



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

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Committee against Torture

Communication No. 374/2009

Decision adopted by the Committee at its forty-seventh session, 31 October to 25 November 2011

<i>Submitted by:</i>	S.M., H.M. and A.M. (represented by counsel, Sanna Vestin)
<i>Alleged victim:</i>	The complainants
<i>State party:</i>	Sweden
<i>Date of complaint:</i>	11 November 2008 (initial submission)
<i>Date of decision:</i>	21 November 2011
<i>Subject matter:</i>	Deportation of the complainants to Azerbaijan
<i>Substantive issue:</i>	Risk of torture upon return to country of origin
<i>Procedural issue:</i>	Insufficient substantiation
<i>Articles of the Convention:</i>	3

Annex

Decision of the Committee against Torture under article 22 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (forty-seventh session)

concerning

Communication No. 374/2009

Submitted by: S.M., H.M. and A.M. (represented by counsel, Sanna Vestin)

Alleged victim: The complainants

State party: Sweden

Date of complaint: 11 November 2008 (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 21 November 2011,

Having concluded its consideration of complaint No. 374/2009, submitted to the Committee against Torture by S.M., H.M. and A.M. 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 complainants, their counsel and the State party,

Adopts the following:

Decision under article 22, paragraph 7, of the Convention against Torture

1. The complainants of the communication, dated 11 November 2008 and 9 February 2009, are Mr. S.M. (born in 1950) and Mrs. H.M. (born in 1955). The communication is also submitted on behalf of their daughter, A.M. (born in 1992). They claim that their deportation to Azerbaijan would constitute a breach by Sweden of article 3 of the Convention. The complainants are represented by counsel, Sanna Vestin.

The facts as presented by the complainants

2.1 The complainants originate from the enclave Nagorno-Karabakh. In 1988, they became internally displaced persons (IDPs) and lived near Baku. S.M. is Christian Armenian on the maternal side; he looks and speaks like a typical Armenian. This caused ethnically motivated persecution of the whole family in Azerbaijan. S.M. alleges that one of his sisters committed suicide after she had been raped, in front of him. Therefore, in order to diminish the risk of persecution, he decided to leave his wife and daughter in Azerbaijan and search for work outside the country, in Moscow, visiting them only occasionally.

Despite this, the persecution did not stop; his wife was beaten by their neighbours, which resulted in a broken leg; their daughter was also injured.

2.2 In 2002, the family sought asylum in Sweden, which was denied, and on 19 August 2004, they were deported to Azerbaijan. Upon arrival, they presented their identity documents to the Azerbaijani police. However, before handing them over, the Swedish police had given two documents which indicated S.M.'s Armenian origin to H.M., his wife, who thus had them in her luggage. During the search of their luggage, the documents were discovered and viewed as an attempt to conceal important information. The family was extensively questioned under violence by officers of the National Security Service. They were held at the airport for four days without any proper food or accommodation. S.M.'s teeth were knocked out and his arm was twisted; he also suffered kicks and blows. H.M. was questioned, beaten and sexually assaulted. Thereafter, the family spent ten days in a hospital near Baku. It was found that S.M. had heart problems and signs of arteriosclerosis; H.M. showed signs of assault and battery, including a skull injury. Their daughter had witnessed some of the violence against her mother and suffers from stress disorder since then. After their release, the National Security Service called them repeatedly for further questioning. Their daughter could not be enrolled in school. The complainants turned to various institutions and organizations, *inter alia*, the Embassy of the United States of America, United Nations High Commission for Refugees (UNHCR) and a women's organization, seeking a way out of the country since they feared for their lives.

2.3 In December 2004, the family returned to Sweden and applied for asylum on 13 December 2004. They submitted several documents in support of their asylum application, *inter alia*, medical certificates, a document certifying that S.M.'s mother is Armenian, and a letter from a women's organization in Azerbaijan. The Migration Board did not order any medical examinations. Instead, the complainants were referred to the Crisis and Trauma Centre at Danderyd Hospital in Stockholm by the Swedish section of Amnesty International. The psychiatric examination concluded that S.M. had given an account of persecution which fulfilled the criteria for torture; it considered as established that he had been subjected to interrogation under torture in the manner he had described. The forensic medical examination also found that there was nothing to contradict his claims of ill-treatment. As regards H.M., the psychiatric opinion concluded that she had suicidal thoughts and fulfilled the criteria for posttraumatic stress disorder (PTSD); it also concluded that it was beyond dispute that she had experienced the events she had described. The forensic investigation findings could possibly confirm that she had been subjected to torture.

2.4 In 2005, while watching the news from Azerbaijan, H.M. allegedly recognized the National Security Service officer who had assaulted her and who is now a high-ranking official in the department of border control. Thereafter, she decided to speak out about her being sexually assaulted by the officer, and an additional application on this matter was filed to the Migration Board.

2.5 On 17 March 2006, the Migration Board rejected the complainants' asylum application. While not questioning that the complainants had been subjected to assault and harassment, the Board indicated that such incidents did not necessarily take place after the enforcement of the deportation order in 2004. The Migration Board concluded that the perpetrators did not act on behalf of the authorities and that the complainants would be able to live in Azerbaijan.

2.6 The complainants appealed the Migration Board's decision to the Migration Court. The court hearing was held on 7 May 2007. Subsequently, several written submissions were

filed with the Court, including a letter from UNHCR in Stockholm, stating that its 2003 Guidelines on Azerbaijan were still valid and that a returned Armenian would be at risk of being pressurized by the security services.¹ The Migration Board opposed the appeal, arguing that UNHCR's guidelines applied to Armenians and mixed families, whereas S.M.'s family did not belong to this category. Another document issued by UNHCR in Baku had been submitted for the first time to the migration authorities.

2.7 On 7 September 2007, the Migration Court rejected the complainants' appeal on the grounds that the medical certificates were not sufficiently conclusive with regard to the ill-treatment alleged, and that the alleged assaults were the result of actions by individuals, not by State agents. The Migration Court further questioned the mixed ethnicity of the family on the grounds that the children's birth certificates stated that both parents were registered as ethnic Azeri in Azerbaijan. Furthermore, the Court noted that from 1976-1996, S.M. had worked at Baku airport and that in 2000, he had acquired a driving license, both events indicating that he did not face any problems with the authorities because of his mother's Armenian origins. Moreover, the family had made contact with three different schools and the Ministry of Education to enrol their daughter, and that this showed the absence of persecution by the authorities. The Court stated that the opinions submitted by UNHCR and Amnesty International did not prove State-sanctioned persecution in Azerbaijan or that S.M.'s family was persecuted; it also pointed to a number of inconsistencies in the complainants' testimonies. However, the complainants note that the judgement by the Migration Court was not handed down unanimously; one judge had written a dissenting opinion in their favour.

2.8 The complainants lodged an appeal with the Migration Court of Appeal, arguing that the Migration Court did not give due consideration to the medical reports issued by the experts on torture and that it did not take into account the expert country information from UNHCR and Amnesty International. On 3 January 2008, leave to appeal was not granted by the Migration Court of Appeal. Their deportation was scheduled for 12 June 2008. Since that date, S.M. and H.M. have gone into hiding. Their daughter has been placed in foster care and attends school in Sweden.

2.9 The complainants further submit that their case received large publicity in the mass media in Sweden. Several articles have been published. In October 2007, their daughter's classmates organized a manifestation against the deportation order. In May 2008, the Bishop wrote an open letter to the Director General of the Migration Board. Most of the publicity around their family occurred after the judgment of the Migration Court and in the weeks before their scheduled deportation. They claim, therefore, that the publicity given to their case could increase the risk that they would be suspected by the Azerbaijani authorities as being enemies of the regime. Moreover, in 2008, when one of their sons travelled to Azerbaijan to obtain a document, he was questioned at the airport, without

¹ The document dated 22 May 2007 states that "the situation of ethnic Armenians residing in Azerbaijan has not improved since 2002. Section V-2 of the UNHCR's position paper International Protection Considerations Regarding Azerbaijani Asylum-Seekers and Refugees, dated September 2003, remains therefore valid and is applicable to the current situation. With regard to return of asylum-seekers of ethnic Armenian or mixed ethnicity, these cases might be at high risk upon arrival back in Azerbaijan. As explained in the guidelines regarding Azerbaijani asylum-seekers, the majority of the Armenians living in Azerbaijan conceal their identity. It is doubtful that they may be accepted back to Azerbaijan, or if accepted, they are, in UNHCR's opinion, at high risk of being pressurized by the Security Services or treated without sympathy by the majority of the population. Any deportee, upon return, is referred to the officer of the National Security Ministry based at the airport for identity check and questioning [...] if necessary, the deportee is referred to the Ministry of National Security for further questioning."

being mistreated, about his whereabouts in Sweden and the purpose of his stay, as well as about his parents and was told that the police were “waiting for them.”

2.10 On an unspecified date, the complainants’ counsel filed an application for re-examination of their case to the Migration Board, alleging that new circumstances had emerged that constituted obstacles to the enforcement of the deportation order, namely the large publicity received by their case in Sweden and the Azerbaijani authorities’ interest in the family, as had been shown by the visit of their son to Azerbaijan. A.M.’s social ties to Sweden after seven years, and new psychiatric reports confirming that the complainants’ mental health had not improved, were invoked as additional obstacles to the enforcement of the deportation order. On 3 July 2008, the Migration Board rejected their request for re-examination on the grounds that the circumstances invoked only constituted amendments or modifications to their previous submissions in their asylum applications. On 27 August 2008, the Migration Court upheld this decision.

The complaint

3.1 The complainants claim that their forcible deportation to Azerbaijan would amount to a violation by Sweden of article 3 of the Convention. In particular, they underline the torture and ill-treatment they suffered upon their return to Azerbaijan, following their first deportation in 2004, as well as the ethnically motivated persecution they suffered before leaving the country in 2002.

3.2 They further claim that the Swedish authorities only focused on minor inconsistencies instead of duly considering their claim of persecution due to their mixed origin. Even if they have overestimated the time they spent in custody at the airport, forgot the dates of summons to KBG or were unable to explain how smugglers could provide them with passports, these factors are not sufficient to deny their traumatizing experience or the injuries they sustained. Their account of the facts is corroborated by medical reports and there is a well-founded fear of repeated torture and humiliating treatment upon a second return.

State party’s observations on admissibility and merits

4.1 On 11 December 2009, the State party provided its observations on the admissibility and the merits of the complaint. It submits that S.M., H.M. and their daughter, A.M., first arrived in Sweden on 29 March 2002 and applied for asylum on 2 April 2002. They stated that they originated from Nagorno-Karabakh province of Azerbaijan, which they had left in 1998 and had since lived as internally displaced persons following the persecution they endured because S.M. has the appearance and the accent of an Armenian. On this account, he has been subjected to beatings, degrading treatment and had to quit his job because of his mixed ethnic origin. H.M. was raped several times and beaten on one occasion, also due to the family’s mixed origin. On one occasion, she was detained for three days after a dispute in a convenience store. The complainants invoked that there were humanitarian reasons for granting their daughter a residence permit. They also stated that they had not been politically active.

4.2 The first asylum application was rejected by the Migration Board on the grounds that State-sanctioned discrimination or persecution of Armenians does not occur in Azerbaijan and the general situation of citizens belonging to this ethnic group cannot, as such, constitute grounds for asylum. It found that it had not been substantiated that the complainants would be subjected to persecution if they returned to their home country. The health problems invoked by the complainants were not so severe as to warrant suspension of the expulsion order against them. The complainants appealed to the Aliens Appeals Board, which upheld the Migration Board’s decision in March 2004. The refusal-of-entry order was enforced on 19 August 2004. The complainants subsequently submitted a new

application for a residence permit, which was rejected by the Aliens Appeals Board on the grounds that the expulsion order had already been enforced.

4.3 The complainants returned to Sweden on 10 December 2004 and submitted a second asylum application on 14 December 2004. At the request of H.M., her case was dealt with separately by the Swedish authorities. However, the submissions of the complainants were to a large extent identical or at least very similar. The asylum interview for the complainants was held on 20 January 2005. They submitted that, upon arrival in Baku in 2004, the Swedish police handed them over to the Azerbaijani authorities and left. They were interrogated and requested to present documents containing information about their ethnicity. After having been asked questions about the reason for arriving on a chartered airplane and about the purpose of their stay in Sweden, S.M. was subjected to beatings. He also became the object of derogatory remarks. H.M. and A.M. were also interrogated. They were forced to sign a document stating that they would stay at a certain address and the police took them there. This occurred after four or five days of interrogation at the airport. The next day, they were summoned to the security service in Baku, where they were interrogated and subjected to physical abuse. They were made to appear before the security service five or six times before S.M. ended up in hospital. After his stay in hospital, they went into hiding and have not been in touch with the authorities since. S.M.'s mixed origin makes them a target for the authorities in their home country. They were in touch with both UNHCR and the United States embassy, but neither was able to provide help. Regarding their health, S.M. stated that he suffers from PTSD and a number of physical injuries caused by the treatment endured upon return to Azerbaijan. H.M. stated that she was hospitalized in Baku for 10 days due to back pains caused by beatings during her interrogation.

4.4 In support of their second application, the complainants submitted a vast number of documents, including various medical reports. According to these medical reports, S.M. suffers from considerable mental health problems. The doctor concluded that, on the basis of the psychiatric assessment alone it could be regarded as established that he was interrogated under torture in the way he had stated. S.M.'s small scar formations could have arisen at the times and in the way he had described. Nor was there any indication that the extensive damage to his teeth was not a consequence of the physical mistreatment he had been subjected to. The expert further noted that the scars were fairly unspecific and for that reason the findings could not be regarded as entirely conclusive; however, he concluded that the assessment findings might substantiate that he had been subjected to torture in the way alleged.

4.5 On 17 March 2006, the Migration Board rejected the complainants' asylum application. It did not call into question that the complainants had been subjected to abuse and harassment, even if this did not mean that these took place after their removal to Azerbaijan in 2004. The Board concluded that the perpetrators were to be regarded as criminal elements rather than representatives of the country's authorities and thus the case was not a matter of persecution sanctioned by State authorities. After an overall assessment of all the circumstances, it found, based on available reports, that it should be possible for the complainants to live in Azerbaijan. Consequently, they were not refugees or persons otherwise in need of protection. The Board stated that, according to information available to it, the Azerbaijani government provides free medication to persons suffering from mental illness and most illnesses can be treated in Azerbaijan. It found that S.M. and A.M. cannot be regarded as suffering from life-threatening diseases or health conditions that constitute grounds for a residence permit. H.M.'s second application was rejected on essentially the same grounds.

4.6 The complainants filed an appeal to the Migration Court. They claimed that they had submitted credible and coherent accounts about the torture to which they had been subjected and that the mere fear of being forced to return to Azerbaijan may cause irreparable harm. They also submitted that A.M. had shown very serious symptoms of

suffering harm, she had made repeated visits to the Child and Adolescent Psychiatric Clinic. H.M. maintained that the medical reports corroborated her allegation of the serious abuse she had suffered upon return to her home country.

4.7 The complainants adduced a written communication by a representative of UNHCR, stating that Armenians and those with mixed ethnicity who return after having sought asylum abroad run a high risk in Azerbaijan. The communication further stated that it was doubtful whether Azerbaijan would take them back, and if they would be accepted, there was a great risk that they would come under pressure from the security services or be treated without sympathy by the majority of the rest of the population. It also recalled that the majority of the Armenians in Azerbaijan hide their identity. Moreover, the complainants also adduced a written communication from a representative of Amnesty International, Sweden, stating, *inter alia*, that the complainants should be regarded as people in a mixed marriage. In addition, H.M. submitted a document produced by an organization working to strengthen the rights of Azerbaijani women.

4.8 The Migration Board opposed the grant of the appeal, stating that the complainants have not shown convincingly that they are to be regarded as refugees or in need of protection, nor can they be granted a residence permit on any other grounds. Their respective accounts cannot form the basis of assessment of the risk of persecution or other inhuman or degrading treatment, since there were several inconsistencies that undermined the general credibility of their claims. Regarding the alleged health problems, the Board held that there was nothing to indicate that they would be unable to receive adequate medical care in Azerbaijan.

4.9 On 7 September 2007, the Migration Court rejected the complainants' appeals, stating that the medical reports and other written evidence submitted did not substantiate the complainants' claim of ill-treatment on the occasions they alleged. The documents produced by them contained contradictory information. Furthermore, the documents issued by UNHCR and Amnesty International did not prove that State-sanctioned persecution of people of Armenian origin occurs in Azerbaijan. Therefore, the Court concluded that the complainants had not substantiated that they ran a risk of torture upon return.

4.10 The complainants appealed against the judgment and held that the Migration Court had made an erroneous assessment of the evidence adduced. On 21 December 2007, the Migration Court of Appeal decided not to grant leave to appeal. The complainants then filed applications to the Migration Board alleging that new circumstances had emerged granting them the right to a residence permit or, alternatively, a re-examination of their case. These applications were rejected for the reason that the circumstances invoked only constituted amendments or modifications to previous submissions in the complainants' asylum applications. The Migration Court upheld the Migration Board's decision.

4.11 With regard to the admissibility of the complaint, the State party submits that it is not aware of the present matter having been or currently being examined under another procedure of international investigation or settlement and also acknowledges that all available domestic remedies have been exhausted. However, the State party maintains that the complainants' claim that they are at risk of treatment contrary to the Convention fails to attain the basic level of substantiation required for purposes of admissibility, and therefore is inadmissible under article 22, paragraph 2, of the Convention.²

4.12 Should the Committee consider the complaint admissible, the issue before it is whether the forced return of the complainants to Azerbaijan would violate the obligation of Sweden under article 3 of the Convention not to expel or return a person to another State where there are substantial grounds for believing that he or she would be in danger of being subjected to torture. The State party recalls that, when determining whether the forced

² See communication No. 216/2002, *H.I.A. v. Sweden*, decision adopted on 2 May 2003, para. 6.2.

return of a person to another country would constitute a violation of article 3, the Committee must take into account all relevant considerations including the existence of a consistent pattern of gross, flagrant or mass violations of human rights in that country. However, as the Committee has repeatedly emphasized, the aim of the determination 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 be returned. 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. For a violation of article 3 to be established, additional grounds must exist, showing that the individual concerned would be personally at risk.³

4.13 Concerning the human rights situation in Azerbaijan, the State party submits that torture, beatings leading to death, police brutality and arbitrary arrests are not uncommon. The Armenian population of Azerbaijan has a bad reputation among the public. Although harassment may occur, the Armenians cannot be regarded as the target of State-sanctioned discrimination.⁴ Discrimination against ethnic Armenians was a problem in 2006, and Azerbaijani citizens who were ethnic Armenians often concealed their ethnicity by legally changing their ethnic designation in their passports.⁵ There were also specific complaints with regard to the way law enforcement agents treat Armenians. Examples of harassment and extortion were mentioned.⁶ According to the United States Department of State report, there were, however, no reports of discrimination against Armenians in 2008. Moreover, according to a survey carried out in 2003 by UNHCR's implementing partner, while discrimination against ethnic Armenians is not a proclaimed official policy in Azerbaijan, there is clearly a certain amount of discrimination against them in everyday life, which is tolerated by the authorities; this discrimination is not such as to amount to persecution per se, but in individual cases it is possible that the cumulative effect amounts to it.⁷ Moreover, the State party submits that the lack of reports of discrimination during 2008 indicates an improvement of the situation.

4.14 The State party further submits that the circumstances referred to in the above mentioned reports do not in themselves suffice to establish that the forced return of the complainants to Azerbaijan would entail a violation of article 3 of the Convention. A forced deportation would only violate article 3 if the complainants could show that they would be personally at risk of being subjected to torture. According to the Committee's jurisprudence, for the purposes of article 3, the individual concerned must face a foreseeable, real and personal risk of being tortured in the country to which he or she is to be returned.⁸ The State party refers to the Committee's general comment No. 1 on the implementation of article 3 of the Convention, according to which it is for the complainant to present an arguable case, i.e. to collect and present evidence in support of his or her account of events⁹. In this context, the Swedish migration authorities apply the same kind of test when considering an application for asylum under the Aliens Act as the Committee will apply when examining a

³ See communications No. 150/1999, *S.L. v. Sweden*, decision adopted on 11 May 2001, para. 6.3; No. 213/2002, *E.J.V.M. v. Sweden*, decision adopted on 14 November 2003, para. 8.3.

⁴ Swedish Ministry for Foreign Affairs, 2007 Human Rights Report on Azerbaijan.

⁵ United Kingdom Home Office, *Operational Guidance Note: Azerbaijan*, 26 April 2007, paras. 3.6.2-3.6.3

⁶ Council of Europe, Report by the Commissioner for Human Rights Mr. Thomas Hammarberg on his visit to Azerbaijan, 3-7 September 2007 (20 February 2008), para. 91.

⁷ UNHCR, "International Protection Considerations Regarding Azerbaijani Asylum-Seekers and Refugees," September 2003, para. 124.

⁸ Communication no. 103/1998, *S.M.R. and M.M.R v. Sweden*, decision adopted on 5 May 1999, para. 9.7.

⁹ Communications No. 150/1999, *S.L. v. Sweden*, decision adopted on 11 May 2001, para. 6.4; No. 265/2005, *A.H. v. Sweden*, decision adopted on 16 November 2006, para. 11.6.

complaint under the Convention. The national authorities conducting the asylum interview are in a very good position to assess the credibility of a claim that a person, in the event of deportation, would run the risk of being subjected to treatment that would violate article 3 of the Convention. The complainants' case has been brought before the Swedish authorities and courts on a number of occasions. The Migration Board and the Migration Court have made thorough examinations of their applications for a residence permit, as well as their request for re-examination. Therefore, great weight must be attached to the decisions of the Swedish authorities.

4.15 The State party maintains that the complainants' claims under article 3 of the Convention are unsubstantiated, since the information provided is inconsistent, vague and to some extent contradictory. H.M. provided a document from an organization working to strengthen the rights of Azerbaijani women, in which it is stated that S.M. and H.M. have always belonged to the political opposition. This statement was disclaimed by H.M. during the oral hearing. The document thus contained information which was not consistent with her oral submissions and information submitted previously in the proceedings, therefore it was deemed to have low value as evidence. With regard to the medical opinions submitted by the complainants (para. 4.4 above), they were found not conclusive. One of the medical experts met with H.M. on only one occasion. The forensic certificate was deemed very vague since it only stated that it cannot be ruled out that S.M. suffered his injuries in the way he had described. Another certificate only stated that H.M. might have been subjected to torture; this statement was too vague to substantiate their allegations of past ill-treatment.

4.16 Amnesty International and UNHCR submitted written communications to the Migration Court in support of the complainants' case. Amnesty International stated that if forced to return to Azerbaijan, the complainants would risk again being subjected to persecution that by its nature and extent would be grounds for asylum and they should be granted protection in Sweden. A UNHCR document stated that Armenians and those of mixed ethnicity who return after having sought asylum abroad run a high risk in Azerbaijan. The document also stated that it was doubtful whether Azerbaijan would take them back, and if they were accepted, there was a great risk that they would come under pressure from the security services or be treated without sympathy by the majority of the population. The State party argues that the submissions by Amnesty International and UNHCR are not pertinent to the complainants' case. According to S.M.'s birth certificate, his father was an Azerbaijani citizen and his mother was of Armenian descent. His surname is typical for a person of Azerbaijani origin and their children's birth certificates show that both complainants are registered as ethnic Azerbaijanis. The family was received as Azerbaijani citizens at the time of their deportation from Sweden. According to UNHCR, they would most probably not have been received in the country if they had been registered as ethnic Armenians or as being of mixed ethnicity, therefore the State party submits that it is doubtful that the complainants would be considered by the Azerbaijani authorities or by others as being Armenians or of mixed ethnicity. It also recalls that as recently as 2000, S.M. had been issued a new driving licence, and in 2004, the complainants had obtained new passports.

4.17 The State party further states that even if the complainants were considered to be of mixed ethnicity, they have not substantiated that they would risk treatment in violation of article 3 of the Convention. It concedes that the Armenian population and those of mixed ethnic origin face difficulties in Azerbaijani society. However, according to the UNHCR report, "International Protection Considerations Regarding Azerbaijani Asylum-Seekers and Refugees" of September 2003, although discrimination against Armenians is tolerated by the authorities to some extent, it is not an official policy in the country and the level of discrimination is not such as to amount to persecution. The State party maintains that there is nothing to suggest that the general situation of Armenians in Azerbaijan is worse than in 2003; on the contrary, recent reports seem to indicate a slight improvement in this regard.

4.18 The complainants have also invoked a document issued by the UNHCR Office in Baku which summarizes the submission made by S.M. on 24 August 2004 after the family had been sent back to Azerbaijan. S.M. stated that he and his family were detained and questioned for two days at the airport. They were allowed to leave the airport on account of his and his daughter's deteriorating health. He further submitted that he and his wife were to report for questioning on a certain date and that they had been questioned for one hour and threatened with imprisonment. S.M. also stated that his brother, who lived with their Armenian mother in Baku, did not experience similar difficulties due to his ethnicity. The document makes no reference to the ill-treatment allegedly suffered by S.M. during interrogation at the airport. Furthermore, according to the above-mentioned document, S.M. stated that he and his family were held at the airport by security forces for two days, while he had claimed before the Swedish authorities that his detention lasted for four or five days. These inconsistencies weaken the general credibility of the complainants' submissions about their experience after being deported to Azerbaijan. Moreover, it seems very contradictory that S.M.'s brother, who apparently lives with their Armenian mother, has not experienced any difficulties due to his ethnicity.

4.19 The complainants have also been inconsistent about what occurred subsequent to S.M.'s stay in hospital in September 2004. S.M. and H.M. stated separately in writing that they were questioned a few days before they left the country. Then they both stated separately that after discharge from hospital they went into hiding and did not undergo any further questioning. During the oral hearing they changed their story and went back to the first version, and explained that by hiding they meant that they were hiding from the community and the local police, not from the KBG. Therefore, the veracity of their statements was called into question.

4.20 S.M. has claimed that he and his family used temporary passports in order to leave Azerbaijan, which they had allegedly obtained with the assistance of an organization. However, if the complainants were of interest to the authorities, it is unlikely that they would have been able to obtain passports. Moreover, if the complainants had been treated in the manner alleged, this information would have been brought to the attention of the Swedish embassy either by other embassies and institutions with which it has regular contacts or by human rights organizations that are very active in Azerbaijan. Therefore, the State party considers it improbable that the complainants were subjected to the violations alleged upon their return to Azerbaijan. The fact that the Swedish embassy has no information about the incidents and that the information in the document issued by UNHCR Baku is inconsistent with what the complainants have stated before the Swedish authorities calls into question the veracity of their allegation of past ill-treatment.

4.21 The State party recalls that, while past torture is one of the elements to be taken into account when making the assessment pursuant to article 3, the deciding factor is whether there are substantial grounds for believing that the complainants would be subjected to any treatment contrary to the Convention upon return to their home country. In view of the fact that the complainants left the country in December 2004, there is little to suggest that they would still be of interest to the Azerbaijani.

4.22 In conclusion, the State party submits that the evidence and circumstances invoked by the complainants do not suffice to show that the alleged risk of torture fulfils the requirements of being foreseeable, real and personal. Accordingly, the enforcement of the expulsion order would not constitute a violation of article 3 of the Convention. Since the complainants' claim fails to rise to the basic level of substantiation, the communication should be declared inadmissible as being manifestly unfounded. Concerning the merits, the State party contends that the communication reveals no violation of the Convention.

Complainants' comments on the State party's observations

5.1 By letter of 31 March 2010, the complainants submitted that the specialist who carried out the psychiatric examinations is one of Sweden's foremost experts in diagnostics

of torture and trauma injuries. As to the opinion of the State party that the documents submitted by Amnesty International and UNHCR did not prove that State-sanctioned persecution of persons of Armenian descent occur in Azerbaijan, they maintain that both organizations noted that asylum-seekers of Armenian origin or mixed ethnicity may be at high risk upon arrival in Azerbaijan, *inter alia*, of being pressurized by the security forces. Therefore, taking into account this information and the traumatizing experiences and pressure they have already faced in Azerbaijan, their return would expose them to a high risk of suffering at the hands of public officials or other individuals acting in an official capacity. The absence of new reports on discrimination against Armenians during one specific year should not be used as evidence that such discrimination has ceased, especially when various other reports concurrently indicate that Armenians in Azerbaijan are trying to conceal their ethnicity.

5.2 The complainants also contest the State party's argument that they would most probably not have been received by Azerbaijan if they had been regarded as ethnic Armenians or as being of mixed ethnicity. In this context, they recall that the documents proving S.M.'s Armenian origin were not actually handed over to the border control officers, but were found in the family's luggage after the departure of the Swedish escort. When the border officers discovered that S.M. tried to conceal his origins, the hostility towards them increased. They also add that S.M.'s brothers and sisters have also experienced various kinds of difficulties: at least one brother has left the country and one sister committed suicide after being abused. The others try to hide their ethnicity, and if they are successful in doing so, it does not mean that they would be safe upon return.

Additional observations by the State party

6. In its submission of 4 October 2010, the State party recalled that it had questioned the veracity of the complainants' account of ill-treatment upon their return to Azerbaijan in 2004 due to inconsistencies in their accounts (see, *inter alia*, paras. 4.15 and 4.18 above). It also contested that the complainants would still be of interest to the Azerbaijani authorities even if their alleged reasons for leaving Azerbaijan were considered substantiated. Therefore, the State party reiterates its previous observations and maintains that the evidence and circumstances invoked by the complainants do not suffice to show that the alleged risk of torture upon return fulfills the requirements of being foreseeable, real and personal, and their deportation to Azerbaijan would not constitute a violation of article 3 of the Convention.

Additional comments by the complainants

7.1 In a submission dated 26 October 2010, the complainants' counsel informed that the complainants' daughter has been granted leave to remain in Sweden. She is staying in foster care with her brother and his family. The decision was based on the existing obstacle to the enforcement of the expulsion, namely that no adult can be expected to take care of her in Azerbaijan since her grandparents passed away and her parents (the complainants) are in hiding. Other elements considered were her health status, adaptation to Sweden, traumatic experiences and anamnesis of psychiatric problems.

7.2 By letter of 22 November 2010, the counsel submitted that the complainant's request for family reunification with their daughter was denied on grounds that they have been in hiding for more than two years, and their daughter would be able to stay in foster care. Therefore, the expulsion order is still enforceable.

Issues and proceedings before the Committee

Consideration of admissibility

8.1 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.

8.2 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 therefore finds that the complainants have complied with article 22, paragraph 5 (b), of the Convention.

8.3 The State party submits that the communication is inadmissible under article 22, paragraph 2, of the Convention, since the complainants' claim that they are at risk of being subjected to torture upon return to Azerbaijan fails to rise to the level of substantiation required for purposes of admissibility. The Committee is of the opinion that the arguments before it raise substantive issues which should be dealt with on the merits and not on admissibility considerations alone. Accordingly, the Committee decides that the communication is admissible with regard to article 3 of the Convention and proceeds to its examination on the merits.

Consideration of the merits

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

9.2 The Committee notes that the State party has issued a resident permit to the complainants' daughter, A.M. Therefore, the Committee decides to discontinue the part of the communication relating to A.M.

9.3 The issue before the Committee is whether the complainants' deportation to Azerbaijan would constitute a violation of the State party's obligation under article 3, paragraph 1, of the Convention, not to expel or return (*refouler*) a person to a State where there are substantial grounds for believing that he or she would be in danger of being subjected to torture.

9.4 In assessing whether there are substantial grounds for believing that the complainants would be in danger of being subjected to torture upon return, 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 in Azerbaijan (art. 3, para. 1). The aim of such an analysis is to determine whether the complainants run a real personal risk of being subjected to torture in the country to which they would be returned. It follows 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. Similarly, the absence of a consistent pattern of flagrant violations of human rights does not mean that a person may not be subjected to torture under his or her specific circumstances.

9.5 The Committee recalls its general comment No.1 on the implementation of article 3,¹⁰ which states that the Committee must 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 to the country of origin. The risk need not be highly probable, but it must be personal and present. In this regard, the Committee has established

¹⁰ Committee's general comment No. 1 (1996) on the implementation of article 3 of the Convention, *Official Records of the General Assembly, Fifty-third Session, Supplement No. 44* (A/53/44 and Corr.1), annex IX.

in previous decisions that the risk of torture must be “foreseeable, real and personal.”¹¹ Furthermore, in exercising the Committee’s jurisdiction pursuant to article 3 of the Convention, considerable weight will be given to findings of facts that are made by organs of the State party concerned. However, the Committee is not bound by such findings; instead, it 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.¹²

9.6 The Committee notes the complainants’ claim that they run a risk of torture in Azerbaijan on account of S.M.’s mixed origin, which makes them a target for the authorities in their home country. It further notes their allegation that due to S.M.’s Armenian origins, the whole family was subjected to ethnically motivated persecution, and as a result they had been victims of beatings and persecution by neighbours, as well as State agents (police). Moreover, they claim that they had been detained, questioned, beaten and sexually assaulted (H.M.) by officers of the National Security Service, including at the airport upon their return from Sweden in August 2004, as well as during further interrogation.

9.7 The Committee observes that the complainants’ allegations of torture are corroborated by authoritative medical reports issued by the Crisis and Trauma Centre in Stockholm. In light of the above and taking into account the treatment inflicted on the complainants upon their return to Azerbaijan in August 2004 and general information available to the Committee, according to which a hostile attitude on the part of the general public towards ethnic Armenians living in Azerbaijan is still widespread,¹³ persons of Armenian origin are at risk of discrimination in their daily life,¹⁴ they are harassed or bribes are requested by low-ranking officials when they apply for passports and they often conceal their identity by legally changing the ethnic designation in their passports, the Committee considers that the complainants’ return to Azerbaijan would expose them to a foreseeable, real and personal risk of torture within the meaning of article 3 of the Convention. Accordingly, the Committee concludes that their deportation to Azerbaijan would constitute a breach of article 3 of the Convention.

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, considers that the return of S.M. and H.M. to Azerbaijan would constitute a violation of article 3 of the Convention.

11. In conformity with rule 118 (former rule 112), paragraph 5, of its rules of procedure, the Committee wishes to be informed, within 90 days, on the steps taken by the State party to respond to this decision.

[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.]

¹¹ See, inter alia, communications No. 203/2002, *A.R. v. The Netherlands*, decision adopted on 14 November 2003, para. 7.3; No. 285/2006, *A.A. et al. v. Switzerland*, Views adopted on 10 November 2008, para. 7.6; No. 322/2007, *Njamba v. Sweden*, decision adopted on 14 May 2010, para. 9.4.

¹² Committee’s general comment No. 1 (note 10 above), para. 9.

¹³ See the concluding observations of the Committee on the Elimination of Racial Discrimination on the fifth and sixth reports of Azerbaijan (CERD/C/AZE/CO/6), para. 15.

¹⁴ Council of Europe, European Commission against Racism and Intolerance, Report on Azerbaijan (23 March 2011), para. 98.