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

VIEWS

Communication No. 61/1996

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| Submitted by: | X, Y and Z (names withheld) [represented by counsel] |
| Alleged victim: | The authors |
| State party: | Sweden |
| Date of communication: | 27 June 1996 |
| Date of adoption of views: | 6 May 1998 |

[See annex]

* Made public by decision of the Committee against Torture.

Annex

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

concerning

Communication No. 61/1996

Submitted by: X, Y and Z (names withheld) [represented by counsel]

Alleged victim: The authors

State party: Sweden

Date of communication: 27 June 1996

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

Meeting on 6 May 1998,

Having concluded its consideration of communication No. 61/1996, submitted to the Committee against Torture under article 22 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,

Having taken into account all information made available to it by the authors of the communication, their counsel and the State party,

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

1. The authors of the communication are X, Y and Z. They are nationals of the Democratic Republic of the Congo (ex-Zaire) and allege a violation by Sweden of article 3 of the Convention against Torture. They are represented by counsel.

The facts as submitted

2.1 Counsel submits that X and his sister Z were politically active in a political opposition party in Zaire, without giving further specifications. He claims that this led to their arrest, imprisonment and torture, without giving more details. It is said that, as a result of her torture, Z is now in poor health. X and Z reportedly fled from prison and escaped to Sweden.

2.2 Y, who is married to X, claims to have faced torture in Zaire as she searched for her husband in different prisons. She too escaped from Zaire to Sweden.

2.3 From the English translations, provided by the State party, of the decisions of the Immigration Board and the Appeals Board in the authors' cases, it appears that X and Z attempted to enter Sweden from Germany on 14 December 1991 in the company of their brother and his wife, both of whom are living in Sweden. X stated that he had travelled to Sweden on his brother's passport, and his sister on the passport of her sister-in-law. They had been imprisoned in Zaire from November 1990 to December 1991, when they were helped to escape. As reason for his imprisonment X stated that he had been involved in organizing a strike in November 1990. Z said that she had helped her brother to hand out leaflets. The Immigration Board passed a refusal-of-entry order with immediate effect, and the authors returned to Germany the same day. The authors then requested asylum in Germany but did not stay to await the outcome of their application. They returned to Sweden on 6 June 1992 and on 13 August 1992 applied for asylum in Sweden. As reason for leaving Germany, X stated that he was afraid and wanted to be with his brother. Z stated that she wanted to be with her brother who was living in Sweden, and also that asylum-seekers were not allowed to stay long in Germany.

2.4 As grounds for asylum, the authors explained that their father was executed in 1978 after having been accused of involvement in a coup against President Mobutu. X was section leader of the MPR's youth section during 1985-86. From 1986 to 1989 he was a member of the political police, then left the MPR and became adviser to the deputy leader in eastern Kinshasa of the PRP. He was active in the PRP from January to November 1990, conducting propaganda and distributing leaflets together with his sister, who had become a member of the PRP in May 1990. On 5 November 1990, his sister was arrested at the market place for distributing leaflets. She was subjected to torture. X was subsequently arrested, imprisoned and subjected to torture. On 11 December 1991, X and his sister were helped by a man they call Colonel, who gave them new clothes and drove them to the airport. At the airport, they were met by their elder sister, who gave them Nigerian passports and aeroplane tickets. They flew to Frankfurt via Brussels and were met by the brother who lives in Sweden. At the hearing of her refugee claim, Z presented two statements from the Centre for Torture Survivors, concluding that she is suffering from depression and post traumatic stress disorder.

2.5 Y entered Sweden on 24 March 1995 and applied for asylum. She could not give any details about her husband's political activities. She stated that when she returned from a visit to north-eastern Zaire, her husband had disappeared and friends told her that he had been arrested. When looking for her husband at the defence staff prison in 1992, she was detained and imprisoned for two months. She was interrogated about her husband's political activities and tortured. She managed to escape and went to stay with an aunt in Bakavu, north-eastern Zaire. In June 1993, she received a letter from her husband through a cousin in Belgium. In December 1994, her aunt's house was searched and her husband's letter found. Y was returned to prison and subjected to torture again. A friend arranged her escape on 21 March 1995. She was given a passport in another person's name and left for Paris. There she was met by someone who travelled to Sweden with her and then took her travel documents.

The complaint

3.1 The authors claim that their return to Zaire would constitute a violation of article 3 of the Convention against Torture by Sweden. The authors fear that if they were to return to Zaire they would be treated in the same way in which they have been treated in the past, stating that: their political party is banned; the leaders of the party are still in exile; and the political situation in Zaire remains essentially the same as when they left. They submit that their personal background shows that they personally would be at risk of torture if returned to Zaire and that there is, in addition, in Zaire a consistent pattern of gross and massive violations of human rights.

The State party's observations

4. On 22 November 1996, the Committee acting through its Special Rapporteur for New Communications, requested the State party not to expel or deport Z to Zaire while her communication was under consideration by the Committee.

5.1 By submission of 11 February 1997, the State party informs the Committee that the Immigration Board has suspended the authors' expulsion, following the Committee's request.

5.2 Regarding the domestic procedure, the State party explains that the basic provisions concerning the right of aliens to enter and to remain in Sweden are found in the 1989 Aliens Act. For the determination of refugee status there are normally two instances, the Swedish Immigration Board and the Aliens Appeals Board. In exceptional cases, an application is referred to the Government by either of the two Boards. In this context, the State party explains that the Government has no jurisdiction of its own in aliens cases not referred to it by either of the two Boards and that not referred cases are determined by the Boards independently and with no interference by the Government. The Swedish Constitution, Chapter 11, section 7, prohibits any interference of the Government, Parliament or any other public authority in the decision making of an administrative authority. The State party submits that, in this respect, an administrative authority, such as the Immigration Board and the Aliens Appeals Board, enjoys the same independence as a court of law.

5.3 Chapter 8, section 1, of the Act corresponds with article 3 of the Convention against Torture and states that an alien, who has been refused entry or who shall be expelled, may never be sent to a country where there is firm reason to believe that he or she would be in danger of suffering capital or corporal punishment or of being subjected to torture, nor to a country where he is not protected from being sent on to a country where he would be in such danger. Further, under chapter 2, section 5, subsection 3, of the Act, an alien, who is to be refused entry or expelled, can apply for a residence permit if the application is based on circumstances which have not previously been examined in the case and if either the alien is entitled to asylum in Sweden or if it will otherwise be in conflict with humanitarian requirements to enforce the decision on refusal of entry or expulsion. Applications under section 5 are dealt with by the Aliens Appeals Board.

5.4 Under Chapter 8, Section 10, of the Act, the Immigration Board and the Aliens Appeals Board may stay the enforcement of an expulsion order when particular reasons exist for doing so. Pursuant to Chapter 8, Section 13, of the Aliens Act, the police authority is to inform the Immigration Board if it finds that enforcement cannot be carried out. As of 1 January 1997, the Act provides a legal basis for complying with an interim request made by an international judicial organ not to deport an asylum seeker.

6.1 Regarding admissibility of the communication, the State party is not aware of the present matter being or having been investigated by another procedure of international investigation. It further submits that the authors can apply, under Chapter 2, Section 5 b of the Aliens Act, for a re-examination, if new circumstances exist.

6.2 Finally, the State party submits that the communication is inadmissible as being incompatible with the provisions of the Convention.

7.1 As to the merits of the communication, the State party refers to the Committee's jurisprudence in the case of Mutombo v. Switzerland[1] and Kisoki v. Sweden, [2] and the criteria established by the Committee, first, that the general situation of human rights in a country must be taken into account, but the existence of a consistent pattern of gross, flagrant or mass violations of human rights is not in and of itself determinative; second, that the individual concerned must personally be at risk of being subjected to torture; and, third, that such torture must be a necessary and foreseeable consequence of the return of the person to his or her country.

7.2 With reference to the general situation of human rights in Zaire, the State party acknowledges that the situation is far from acceptable, and that the State is losing control. The State party submits, however, that the situation with respect to political persecution has slightly improved since the middle of 1994. The State party submits that at present there is no systematic persecution in Zaire of members of the UDPS, and that on the contrary, a great number of opposition parties act without being at risk of being exposed to persecution. Furthermore, according to recent information provided by UNHCR, only those playing an active political role at the national level risk being harassed and not ordinary active members of a party or local party leaders. Especially members of the UDPS appear to be free from persecution at the moment.

7.3 The State party submits that it is a different matter that members of the army and of the security forces may act arbitrarily and commit atrocities during interrogation of detainees. But in the State party's view the risk for a returned asylum seeker of being subjected to torture is not significantly greater than for the population in general.

7.4 The State party refers to its own legislation which reflects the same principle as that of article 3 of the Convention. The State party's authorities thus apply the same test as the Committee in deciding on the return of a person to his or her country. The State party recalls that the mere possibility that a person be subjected to torture in his or her country of origin does not suffice to prohibit his or her return as being incompatible

with article 3 of the Convention. The risk must be substantiated having regard to the circumstances and in particular to the asylum seekers' personal conditions.

7.5 In respect of its assessment whether or not the authors would be personally at risk of being subjected to torture when returned to Zaire, the State party relies on the evaluation of the facts and evidence made by its immigration board and the Appeals Board, which have decided that there are no impediments to deporting the authors to Zaire. In particular, the Board considered that the PRP, the political party of which X claimed to be a sympathizer, was now allowed in Zaire and that he was of no particular interest to the Zairian authorities. Regarding his sister, the Board was uncertain of her identity, and noted that the medical statement submitted did not exclude that the findings could have other explanations than those claimed. Finally, Y had never been politically active and did not submit any medical evidence to substantiate her claims of having been subjected to torture.

7.6 The State party further points out that the authors' stories contain many inconsistencies and questionable information. Z changed her account of political involvement on several occasions (not being involved, recruiting new members, and later being vice-treasurer). The account of the circumstances of the arrest of X and Z also differed, and they also submitted conflicting information about how they travelled to Sweden. There is also conflicting information about when X left Zaire, and the State party points out that X and his sister have indicated different languages as their mother tongue.

7.7 In the State party's view there is a general lack of credibility attached to the information which the authors of the communication have submitted to the Swedish authorities. The State party seriously questions whether the authors are not abusing the system set up under the Convention against Torture. The State party submits that it has not been possible to ascertain any of the facts invoked by the authors in support of their applications for asylum. In view of the fact that the authors carried no valid travel documents when arriving in Sweden, it cannot be excluded, according to the State party, that they had been residing somewhere else in Europe before entering Sweden. The State party submits that it would have been possible for X and Z to remain in Germany awaiting the examination of their application for asylum in that country.

7.8 The State party therefore maintains that the authors have not substantiated that they would be personally at risk of being subjected to torture if they were to return to Zaire. It has not been substantiated that they are wanted by the Zairian authorities or that they would be of particular interest to those authorities. The risk they will run if returning to Zaire is not significantly greater than for the population in general in Zaire. The State party further emphasizes that the authors are free to leave Sweden in order to go to some other country where they can obtain a residence permit.

7.9 The State party concludes that the authors have not shown the existence of substantial grounds for believing that they would be in danger of being subjected to torture if the expulsion order were to be carried out. In this context, the State party points out that no sufficient evidence has been

submitted which shows that their alleged political activities render them a target of the Zairian authorities at this point in time. An enforcement of the expulsion order against the author would therefore not constitute a violation of article 3 of the Convention.

Counsel's comments

8.1 In his comments on the State party's submission, counsel for the authors states that the political situation in Zaire is very difficult at present, since different groups are fighting each other and the Government has lost control of great parts of the country. According to counsel, people returning from abroad risk arrest and torture upon arrival.

8.2 With reference to the jurisprudence of the European Commission of Human Rights, counsel states that the possibility of lodging a new application with the Aliens Appeals Board does not affect the admissibility of the communication.

8.3 As to the merits, counsel submits that a consistent pattern of gross, flagrant or mass violations of human rights exists in Zaire. He adds that the authors are at personal risk of being tortured if returned to Zaire. In this context, counsel claims that the political party to which X and Z belong is still forbidden in Zaire. Counsel states that the changes made in the political structure in Zaire make it very difficult to predict the danger of their return.

8.4 Regarding Y, counsel points out that she has been tortured and submits that if one of her torturers were to see her again, he may kill her or torture her to prevent her from telling what earlier had happened to her.

8.5 Regarding the UNHCR information, counsel states that he has been told by UNHCR representatives that this information is not consistent with the policy of the UNHCR central office and should thus not be used.

8.6 Counsel argues that the Immigration Board and the Aliens Appeals Board do not examine the real reasons for a person to seek asylum, but only look into the question of credibility.

8.7 Regarding the State party's argument that the authors have provided different and contradictory information, counsel claims that they have never been given an opportunity to give a full statement, which explains the discrepancies. Counsel further argues that even if some information is inconsistent, the important question is whether they will be at risk of being treated in violation of the Convention against Torture when returned to Zaire.

8.8 Concerning the lack of medical evidence for X and his wife, counsel states that, since no one questioned the fact that they had been tortured, it was not necessary to provide medical evidence. Medical evidence for the sister was only provided, because she suffered from the consequences of the torture so much that she had to see a specialist.

9.1 In a further letter, counsel for the authors states that he had filed a new application with the Aliens Appeals Board, on the basis of the uncertain new political situation in the former Zaire,[3] and that on 18 June 1997, the Board stopped the execution of the decision to expel the authors.

9.2 By note of 2 February 1998, the State party informed the Committee that the Aliens Appeals Board, on 22 January 1998, rejected the authors' new application. The Board concluded that neither the situation in the Democratic Republic of the Congo, nor the personal situation of the authors entailed any risk of persecution, torture or inhuman or degrading treatment if they were to return. In respect of the political situation in the former Zaire, after the overthrow of the Government of President Mobutu in spring 1997, the Board considered that there existed no general impediments to enforcing decisions of expulsion to the Democratic Republic of the Congo. Moreover, the Board noted that the PRP, the party to which the authors claim to belong, is part of the Alliance of Democratic Forces for the Liberation of Congo-Zaire, led by Mr. Kabila, the new head of State of the Democratic Republic of the Congo. For this reason, the Board found that no personal impediments existed to the enforcement of the decision of expulsion in the authors' case. The State party states that it shares the Board's view.

9.3 By letter of 22 April 1998, counsel for the authors admits that the party to which the authors belong is the party to which the present head of State Kabila, belongs. He argues however that the situation has changed since the authors left their country, and that the authors do not agree with the dictatorship imposed by President Kabila. In this context, he notes that the authors participated in a demonstration in front of the American, English and French embassies to protest against the arrest of Mr. Thsisekedi, the leader of the UDPS. The authors are convinced that the Government of the Democratic Republic of the Congo are aware of their presence at the demonstration and that they will risk torture if they were to return. In this context, they also submit that their father was an active supporter of ex-president Mobuto and that they speak Lingala, a language associated with President Mobutu supporters. Further, they claim to risk ill treatment because they are not in the possession of identification documents.

Issues and proceedings before the Committee

10. Before considering any claims contained in a communication, the Committee against Torture must decide whether or not it is admissible under article 22 of the Convention. The Committee has ascertained, as it is required to do under article 22, paragraph 5 (a), of the Convention, that the same matter has not been and is not being examined under another procedure of international investigation or settlement. The Committee finds that no further obstacles to the admissibility of the communication exist and proceeds with the consideration of the merits of the communication.

11.1 The Committee must decide, pursuant to paragraph 1 of article 3, whether there are substantial grounds for believing that the authors would be in danger of being subject to torture upon return to the Democratic Republic of the Congo. In reaching this decision, the Committee must take into account all relevant considerations, pursuant to paragraph 2 of article 3, including the existence of a consistent pattern of gross, flagrant or mass violations of

human rights. The aim of the determination, however, is to establish whether the individual concerned would be *personally* at risk of being subjected to torture in the country to which he or she would return. It follows that the existence of a consistent pattern of gross, flagrant or mass violations of human rights in a country does not as such constitute a sufficient ground for determining that a particular person would be in danger of being subjected to torture upon his return to that country; additional grounds must be adduced to show that the individual concerned would be personally at risk. Similarly, the absence of a consistent pattern of gross violations of human rights does not mean that a person cannot be considered to be in danger of being subjected to torture in his or her specific circumstances.

11.2 The Committee notes that the authors have claimed that they have been subjected to torture in the past, and that Y has provided medical evidence showing that she suffers from a post traumatic stress disorder. The Committee observes that past torture is one of the elements to be taken into account by the Committee when examining a claim concerning article 3 of the Convention, but that the aim of the Committee's examination of the communication is to find whether the authors would risk being subjected to torture now, if returned to the Democratic Republic of the Congo.

11.3 The authors' fear of being subjected to torture was originally based on their political activities for the PRP. The Committee notes that this party is part of the alliance forming the present Government in the Democratic Republic of the Congo, and that the authors' fear thus appears to lack substantiation.

11.4 In their latest submission, the authors have raised other grounds for fearing to be subjected to torture upon return to their country. In this context, they have stated that they disagree with the present Government's policy and that they have participated in a demonstration against the arrest of a political leader in the Democratic Republic of the Congo. According to the Committee's jurisprudence,[4] activities in the receiving country should also be taken into account when determining whether substantial grounds exist for believing that the return to their country would expose the authors to a risk of torture. In the instant case, however, the Committee considers that the authors' activities in Sweden are not such as to substantiate the belief that they would be in danger of being subjected to torture.

11.5 The Committee is aware of the serious situation of human rights in the Democratic Republic of the Congo, as <u>inter alia</u> reflected by the report of the Special Rapporteur of the United Nations Commission on Human Rights. The Committee observes however, that UNHCR has not issued a recommendation to suspend the return of rejected asylum seekers to the Democratic Republic of the Congo in view of the present situation and accordingly that no objective impediments exist to the return of failed refugee claimants to the Democratic Republic of the Congo. The Committee recalls that, for the purpose of article 3 of the Convention, a foreseeable, real and personal risk must exist of being tortured in the country to which a person is returned. On the basis of the considerations above, the Committee is of the opinion that such risk has not been established.

11.5 In light of the above, the Committee considers that information before it does not show that substantial grounds exist for believing that the authors will be personally at risk of being subject to torture if they are returned to the Democratic Republic of the Congo.

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

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

Notes

1. Communication No. 13/1993, Views adopted on 27 April 1994.

2. Communication No. 41/1996, Views adopted on 8 May 1996.

3. In spring 1997, the Government of President Mobutu was overthrown by Mr. Kabila. The name of Zaire was changed to Democratic Republic of the Congo.

4. See Committee's Views in communication No. 34/1995 (Aemei v. Switzerland), adopted on 9 May 1997.

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