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Committee against Torture
Thirty-first session
10 – 21 November 2003

DECISION

Communication No. 228/2003

Submitted by:	T. M. (represented by counsel, Ms. Gunnel Stenberg)
Alleged victim:	T. M.
State party:	Sweden
Date of complaint:	6 March 2003 (initial submission)
Date of present decision:	18 November 2003

[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

Thirty-first session

Concerning

Communication No. 228/2003

Submitted by:	T. M. (represented by counsel, Ms. Gunnel Stenberg)
Alleged victim:	T. M.
State party:	Sweden
Date of complaint:	6 March 2003 (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 18 November 2003,

Having concluded its consideration of complaint No. 228/2003, submitted to the Committee against Torture by Mr. T. 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 author of the complaint, his counsel and the State party,

Adopts the following:

Decision of the Committee Against Torture under article 22 of the Convention

1.1 The complainant is Mr. T. M., a Bangladeshi national born in 1973 and awaiting deportation from Sweden to Bangladesh at the time of submission of the complaint. He claims that his expulsion to Bangladesh would, in the circumstances, constitute a violation by Sweden of articles 2, 3 and 16 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. He is represented by counsel.

The facts as presented by the author

2.1 The complainant entered Sweden on 26 September 1999 and immediately applied for asylum. During an Immigration Board interview on the same day, he stated he had been become a member of the Bangladesh Freedom Party (hereafter

"BFP") in 1991, an allegedly illegal political party, and in 1994 started actively working for the party, including by organizing, and participating in, meetings and demonstrations. In 1997, upon release on bail three days after being arrested for illegal possession of weapons, he claimed to have gone into hiding for two years. As the political situation worsened, he paid a smuggler to arrange departure from Bangladesh.

2.2 On 29 September 1999, the Immigration Board held a second interview with the complainant. He stated that from 1994 to 1997 he was joint secretary of the party in the Dhaka city party district. He claimed Government members harass and abuse party members, and that he too, as a known party figure, suffered harassment. He claimed to have been falsely accused of murder, possession of weapons and taking bribes in 1997. While he was under arrest, he claimed to have been tortured with kicks and truncheons, and he adds that he continues to suffer from a back injury as a result. The party arranged for his release on bail, whereupon he went into hiding outside Dhaka. He allegedly was unaware whether he had been convicted of the offences of which he had been accused. By subsequent written submissions and seeking to clarify "misunderstandings", the complainant's counsel observed that the party was legal but due to Government impediments of its activities, its activities were "underground". Counsel stated that the bribe charges were in fact charges to the effect that the complainant had unlawfully extorted money, charges which had been brought by police upon pressure from the party then in Government, the Awami League.

2.3 On 8 October 1999, the Immigration Board denied his application. The Board established a variety of credibility problems related to documentation, and that he had not established his identity. On the substance of the claim, it found that the BFP was legal in Bangladesh, and that the complainant had not engaged in any impermissible political activity. While aware of some politically-motivated charges, the Board considered that the criminal justice system in Bangladesh provided sufficient guarantees for fair trial in respect of any criminal charges. The Board observed that the complainant had been released after 3 days in custody, had not been able to provide any documentary evidence supporting his allegations of charges against him and had provided very vague information as to any legal proceedings after his release. It thus concluded that the complainant had not shown reason to believe he was at risk of punishment for political reasons.

2.4 The complainant appealed to the Aliens Appeals Board, submitting what he claimed were copies of four court documents sent by his Bangladeshi lawyer, and a statement by the latter dated 16 October 1999. According to the statement, a trial in absentia still proceeded against the complainant, in which the statement's author had been appointed "lawyer of state defendant". The statement also argued that the political situation in Bangladesh was critical, that the police were seeking to arrest the complainant, and that Awami League members were seeking to kill him. The complainant submitted a document, dated 14 October 1999, which was described as a BFP certificate from the "Office Secretary" of the party's Central Executive Committee, stating that the complainant had been arrested and subjected to torture for three days, that his life was at risk and that he "may be killed by Govt. thugs if [he] returns home".

2.5 On 10 December 1999, the Aliens Appeals Board rejected the appeal, observing that affiliation to and support of the BFP, a legal party permitted to operate, did not constitute asylum grounds. Nor was the situation in Bangladesh such that persecution by private individuals supported by the authorities or where the latter, due to lack of will or ability, failed to take appropriate measures against such persecution. Concerning the false charges allegedly made, the Board considered that, based on its knowledge of the Bangladeshi judicial system, he would have his case determined in a legally acceptable manner. As to the allegation of abuse following arrest, the Board accepted that these kinds of acts were engaged in by police, but rejected that they were sanctioned by the Government or the authorities, raising any risk of persecution or abuse in the event of a return. Following the Appeals Board's decision, the complainant went into hiding, where he remained until located and detained on 4 March 2003.

2.6 On 20 December 2002, the complainant lodged a new application with the Aliens Appeals Board, arguing that during his detention in January 1997, he had been subjected to different forms of severe torture that resulted in physical and mental injuries. His family had allegedly been threatened by Awami League members after his departure. If he returned, he would be arrested, and given allegedly widespread torture during criminal investigations it was "very improbable" that he would be able to avoid such treatment. As a result of the torture allegedly suffered, he suffered from post-traumatic stress syndrome (PTSS), such that return would place him at "great risk" of taking his own life. He presented psychiatric certificates on his state of mental health as well as detailed forensic reports undertaken in Sweden, which assessed that the complainant had been subjected to torture in 1997.

2.7 On 16 January 2003, the Board rejected the application, applying the standards of article 3 of the Convention and the Committee's General Comment on its implementation. It observed that the complainant had waited 3 years since the expulsion order became final before first complaining about acts of torture during his detention in 1997. Applying an appropriately low burden of proof, however, it found that the medical evidence supported a claim of torture. As to whether there was a current risk of torture, the Board found that in the light of the passage of six years, of the complainant's inability to show he was still being sought by Bangladeshi authorities, and of the fall from power of the party allegedly persecuting him, there was no reason presently to fear such treatment. As to his health, the Board observed that he had at no previous point complained of the psychological problems suddenly alleged, nor had he shown that he had been in contact with any mental health care provider in Sweden. It thus concluded that his mental health status was primarily due to his unsettled life in Sweden resulting from his failure to comply with the expulsion order and continued illegal presence in the country.

2.8 On 4 March 2003, the complainant was arrested after being reported to the police for setting fire to a psychiatric clinic where he had sought treatment. On the morning of 7 March 2003, the complaint was received by the Committee. Later on 7 March 2003, counsel advised that the complainant had been removed from Sweden that same afternoon, and allegedly without medication for mental health problems nor his clothes. She alleged that the previous evening the complainant had sought to cut himself with a plastic knife.

The complaint

3.1 The complainant claims he would be tortured in the even of return, and that his return would violate articles 2, 3 and 16 of the Convention. He claims that he would be arrested upon return to face protracted legal proceedings, and that this was not affected by the change of government, especially as no amnesty had been issued. The complainant cites the 2001 human rights report of the United States' State Department, unspecified Amnesty International reports and a recent Swedish Foreign Office report, all on the general human rights situation in Bangladesh, as support for the proposition that the police routinely resorts to torture in investigations, with impunity, and that thus he would be exposed to a "very high risk" of torture in the event of return and arrest. Only exceptionally, he claims, are police officers sanctioned for use of torture. As evidence for the "almost total impunity" enjoyed by police officers and the country's alleged unwillingness to respect its obligations under the Convention, he refers to an indemnity ordinance issued in respect of acts committed by the armed forces between 16 October [presumably 2002] and 24 January 2003.

3.2 The complainant also argues that his removal from Sweden in the circumstances described in paragraph 2.8 above violated article 16 of the Convention.

3.3 The complainant states that the same matter has not been submitted for examination under another procedure of international investigation or settlement.

The State party's observations on admissibility and merits

4.1 By letter of 12 May 2003, the State party contested the admissibility and merits of the complaint. While conceding domestic remedies had been exhausted, it argues that, in the light of its submissions on the merits, the complainant has not substantiated, for purposes of admissibility, his claims under article 3. As to the claim that his expulsion in addition would violate articles 2 and 16, the State party notes that article 2 requires a State party to take effective measures to prevent acts of torture, and that an expulsion cannot be considered an act which intentionally causes pain or suffering of such severity so as to bring it within the definition of torture contained in article 1, for one of the purposes enumerated there. This claim is thus incompatible with the provisions of the Convention, is insufficiently substantiated, for purposes of admissibility, and the complainant does not have the necessary victim status to bring this claim. As to article 16, the State party refers to the Committee's jurisprudence that the obligation of *non-refoulement* does not extend to situations where a risk of cruel, inhuman or degrading treatment may exist,[1] and therefore considers this claim incompatible with the provisions of the Convention.

4.2 As to the separate claim that the specific circumstances of the complainant's expulsion violated article 16 in view of his physical and mental condition, the State party refers to academic commentary that the purpose of this article is to protect persons deprived of their liberty or under factual power or control of the person responsible for treatment or punishment. As the complainant cannot be a victim in this

[1] B.S. v Canada Case No 166/2000, Decision adopted on 14 November 2001.

sense, the article is inapplicable. Moreover, for the reasons developed below, this claim is also insufficiently substantiated, for purposes of admissibility.

4.3 On the merits, the State party argues that, in the light of the general human rights situation in Bangladesh and the evidence advanced, the complainant failed to make out a personal and substantial risk of torture, as defined in article 1, which would render his expulsion contrary to article 3. As to the general situation, the State party concedes that it is problematic, but points to progressive improvement over a longer term. Following the introduction of democratic rule in 1991, no systematic oppression of dissidents has been reported, and human rights groups are generally permitted to conduct their activities. The Bangladesh National Party (BNP) returned to power (after holding power from 1991 to 1996 and being in opposition from 1996 to 2001, to the Awami League) following elections on 1 October 2001 declared free and fair. Violence is however a pervasive element in political life, with supporters of different parties clashing at rallies and police reportedly often engaging in arbitrary arrest and abuse during interrogations. Acts of torture are seldom investigated, and the police, whose members are allegedly utilized by the Government for political purposes, are reluctant to pursue investigations against persons affiliated with Government. While lower courts are susceptible to executive pressure, higher courts are by and large independent and rule against the Government in high profile cases. Persons are occasionally tried in absentia, though no right of retrial exists if the person returns.

4.4 In 2002, members of the State party's Aliens Appeals Board visited Bangladesh, meeting with advocates, members of Parliament and the Executive, representatives of local embassies and international organizations, and found no institutional persecution. While "high profile" persons may be arrested and harassed by the police, political persecution is rare at the grass roots level. Court cases based on false accusations are common, but directed primarily against senior party officials. Harassment can be avoided by internal relocation within the country. The State party points out Bangladesh is a party to the Convention and, since 2001, to the International Covenant on Civil and Political Rights.

4.5 Turning to the real, personal and foreseeable risk of torture which the complainant is required to face under article 3 in the event of a return, the State party points out that its authorities explicitly applied the relevant Convention provisions. In addition, the competent authorities are in an advantageous position in assessing applications, particularly in the light of the experience gained in granting 629 cases on article 3 grounds in 1'427 cases from Bangladesh over a 10-year period. Accordingly, weight should be given to the decisions of the Immigration and Aliens Appeals Boards, whose reasoning the State party adopts. The State party emphasizes, with reference to the Committee's jurisprudence, that past torture is not sufficient, of itself, to determine a risk of future torture contrary to article 3.

4.6 The State party observes that, on the complainant's own account, false charges were lodged and police abuses committed against him on account of strong governmental pressure. The alleged torture took place over six years ago, and the complainant has been politically inactive since January 1997. Given that the Bangladeshi political context has significantly changed since the complainant's arrival in Sweden, notably by virtue of the defeat of the Awami League government in the

2001 elections and its replacement by the "anti-Awami League" comprising the complainant's BFP party and another party, which enjoy good relations with each other, there is no ground currently to suspect politically-motivated interest in the complainant. Even if former opponents sought to locate him, any ill-treatment from such quarters would emanate from private parties without the consent or acquiescence of the State and thus fall outside article 3.

4.7 With reference to the "court documents" and statement supplied to the Aliens Appeals Board, the State party observes that it is unable to determine whether these reliably substantiate the contention that legal proceedings were initiated against the complainant in 1997 and remained pending in October 1999. No evidence has been advanced to suggest that these proceedings instigated in the Awami League era currently remain pending. Even if this were so, this would not demonstrate a real and personal risk of torture, and the general human rights situation does not suggest that *ipso facto* all persons liable to arrested on criminal charges on return to Bangladesh face a substantial risk of torture. Given the substantial change since 1997 in the complainant's own and in his country's circumstances, therefore, he has not made out the necessary case under the Convention that his expulsion violated his rights under article 3.

4.8 On the claims under articles 2 and 16, if considered applicable by the Committee, the State party refers to two cases in which there was medical evidence of PTSS and a claim that state of health prevented expulsion. In G.R.B. v Sweden, the Committee considered that an aggravation of the state of health possibly caused by deportation did not rise to the threshold of treatment proscribed by article 16, attributable to the State party, while in S.V. v Canada, the Committee considered the claim insufficiently substantiated.[2] The State party refers to the jurisprudence of the European Court of Human Rights on equivalent provisions that have held that ill-treatment must rise to a minimum level of severity, and that there is a high threshold where the case does not concern the State party's responsibility for infliction of harm. No exceptional circumstances exist in the present case that the enforcement of the expulsion order gives rise to such issues.

4.9 The State party notes that the medical reports provided by the complainant suggest a diagnosis of PTSS, with a finding on 16 December 2002 apparently made on the basis of an examination on 31 July 2002 that the complainant showed deep depression with a serious risk of suicide. On 29 October 2002, however, the risk of suicide was described as "very difficult to assess". The State party observes that mental health issues were invoked for the first time in a new residence application filed in December 2002, three years after the complainant's arrival and two years after his abscondment, suggesting that a mental deterioration arose as a result of denial of entry to Sweden and his unsettled unlawful presence in the country. On the information available, he did not seek or receive any type of regular medical treatment, or submit to psychiatric care. Nor, to the extent that he is said to require medical attention, would this be unavailable in Bangladesh. Even if his contention of fearing a return to Bangladesh as he suffered from PTSS is relevant to an assessment

[2] Case No 83/1997, Decision adopted on 15 May 1998, and Case No 49/1996, Decision adopted on 15 May 2001.

under article 16, which the State party rejects, the complainant has not made out a substantial basis for this fear.

Complainant's comments on the State party's submissions

5.1 By letter of 15 May 2003, counsel for the alleged victim was requested to make any comments on the State party's submissions within six weeks, and advised that failure to do so would result in the Committee's consideration of the case on the basis of the information before it. No such comments were received.

Issues and proceedings before the Committee

6.1 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. The Committee has ascertained, as it is required to do under article 22, paragraph 5 (a), of the Convention, that the same matter has not been and is not being examined under another procedure of international investigation or settlement. The Committee further notes that the State party concedes that domestic remedies have been exhausted.

6.2 To the extent that the complainant argues that the State party would be in breach of articles 2 and 6 through exposing him to possible ill-treatment in Bangladesh, the Committee observes that the scope of the *non-refoulement* obligation described in article 3 does not extend to situations of ill-treatment envisaged by article 16. Accordingly, the claims under articles 2 and 16 relating to the expulsion of the complainant are inadmissible *ratione materiae* as incompatible with the provisions of the Convention. In addition, concerning the claim under article 16 relating to the circumstances of the complainant's expulsion, the Committee observes, with reference to its jurisprudence, that an aggravation of the condition of an individual's physical or mental health through deportation is generally insufficient, in the absence of other factors, to amount to degrading treatment in violation of article 16.[3] In the absence of exceptional circumstances and in view of counsel's failure to respond to the State party's argument that it had not been shown that the appropriate medical care was unavailable to the complainant in Bangladesh, the Committee considers that he has failed sufficiently to substantiate this claim, for purposes of admissibility, and it must accordingly be considered inadmissible.

6.3 With respect to the complainant's claim under article 3 concerning torture, for purposes of admissibility, the Committee considers, particularly in light of the complainant's account of his previous torture, that he has made out a prima facie case which, if established on the merits, would reveal a violation of article 3. In the absence of any further obstacles to the admissibility of this claim, the Committee accordingly proceeds with the consideration of the merits thereof.

7.1 The issue before the Committee is whether the removal of the complainant to Bangladesh violated the State party's obligation under article 3 of the Convention not to expel or to 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.

[3] See footnote 2 above.

7.2 The Committee must evaluate whether there are substantial grounds for believing that the complainant would be personally in danger of being subjected to torture upon return to Sweden. In assessing the risk, the Committee must take into account all relevant considerations, pursuant to article 3, paragraph 2, of the Convention, including the existence of a consistent pattern of gross, flagrant or mass violations of human rights. However, the Committee recalls that the aim of such determination is to establish whether the individual concerned would be personally at risk of being subjected to torture 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 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.

7.3 In the present case, the Committee observes that the Aliens Appeals Board accepted the complainant's (belated) contention that he had been subjected to torture in January 1997. The Committee notes, however, that the complainant's case was based on the contention that, as a political activist for the BFP, false charges were brought against him, and that he suffered abuse at the hands of the police, as a result of political pressure from the government authorities then in power. The Committee notes that this practice has been documented by several sources. In the light of the six years that have passed since the alleged torture took place, however, and, more pertinently, given that the complainant's political party now participates in government in Bangladesh, the Committee considers that the complainant has failed to show that substantial grounds existed, at the time of his removal, that he was at a real and personal risk of being subjected to torture.

8. 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 complainant has not substantiated his claim that he would be subjected to torture upon return to Bangladesh and therefore concludes that the complainant's removal to that country did not constitute a breach by the State party of article 3 of the Convention.

[Adopted in English, French, Spanish and Russian, 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.]

Individual opinion by Committee member, Mr. Fernando Mariño Menéndez
(dissenting in part)

I wish to indicate my disagreement with the Committee's decision declaring this complaint inadmissible *ratione materiae* on the grounds that the complainant's claim of a possible violation of articles 2 and 16, should he be expelled, is incompatible with the Convention (art. 22, para. 2).

On the one hand, the fact that expulsion causing the subject severe pain or suffering, whether physical or mental, may constitute torture within the meaning of article 1 of the Convention if, for instance, it is enforced pursuant to a discriminatory policy, should not be discounted.

In any event, the right way to respond to the claim of a violation of article 2 in the complaint under consideration would have been to find it inadmissible on the grounds that it was manifestly unfounded (Rules of Procedure, Rule 107 (b)), if that is what the Committee had wanted.

On the other hand, expulsion can obviously constitute cruel, inhuman or degrading treatment or punishment, and here, too, the Convention imposes obligations on States parties.

The exercise, in other words, is to consider not just how States are complying with their obligations under article 3 of the Convention, but how they are complying with all their obligations under an agreement whose ultimate objective is (sixth preambular paragraph) to "make more effective the struggle against torture and **other** cruel, inhuman or degrading treatment or punishment throughout the world".

A further consideration is that under article 31, paragraph 3, of the 1969 Vienna Convention on the Law of Treaties, when interpreting a treaty account must be taken, together with the context, of "any relevant rules of international law applicable in the relations between the parties"; this is relevant inasmuch as it applies to the possible existence of general rules of international law prohibiting cruel, inhuman or degrading treatment.

In keeping with the Committee's jurisprudence in case *B.S. v. Canada* (Case No. 166/2000, Decision adopted on 14 November 2001) it would, in my judgement, have been more correct to find that the complaint raised substantive issues relating to a possible violation of article 16 which should be dealt with at the merits and not at the admissibility stage.

[Signed]

Mr. Fernando Mariño Menéndez