

COMMITTEE AGAINST TORTURE

K. S. Y. v. The Netherlands

Communication No. 190/2001

15 May 2003

CAT/C/30/D/190/2001

VIEWS

Submitted by: K. S. Y. (represented by counsel)

Alleged victim: K. S. Y.

State Party: The Netherlands

Date of complaint: 5 January 2001 (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 15 May 2003,

Having concluded its consideration of complaint No. 190/2001, submitted to the Committee against Torture by Mr. K. S. Y. 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 under article 22, paragraph 7, of the Convention

1.1 The complainant is Mr. K. S. Y., a citizen of Iran, born on 23 August 1950, whose application for refugee status was rejected in the Netherlands. He claims that his deportation to Iran would constitute a violation by the Netherlands of article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (hereafter, the Convention). He is

represented by counsel.

1.2 In accordance with article 22, paragraph 3 of the Convention, the Committee transmitted the communication to the State party on 16 October 2001. Pursuant to rule 108 of the Committee's rules of procedure, the State party was requested not to deport the complainant to Iran pending the consideration of his case by the Committee.

The Facts as Presented by the Complainant

2.1 The complainant states that he has encountered problems in Iran on account of his homosexuality and because of the political activities of his brother, Ali Akbar.

2.2 The complainant had difficulties with Iranian authorities since his brother was recognized as a refugee in the Netherlands in the early eighties. He was interrogated by the Monkerat Committee four or five times and, after each interrogation, had to sign the next convocation.

2.3 In March 1992, the complainant travelled to the Netherlands for the wedding of his brother. When he returned to Iran, he was interrogated by the authorities about the reasons of his trip and the activities of his brother in the Netherlands. The Iranian authorities confiscated his passport, issued an order prohibiting him to travel abroad. He was ordered to report daily to the passports' office of the criminal investigation department.

2.4 In Iran, the complainant had a homosexual relationship with one Karim Hamwar, whose homosexuality allegedly was easy to recognize due to his "female" behaviour. Because of his homosexuality, he separated from his wife, with whom he had three kids.

2.5 On 10 August 1992, the complainant was arrested in Shiraz by the Monkerat (Special Unit of the Revolutionary Committee) on account of complaints by neighbours about his homosexual activities. His partner was not arrested as he went into hiding. The complainant was taken to a prison in the Lout desert and interrogated about his homosexuality and his brother's activities. During his detention, he allegedly was tortured, beaten with cables on the sole of his feet, on his legs and in the face, and hanged to the ceiling by one arm during half a day over three weeks. The complainant was later sentenced to death 1/ but never received a written verdict of the sentence. After 5 months of detention, he succeeded to escape with the help of prison cleaning services who hid him in the garbage truck. The escape was facilitated by the absence of guards in the evening, the prisoners being all confined in their cell.

2.6 The complainant first went to Mashad and then to Ispahan, where some relatives resided. From there he organized his travel to Europe. In August 1993, the complainant and his partner travelled separately to the Netherlands. The complainant used an Iranian passport provided by the "passeur" with his own photograph. When he arrived in the Netherlands, he destroyed the passport as he had been told to do so.

2.7 On 16 March 1994, the complainant applied for both refugee status and residence permit on humanitarian grounds. Both applications were rejected on 26 August 1994. On 29 August 1994,

the complainant applied for a review of this decision. On 22 December 1994, the Advice Committee on Alien Affairs advised the State Secretary of the Department of Justice to deny asylum to the complainant but to grant him a residence permit because of his physical and psychological condition.

2.8 Since his arrival in the Netherlands, the complainant shared accommodation with his partner, Karim Hanwar, until the latter started relationships with other men. After a fight about this situation, the complainant killed his partner. On 22 June 1995, the complainant was convicted of murder by the District Court Leeuwarden and sentenced to 6 years imprisonment. He was imprisoned between 21 January 1995 and 21 January 1999. The body of Karim Hanwar was repatriated to Iran, after intervention of the Iranian Embassy in the Netherlands.

2.9 In the meantime, on 12 September 1996, the application for review of the initial decision denying asylum and residence permit to the complainant was rejected. The complainant appealed this decision on 13 September 1996 before the District Court of The Hague.

2.10 Moreover, further to the crime committed by the complainant, the State Secretary of the Department of Justice declared the complainant to be an “undesirable person” on 10 September 1996. A request to review this decision was rejected on 6 December 1996. The complainant made a further appeal against this decision on 24 December 1996 before the District Court of the Hague.

2.11 On 22 December 1999, the District Court of The Hague dismissed both appeals of 13 September 1996 and 24 December 1996.

2.12 In the meantime, on 1 October 1999, the complainant introduced a new application for asylum which was rejected on 5 October 1999. His appeal against this decision was finally rejected on 11 May 2001.

The Complaint

3.1 The complainant claims that if he is returned to Iran, he is at risk of being subjected to torture, and that his forcible removal to Iran would entail a violation of article 3 of the Convention by the State party.

3.2 In support of his claim, the complainant argues that he was tortured when he was detained in Iran in 1992. The consequences of these abuses are confirmed by a number of medical reports submitted to the Committee. According to the medical reports, the complainant suffers from severe post traumatic stress disorder, including a suicidal tendency, and his right shoulder is seriously restricted in its movements because he had been hanged by one arm for prolonged periods.

3.3 The complainant considers that the main element supporting the risk of torture are his homosexuality and the events that occurred in the Netherlands after his arrival. He argues that his homosexuality was confirmed by his partner, Karim Hanwar, during hearings related to his own asylum application and by the judgment of 22 June 1995, in which the complainant was convicted of murder.

3.4 The complainant explains that after the death of Karim Hamwar, his body was repatriated to Iran and that the Iranian authorities have undoubtedly tried to obtain explanations about the reasons of Karim Hanwar's death. If he were removed now to Iran, he would certainly face problems related to the murder he committed and, particularly, his homosexuality. This would put him at risk of again being detained and subjected to torture and other forms of ill-treatment.

3.5 The complainant, referring to a report of Amnesty International of 30 July 1997, notes that homosexual activities are a criminal offence under the Iranian Penal Code. He points out that the mere declaration of four witnesses may lead to punishment as well as the opinion of a judge based on his own knowledge. The report further says that a person suspected of "committing" homosexual activities risks arrest, torture (lashes) or ill-treatment.

3.6 As to sources that confirm the existence of acts of torture in Iran, the complainant refers to the report of the United Nations Special Representative of the Commission on Human Rights on Iran of 21 September 1999, according to which "[p]ress accounts suggest that corporal punishment is prevalent. In January 1999, an Iranian newspaper reported that two 15 year old boys had been sentenced to a flogging for 'offending public democracy' by dressing up as girls and wearing make-up. They explained to the Court that they did this to 'extract money from rich young men'. In June an Iranian newspaper reported that a young man in Mashad had been given 20 lashes for 'wounding public moral sentiments' by plucking his eyebrows and wearing eyeshadow. In March an Iranian newspaper reported that six persons had been sentenced in Mashad to 18 months in jail and 228 lashes for goading passers-by to dance in the street".

3.7 The complainant underlines that the decisions of the State party to deny him refugee status were based on alleged discrepancies and, in particular, on the fact that Karim Hanwar did not mention during his own asylum hearings that the complainant had been detained in Iran. The complainant argues that Karim Hanwar only mentioned his homosexual relationship with him and explained that his partner also had problems but did not give any more details. The complainant also refers to the jurisprudence of the Committee according to which complete accuracy can seldom be expected from victims of torture.

3.9 Finally, the complainant draws attention on the fact that the complainant was not admitted in the State party because he was convicted of a serious crime. The complainant that is not compatible with the absolute character of article 3 of the Convention. Furthermore, the complainant argues that he is not a threat to the Dutch society because his crime was committed out of passion, as confirmed in the judgment of 22 June 1995.

State Party's Observations on the Admissibility and Merits

4.1 In a submission dated 21 November 2000, the State party made its observations on the merits of the case as it did not propose any grounds for inadmissibility.

4.2 Referring to the jurisprudence of the Committee, the State party recalls that in order to be personally at risk of being subjected to torture in the sense of article 3 of the Convention, there

must not only be a consistent pattern of gross violations of human rights in the country where the complainant is expelled but also specific grounds indicating that the complainant is personally at risk of being subjected to torture. It also reminds that the terms “substantial grounds” imply that torture is highly likely and that the individual must face a foreseeable, real and personal risk of being tortured, as interpreted in the light of the Committee’s general comment No 1 on the implementation of article 3.

4.3 Concerning the situation in Iran, the State party, referring to some Views of the Committee, argues that although the situation is disquieting it is not to a point that any person removed to Iran would be in danger of being subjected to torture. Moreover, the complainant’s homosexuality does not in itself constitute a risk incompatible with article 3 of the Convention. Referring to a number country reports carried out by its own services, the State party is of the view that although homosexual acts are prohibited in Iran and may incur the death penalty, there is no active policy of prosecution. Even if a charge of homosexuality is in some cases added to a range of other criminal charges, there are no known cases of convictions, including at the court’s own discretion, solely for homosexual acts. It is further noted that the United Nations High Commissioner for Refugees has not “been able to trace any cases of execution of persons found guilty of homosexual relations”.

4.4 Concerning the political activities of his brother, Ali Akbar, the State party considers that the complainant has not substantiated that they would imply a personal, real and foreseeable risk of torture for him because his statements in that regard have been inconsistent, vague and contained little detail. According to different interviews, the complainant has been arrested once, five or six times, or more than forty times in connection with his brother’s political activities. Moreover, while the complainant had stated that his brother had been the leader of a Mujaheddin group, his brother himself told the State party’s authorities that he was only a sympathiser of the Mujaheddin and distributed pamphlets, but undertook no further activity against the Iranian government.

4.5 The State party considers that it is implausible that, while the complainant had encountered no problems in this respect until he travelled to the Netherlands in March 1992 with the permission of the authorities, he was arrested upon his return to Iran, that his passport was confiscated and that he was interrogated in relation with his brother’s activities. The State party refers to ministerial reports according to which it is impossible for persons researched by the authorities to travel abroad and notes that thousands of Iranians travel annually abroad without encountering problems at their return in the country.

4.6 Moreover, the State party argues that, even assuming that the complainant was indeed arrested after his return to Iran in April 1992, the fact that he was released shortly afterwards without having been molested and that the political activities of his brother took place 17 years ago could not constitute evidence that the complainant would run the risk of being tortured for that reason.

4.7 Concerning his sexual preference, the State party notes the complainant’s declarations that until August 1992 and prior his departure from Iran, in August 1993, he did not have any problems with the Iranian authorities in this respect. The State party further considers that his arrest in August 1992 because of his homosexuality lacks credibility because the complainant was not open about his sexual preference. It is similarly implausible that his partner, Karim Hanwar, whose

appearance was patently homosexual, was not arrested. The fact that Karim Hanwar did not mention the complainant's arrest in his asylum hearings because of their relationship also permits the doubts about the veracity of this claim given the importance of such a detail.

4.8 Concerning the death penalty to which he was sentenced because of his homosexuality, the complainant stated in his first interview that he did not receive any document recording his sentence. In April 1994, he stated that his sentence had been slipped under his cell door, attached to a piece of string. He later stated that he was told that he had to die because he was homosexual. Finally, in December 1994, he stated that his death sentence had been read out to him at the Monkerat office.

4.9 The State party observes that the complainant's account of his detention and escape, in that there was no guard in the evening and that he was able to escape into a garbage truck without encountering any problems, are inconsistent with the detention of a person under sentence of death.

4.10 The State party considers that the jurisprudence of the Committee related to the issue of inconsistencies and contradictions made by victims of torture in their account of past abuses is not applicable to the present case because the complainant's alleged contradictions relate to essential parts of his persecutions.

4.11 Concerning the medical reports submitted by the complainant, the State party argues that they conflict with the complainant's lack of credibility regarding his reasons for seeking asylum. The State party therefore considers that it is not necessary to examine whether the alleged physical symptoms are indicative of torture and thus relevant for the assessment of the complainant's claim and that it is incumbent to the complainant to demonstrate their relevance by presenting a credible claim. Moreover, physicians make their medical findings solely within the limited context of the statements made to them so that the causes of the complainant's medical situation cannot be ascertained objectively.

4.12 Finally, the State party considers that the complainant has not demonstrated that, since his arrival in the Netherlands, his sexual preference has come to the attention of the Iranian authorities, and referring again to the reports made by its Ministry of Foreign Affairs according to which homosexuality remains a social taboo in Iran, that it is implausible that Karim Hanwar's family would have reported to the authorities about the reasons for his death. The complainant has not further demonstrated that he is likely to be imprisoned in Iran, let alone tortured, because of the murder of Karim Hanwar committed in another country.

Counsel's Comments

5.1 In a submission dated 30 May 2002, the complainant transmitted his comments on the observations of the State party.

5.2 Regarding the absence of known cases of recent prosecutions solely on a charge of homosexuality, the complainant emphasizes that this does not mean that there are not any and that it is known that Iranian authorities are reluctant to give information about criminal prosecutions.

Moreover, according to an Amnesty International report transmitted to the State party on 7 November 2001, one hundred people were tortured in Iran only in July 2001, at least 10 people were hanged and one hundred death sentences were upheld by the Supreme Court. As the background of these incidents is most of the time difficult to ascertain, homosexuality may in some cases have been at issue.

5.3 The complainant underlines the State party's observation that homosexual acts are often prosecuted together with other criminal charges. He states that this is exactly what he expects to happen in his case since the body of his partner was repatriated to Iran. This will give the Iranian authorities a reason to add a criminal charge of murder to that of homosexuality. The complainant considers that the murder he committed constitutes in itself a risk of being tortured if returned to Iran and that the fact that he has already been punished in the Netherlands is irrelevant.

5.4 Regarding the alleged contradictions and inconsistencies of his account of the facts, the complainant considers that the State party misinterpreted his words, particularly on the question of his detention on account of his brother's political activities. During the first interview with the Dutch authorities, the complainant mentioned that he was arrested once because of his homosexuality and several times in connection with his brother's political activities. His following declarations about his separate and different arrests were either related to arrests by the Sepah or by the Committee. The complainant finally notes that he is not in a position to compare his interviews with those of his brother as he was transmitted the file by the State party.

5.5 Regarding the alleged implausibility that he was arrested in August 1992 for his homosexuality because he was not open about his sexual preference, the complainant reiterates that he was arrested further to complaints made by neighbours who saw him with Karim Hanwar, who was openly homosexual. Moreover, the complainant considers that it is perfectly conceivable that Karim Hanwar went into hiding.

5.6 Regarding the fact that Karim Hanwar did not mention the detention of the complainant during his own asylum hearing, it is noted that Karim Hanwar was not specifically interrogated on this issue and that interviews were short.

5.7 The complainant confirms that he never received any document recording his death sentence, and that he was only informed of it when the sentence was pushed under his cell door and then pulled back.

5.8 The complainant finally submits an additional report made by "Stichting Centrum '45", an organization dealing with traumatized war victims and asylum seekers, according to which his situation is worsening and that serious risk of "balance suicide" exists. Contrary to the State party, the complainant considers that medical reports constitute evidence in support of his claim. Moreover, he notes that he has already demonstrated the relevance of the medical reports.

Issues and Proceedings Before the Committee

6.1 Before considering any claims contained in a communication, the Committee 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.

6.2 Moreover, the Committee notes that the State party has not submitted any objections on the admissibility of the communication, including with regard to the exhaustion of domestic remedies. The Committee therefore declares the communication admissible and proceeds without further delay to its consideration of the merits.

7.1 The Committee must decide whether the forced return of the complainant to Iran would violate the State party's obligation, under article 3, paragraph 1 of the Convention, not to expel or return (refouler) an individual to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture. In order to reach its conclusion, the Committee must take into account all relevant considerations, including the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights. The aim, however, is to determine whether the individual concerned would personally risk 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 sufficient grounds for determining whether the 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. Conversely, the absence of a consistent pattern of gross violations of human rights does not imply that a person cannot be considered to be in danger of being subjected to torture in his or her specific circumstances.

7.2 In the present case, the Committee notes that the political activities of the complainant's brother took place more than 17 years ago and that they may not in themselves constitute a risk for the complainant himself to be subjected to torture, if he were returned to Iran.

7.3 Concerning the alleged difficulties faced by the complainant because of his sexual orientation, the Committee notes a number of contradictions and inconsistencies in his account of past abuses at the hand of the Iranian authorities, as well as the fact that part of his account has not been adequately substantiated or lacks credibility.

7.4 The Committee also notes from different and reliable sources that there currently is no active policy of prosecution of charges of homosexuality in Iran.

7.5 In the light of the arguments presented by the complainant and the State party, the Committee finds that it has not been given enough evidence by the complainant to conclude that the latter would run a personal, present and foreseeable risk of being tortured if returned to his country of origin.

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

Iran and therefore concludes that the complainant's removal to that country would not constitute a breach by the State party of article 3 of the Convention.

[Adopted in English, French, Russian and Spanish, the English text being the original version. Subsequently to be issued also in Arabic and Chinese as part of the Committee's annual report to the General Assembly.]

Notes

1/ The complainant explains that he has never received a copy of the judgment and that he was only informed of his death sentence through a document that was pushed under his cell door and then immediately pulled back. He is therefore not in a position to give the date of the judgment.