the best position to assess the information submitted by the complainant and estimate his credibility. As to the quality of the interpretation provide during the interviews, the State party notes that the complainant only contended that the interpretation *might* have affected the outcome of the interview, but that he had no comments on the quality of interpretation at the end of those interviews. The issue of whether or not the

complainant was to be considered credible was not decisive in the Board's decision to deny his asylum request.

4.5 The State party explains that following a request by the Government, the Swedish Embassy in Ankara, Turkey, conducted an investigation concerning the political activities of the complainant as well as the authenticity of the documents submitted by him. The investigation confirmed his identity and the fact that he is a member of Musavat. However, information about the exact position he held in that party could not be obtained. The judgment of the court imposing a fine is genuine as well as the summons to appear before the same court. Concerning the summons of 31 August 2004, the investigators concluded that it was forged, as no person named J. Azizov ever worked for the relevant authority. Several other formal requirements have not been complied with. On the issue whether the complainant would face torture if returned to Azerbaijan, the Embassy considered the risk of torture to be highly unlikely, as being a member of an opposition party is normally not a problem in Azerbaijan.

4.6 The State party argues that, according to the complainant's submission, he has never been detained for more than three days and his longest period of detention occurred in 1998. It contends that, had the Azerbaijani authorities considered him to be a threat to the regime, they would have kept him in detention for longer periods. In addition, according to reports by the OSCE and Human Rights Watch, out of 600 individuals detained during the demonstration on 16 October 2003, 125 were sentenced to imprisonment for up to five years. It submits that, in 2005, a presidential pardon was granted in Azerbaijan to all seven opposition leaders arrested and imprisoned in the aftermath of the 2003 elections. It follows that the complainant, whose alleged position in the party was much lower than that of the party leaders, would run no risk of torture.

4.7 As to the summonses invoked by the complainant, the State party contends that the summonses dated 1 March and 30 December 2004 were issued mainly to ensure that the complainant pay the fine imposed on him. With regard to the summons of 31 August 2004, even if it was considered to be genuine, there is nothing to support the complainant's contention that he was called for questioning about the demonstration in October 2003. Additionally, that document would not prove that the complainant is wanted today, particularly in view of the 2005 presidential pardon.

4.8 As to the alleged physical abuse and damage to the complainant's kidneys, the State party argues that there is no evidence to prove that the kidney condition is the result of past abuse or torture. The alleged abuse in 1998 occurred so long ago that it cannot be considered to meet the requirement that a previous instance of torture should have happened in the recent past in order to be pertinent to the risk of being subjected to torture.¹

Complainant's comments on the State party's observations

5.1 On 3 August 2007, the complainant recalls that his case was not re-examined under the 2005 Aliens Act, although he did invoke new circumstances in accordance with the new legislation. He indicates that reports of the interviews by the Migration Board are quite brief and that they do not reflect all the answers provided by him.

¹ The State party refers to Communication No. 191/2001, *S.S. v. The Netherlands*, Views adopted on 5 May 2004, paragraph 6.6.

5.2 The complainant states that the risk of torture in Azerbaijan goes beyond mere theory or suspicion and that it must be considered highly probable, in view of prior harassment, severe physical abuse and torture by the Azeri authorities. He contends that there are well founded reasons that he will be persecuted and/or arrested due to his political beliefs if returned to Azerbaijan. He points out to a certificate issued by the Musavat party where it is stated that, should he return to Azerbaijan, he would face “a number of legal measures”². He argues that he is still of interest to the Azeri authorities.

5.3 As to the State party’s view that there is no general need for protection of asylum seekers from Azerbaijan, the complainant submits that he has never made such a claim. He questions whether the Swedish migration authorities apply the same kind of test as the Committee when considering an asylum application under the 1989 Aliens Act. According to him, decisions delivered by the Swedish migration authorities with regard to asylum –seekers from Azerbaijan are routine decisions.

5.4 As to the authenticity of the documents submitted by the complainant as evidence, he contends that all are genuine. As regards the summons of 31 August 2004, he refers to a certificate issued by the Musavat party attesting to the fact that a J. Azizov did work at the relevant authority. Moreover, it is not logical for him to submit one piece of forged evidence, when all the rest has been confirmed as genuine. He states that his alleged lack of credibility has affected the outcome of the Migration Board’s decision.

5.5 As to the complainant’s past torture, reference is made to certificates issued by Danderyd University Hospital on 18 June 2007, where it is stated that, although the origin of some scars in his body cannot be determined, there is nothing to suggest that they could not have occurred as a result of blows with weapons, kicks and falls on hard surfaces. Reference is also made to an expert psychiatric opinion, where it was concluded that the complainant is probably suffering from Post Traumatic Stress Disorder (PTSD).

Additional comments by the parties

6.1 On 15 October 2007, the State party submitted the following additional comments.

6.2 As to the claim that the Swedish migration authorities issue “standard decisions” concerning aliens from Azerbaijan, the State party submits that its domestic authorities first assessed whether the general condition in Azerbaijan would be a sufficient basis for asylum and then made an assessment of the particular circumstances invoked by the complainant.

6.3 As to the authenticity of the August 2004 summons, the State party contends that the statement by the Musavat party concerning J. Azizov cannot be considered to effectively refute the findings of an independent lawyer hired by the Swedish Embassy.

6.4 As to the medical certificates, the State party states that they are new to the case and that they have not previously been presented to or assessed by the Swedish authorities or courts. In its view, the certificates offer weak support for the complainant’s claim of past torture as his scars are so discreet and unspecific that it is not possible to say exactly how they were caused. The final conclusion of the forensic expert is that the findings of the

² No information was provided as to the nature of those legal measures.

physical examination *may* support the complainant's statements concerning physical abuse. Likewise, the psychiatric expert concluded that he *probably* suffers from PTSD.

6.5 On 24 October 2007, the complainant reiterated his previous arguments in additional comments. On the medical certificates, the author does not provide an explanation as to why they were not submitted to the State party previously. He states that it would have been possible for the Swedish migration authorities to arrange for a medical examination when assessing his application.

Issues and proceedings before the Committee

Consideration of admissibility

7.1 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.

7.2 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.

7.3 In accordance with article 22, paragraph 5 (b), of the Convention, the Committee does not consider any communication unless it has ascertained that the complainant has exhausted all available domestic remedies. The Committee notes the State party's acknowledgment that domestic remedies have been exhausted and thus finds that the complainant has complied with article 22, paragraph 5 (b).

7.4 The State party submits that the communication is inadmissible under article 22, paragraph 2, of the Convention, on the basis that it fails to rise to the basic level of substantiation required for purposes of admissibility under article 22, paragraph 2, of the Convention. The Committee considers, however, that the arguments before it raise substantive issues, which should be dealt with on the merits. Accordingly, the Committee declares the communication admissible and proceeds to its consideration on the merits.

Consideration of the merits

8.1 The issue before the Committee is whether the complainant's removal to Azerbaijan 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.

8.2 In assessing the risk of torture, the Committee takes into account all relevant considerations, including the existence in the relevant State of a consistent pattern of gross, flagrant or mass violations of human rights. However, the aim of such determination is to establish whether the individual concerned would be personally at risk in the country to which he 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 or her return to that country; additional grounds must exist 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.

8.3 The Committee recalls its General Comment No.1 on article 3, which states that the Committee is obliged to assess whether there are substantial grounds for believing that the complainant 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 suspicion³. However, the risk does not have to meet the test of being highly probable,⁴ but it must be personal and present.⁵ In this regard, in previous decisions, the Committee has determined that the risk of torture must be foreseeable, real and personal.⁶ Furthermore, the Committee observes that considerable weight will be given, in exercising the Committee's jurisdiction pursuant to article 3 of the Convention, to findings of facts that are made by organs of the State party concerned; but that it is not bound by such findings and instead has the power, provided by article 22, paragraph 4, of the Convention, of free assessment of the facts based upon the full set of circumstances in every case.⁷

8.4 The Committee has noted the claim that Z. K. would be tortured if returned to Azerbaijan, on account of his political activities and beliefs. It also notes that he claims to have been tortured in the past and that, in support of his claims, he provides recent medical reports. These reports, however, were not previously presented before the Migration Board, and the complainant has failed to provide any explanation as to why these reports were not previously presented, nor has he claimed that such an avenue was not available to him. His failures would apparently provide sufficient grounds to reject the reports. In any case, the Committee observes that these medical reports, while attesting to the fact that he is "probably suffering from PTSD", do not conclusively state that he was tortured, stating instead that his scars are "discreet and unspecific", and that no exact statement can be made on how the past injuries occurred. Hence, it cannot be definitely concluded from the medical certificates that the complainant was subject to torture. At the same time, these medical reports cannot be completely disregarded as they state that the scars on the complainant's body could have occurred as a result of torture.⁸ Even if the Committee were to accept the claim that the complainant was subjected to torture in the past, the question is whether he currently runs a risk of torture if returned to Azerbaijan. It does not necessarily follow that, several years after

³ A/53/44, annex IX, CAT General Comment No. 1, paragraph 6.

⁴ Id.

⁵ Id. paragraph 7.

⁶ Communication No. 203/2002, A.R. v. The Netherlands, Views adopted on 21 November 2003, paragraph 7.3.

⁷ A/53/44, annex IX, CAT General Comment No. 1, paragraph 9.

⁸ The certificate dated 18 June 2007 from the Crisis and Trauma Centre states, *inter alia*, that: "There is nothing to suggest, however, that [the scars] cannot have occurred as a result of blows with weapons, kicks and falls on a hard surface."; "The injury to his left side ... may very well have been caused by heavy blows to the area from a blunt instrument ..."; and "The findings of the examination can, thus, confirm that he has been subjected to aggravated assault in the manner described by him."

the alleged events occurred, he would still be at risk of being subjected to torture if returned to Azerbaijan in the near future.⁹

8.5 As regards the complainant's past political activities, although it is undisputed that Z. K. was a member of the Musavat party, it is not clear to the Committee that his activities as a party member were of such significance that he would attract the interest of the authorities if returned to Azerbaijan. In addition, the evidence submitted by the complainant does not reveal that he is currently being searched in that country. With respect to his political activities in Sweden, the complainant has not provided any information that he has been involved in Azerbaijani politics from Sweden, outside of the 26 April 2005 protest, so as to attract such interest or experience persecution.

8.6 In light of all the above, the Committee is not persuaded that the complainant would face a real, personal, and foreseeable risk of torture if deported to Azerbaijan and therefore concludes that his removal to that country would not constitute a breach of article 3 of the Convention.

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 complainants' removal to Azerbaijan by the State party would not constitute a breach of article 3 of the Convention.

[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.]

⁹ Communication No. 245/2004, *S.S.S. v Canada*, Views of 16 November 2005 and Communication No. 126/1999, *Haad v. Switzerland*, Views of 10 May 2000.