



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

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Committee Against Torture
Forty-fifth session
1 – 19 November 2010

Decision

Communication No. 373/2009

Submitted by: Munir Aytulun, and Lilav Guclu (represented by
counsel, Ingerman Sahlstrom)

Alleged victim: The complainant

State party: Sweden

Date of the complaint: 27 January 2009 (initial submission)

Date of present decision: 19 November 2010

Subject matter: Deportation of the complainant to Turkey

Procedural issues: insufficient substantiation

Substantive issues: Prohibition of refoulement

Article of the Convention: 3

[Annex]

* Made public by decision of the Committee against Torture.

Annex

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

concerning

Communication No. 373/2009

Submitted by: Munir Aytulun, and Lilav Guclu (represented by counsel, Ingerman Sahlstrom)

Alleged victim: The complainant

State party: Sweden

Date of the complaint: 27 January 2009 (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 19 November 2010,

Having concluded its consideration of complaint No. 373/2009, submitted to the Committee against Torture by Munir Aytulun and Lilav Guclu under article 22 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,

Having taken into account all information made available to it by the complainant, his counsel and the State party,

Adopts the following:

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

1.1 The complainants are Mr. Munir Aytulun, born in 1965 and his daughter Ms. Lilav Güclü, born in 2007, both citizens of Turkey of Kurdish ethnicity. They are currently in Sweden, awaiting deportation to Turkey. Their deportation was initially scheduled for the end of February 2009. They claim that the first-named complainant's deportation to Turkey would constitute a violation by Sweden of article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The complainants are represented by counsel, Ingemar Sahlstrom. The wife of the first-named complainant submitted a similar complaint to the Committee against Torture registered as case No. 349/2008, Mukerrem Güclü v Sweden.

1.2 Under rule 108, paragraph 1, of the Committee's rules of procedure, the Committee requested the State party, not to expel the complainants to Turkey while their complaint was under consideration by the Committee.

The facts as presented by the complainant

2.1 In 1991, the first-named complainant, a teacher, became a member of the PKK. Soon after, he was sent to join the fighting forces of the PKK base in Haftanin in Iraq. In 1995, he was trained for six months on the politics of the PKK at their headquarters in Damascus.

2.2 At the end of 1996, he was wounded and was treated in the field. He was only sent to a hospital in Urimia, Iran, three months later. Since then, he continued to work as a PKK teacher. In 2000, he was sent to teach in Syria and in 2003, he was sent as a PKK teacher to Iraq, where he met his future wife, who was a PKK soldier. Since having a relationship with a fellow soldier was prohibited, he was arrested by the PKK for one month. He “deserted” the PKK on 16 October 2005 and arrived in Sweden four days later. He claims that in 1991-1992 his photo was published in national newspapers in Turkey.

2.3 He submits that he is wanted by the military and the police, who searched for him at his parent’s home. On several occasions, his siblings were forced to accompany the authorities while they searched for him in the mountains. He claims that the family’s phone had been and remains tapped by the authorities. A letter from his lawyer confirms that he is wanted and will be prosecuted for crimes under articles 302 and 314 of Turkish criminal legislation. He claims that under this legislation he will be sentenced to 15 years’ imprisonment and subjected to torture by the security forces. This was confirmed by the Diyabakir Human Rights Association.

2.4 On 18 January 2008, the Migration Board rejected the complainants’ application. On 2 September 2008, the Migration Court issued a decision, dismissing the appeal and arguing that the first-named complainant did not hold any prominent position within the PKK and had not participated in any combat on its behalf. Two judges out of four disagreed with the decision of the court and considered that the complainant had a well-founded fear of being exposed to torture if he were to be deported to Turkey.

2.5 On 22 October 2008, the Migration Court of Appeal decided not to grant the complainants leave to appeal.

The complaint

3.1 The complainants claim that the forcible return of Mr. Aytulun to Turkey would constitute a breach by Sweden of his rights under article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

3.2 Counsel refers to the British Home Office guidelines, which states that despite the policy of zero tolerance against torture, which has resulted in the elimination of the most severe forms of torture and abuse, there remain reports of incidents of torture during police custody.

State party’s observations on the admissibility and the merits

4.1 On 18 September 2009, the State party reiterated the facts as submitted by the complainants and added that according to the information given by the first-named complainant during the course of interviews with the migration authorities he was allegedly first arrested in 1989 on suspicion of association with a teacher colleague who was a member of the Turkish Communist Party. He was interrogated over a period of four days. During the interrogations, he was beaten and subjected to electric shocks. He was also prosecuted for handing out political leaflets. During the criminal trial, he managed to demonstrate that the accusations against him were false and he was released.

4.2 Until 1994, he was also involved in teaching new PKK recruits. He was a leader of the PKK from 1994-1995. At some point, he was also active in criticizing the policies and strategies of the organization, arguing that armed conflict would not be a successful strategy in reaching the political goals of the PKK. As a result, he had been accused by the PKK leadership of questioning the guerilla organization. One of his brothers had been imprisoned for seven months merely due to the first complainant's membership in the PKK.

4.3 The State party admits that the Migration Board did not question the first-named complainant's statement about his activities in the PKK and acknowledged the risk that he could be arrested and tried if returned to Turkey. However, it considered that there was no reason to believe that his sentence would be a more severe punishment than that of other persons in similar situations. It also referred to the Turkish government's policy of zero tolerance of torture and legislation changes to that end, which increased the possibilities for persons who have been tortured to report the perpetrators.

4.4 The State party submits that in the appeal to the Migration Court the complainants added that the Migration Board had not taken into consideration that the first-named complainant would be prosecuted before a special criminal court in Turkey, namely the Heavy Penal Court and might be sentenced to life imprisonment. The claim was allegedly supported by a human rights non-governmental organization and the first-named complainant's lawyer in Turkey. The first-named complainant claimed that he would be subjected to torture and the second-named complainant would be forced to live in a public institution. He argues that the residence permits in similar cases had been granted. He was also threatened by the PKK during his time in Sweden.

4.5 On 2 September 2008, the Migration Court issued a decision, dismissing the appeal and arguing that the first-named complainant did not hold any prominent position within the PKK and had not participated in any combat on its behalf. His actions could not be regarded as terrorist acts and he had spent relatively little time in Turkey. It confirmed that membership in a terrorist organization can entail up to 15 years imprisonment, however refugee status can not be based solely on the circumstance that the person risks punishment under legislation of their native country. It stated that the persecution should be distinguished from punishment for breach of law, adding that the punishment is not disproportionate considering that he has been active in a terrorist organization. Considering whether the complainants could be regarded as persons otherwise in need of protection, it pointed to the reforms that had been undertaken to address the problem of torture although, it noted that, despite the efforts made, incidences of torture still occur. However, it was neither systematic nor supported by the Turkish government. It added that the first-named complainant had not plausibly shown that he was at risk of persecution by the PKK due to his defection from the organization, as to make him in need of protection. It added that if he were to risk persecution by the PKK, it was the judicial and law enforcement authorities in Turkey that should offer him protection. Only if such protection is unsatisfactory, would there be a need for protection in Sweden and there was no indication that the authorities could not offer adequate protection. The Court also stated that the complainants had a large family in Turkey and should both parents of the second-named complainant be convicted and sentenced to imprisonment, it would be the responsibility of the Turkish authorities to decide on her care.

4.6 The State party adds that before the migration authorities the first-named complainant claimed that he had never had a passport and submitted a copy of a transcript from the Turkish national register of citizens dated 2003 and an original transcript from the same register dated 2005. It submits that according to the transcript from 2003 he had been sought by the police at that time, while the latter original transcript contains no such information.

4.7 On the issue of admissibility, the State party submits that it is not aware of the present matter having been or being subject to any other investigation or settlement. It also acknowledges that all domestic remedies have been exhausted. It, however, contends that the complainants' claims fail to rise to basic level of substantiation required for purposes of admissibility. It, therefore, submits that the communication is manifestly unfounded and thus should be inadmissible.

4.8 On the merits, the State party notes that Turkey has ratified several major human rights instruments and signed the Optional Protocol to the Convention against Torture. It states that Turkey cooperates with the Council of Europe's Committee for the Prevention of Torture and accepts the publication of the Committee's reports. It reiterates a policy of zero tolerance declared by the Turkish government and important legislative reforms to this end. It also notes that despite the efforts made the incidents of torture still occur, especially during arrest and outside detention centers. It refers to reports by human rights organizations¹, which reported a rise in cases of torture and abuse during 2007. It submits that the most severe methods of torture have been eliminated, but incidents of ill-treatment during police custody continue and courts rarely convict security officials accused of torture and tend to issue lighter sentences when they do convict. The judiciary is still not independent from the executive and the proceedings are lengthy. It refers to the report by the US State Department 2007, which stated that those arrested for ordinary crimes were as likely to suffer torture and mistreatment in detention as those arrested for political offences, although they were less likely to report the abuse. It also cites the report issued by the Swedish Ministry of Foreign Affairs that members of the PKK should be considered a specific target group for individual civil servants who violate the prohibition on using torture. It, nevertheless, contends that concerns regarding the human rights situation in Turkey cannot lead to the conclusion that persons liable to be arrested on criminal charges *ipso facto* face a real risk of torture.

4.9 The State party submits that it must take into account the recent developments in the efforts made by the Turkish government to eradicate torture and submits that torture is not used systematically and the use that still occurs does not have the acquiescence of the Turkish state. Thus, the State party contends that it might be legitimate to question whether reported incidents of torture could be imputed to the Turkish state or whether they are rather viewed as criminal acts for which Turkey cannot be held responsible.

4.10 The State party submits that several provisions of the 2005 Aliens Act reflect the same principles as those laid down in article 3, paragraph 1, of the Convention. Thus, the Swedish authorities apply the same test when considering an application for asylum as the Committee. It notes that the national authorities conducting the interview are in a good position to assess the information submitted by the asylum seeker and to evaluate the credibility of his or her claims. The Migration Board took the decision after two extensive interviews and had sufficient information taken together with the facts and documentation.

4.11 The State party adds that the migration authorities did not question the first-named complainant's involvement in the PKK, as well as his claim that he is wanted by the Turkish police and risk being arrested and put on trial. The State party concurs with the conclusions of the Migration authorities and submits that the first-named complainant's

¹ The 2008 Report issued by the Swedish Ministry of Foreign Affairs, the US State Department 2007 Country Report on Human Rights Practices in Turkey, The British Home Office Country of Origin Information Report on Turkey, 29 August 2008, The British Home Office Operational Guidance Note on Turkey, 2 October 2008 and Amnesty International 2008 Annual Report and the Human Rights Watch World Report 2008.

involvement in the PKK should be regarded as having been at a low level, despite his claims that he had educated new PKK recruits and was a leader of a PKK base (until 1995). He had been in the PKK for a long time but had not participated in active combat for the PKK. Against this background, the State party questions whether he would be of much interest to the Turkish authorities.

4.12 The State party submits that it was aware of the fact that all individuals dealing with the PKK are criminally prosecuted and sentenced. It refers to a report by the Swedish Embassy in Ankara and submits that a founder of an illegal and armed organization or a person in a leading position in such an organization can be sentenced to 10-15 years imprisonment. If the organization is classified as a terrorist organization, it results in a 50% increase in the sentence under the Turkish Anti-Terrorist Law. Membership of an illegally-armed organization can result in 7.5-15 years' imprisonment (including the 50% increase). Thus, the State party does not dispute the first-named complainant's claim that he runs the risk of being arrested and tried on his return to Turkey. It, however, submits that no reason has emerged for believing that he would be sentenced to more severe punishment than other persons in the same situation. It reiterates the arguments by the Migration authorities and submits that the punishment that he risks is not disproportionate to the crime of membership of the PKK, considering that he has been active in an organization that is considered a terrorist organization by the Turkish government and EU. It adds that due to the Turkish government's declaration of zero tolerance of torture and legislative changes, there are increased possibilities for persons who have been subjected to torture to report the perpetrators.

4.13 The State party submits that the first-named complainant has not shown that he was at risk of persecution by the PKK due to his defection from the organization, as to make him in need of protection. It submits that the risk of being subjected to ill-treatment by a non-governmental entity or by private individuals without the consent or acquiescence of the government falls outside the scope of article 3 of the Convention. In any event, it contends that the claim is not substantiated. It questions whether there is a risk of the first-named complainant being of interest to the PKK now, considering the time that had elapsed since he left Turkey. It submits that if such risk exists he would most certainly be able to obtain protection from the Turkish authorities.

4.14 In relation to the second-named complainant, the State party agrees with the Migration court's assessment that the complainants have a large family in Turkey. Should both parents be convicted and imprisoned it would be the responsibility of the Turkish authorities to decide on her care.

Complainants' comments on the State party's observations on the admissibility and the merits

5.1 On 11 December 2009, the complainants challenged the State party's argument as to the low level of the first-named complainant's involvement in PKK activities. They claim that he was a member for a long time and because of his elevated position he served in many countries.

5.2 The complainants submit that a criminal case against the first-named complainant (No.1999/190) in Van is still open in relation to his membership of a terrorist organization. If returned he would be sentenced to 15 years in prison. He adds that the occurrences of torture in Turkey have increased.

5.3 He submits that the Migration Courts were aware of the criminal case against him as well as of the increasing occurrences of torture in Turkey.

Issues and proceedings before the Committee

Consideration of admissibility

6.1. Before considering a claim 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, and b), that the same matter has not been, and is not being, examined under another procedure of international investigation or settlement and that all available domestic remedies have been exhausted.

6.2. As to the complainants' allegation that if returned to Turkey the first-named complainant would be killed by the PKK in retaliation for leaving the organization without permission, the Committee considers that the issue of whether the State party has an obligation to refrain from expelling a person who might risk pain or suffering inflicted by a non-governmental entity, without the consent or acquiescence of the Government, falls outside the scope of article 3 of the Convention.² Thus, the Committee finds that this claim is inadmissible in accordance with rule 107 (c) of the Committee's rules of procedure.

6.3. The Committee takes note of the State party's contention that the communication is manifestly unfounded and therefore inadmissible, as the complainants' assertion that the first-named complainant is at risk of being treated by public officials in a manner that would amount to a breach of article 3 of the Convention fails to rise to the basic level of substantiation required for purposes of admissibility. However, the Committee considers that the complainants have provided sufficient information to permit it to consider the case on the merits.

Consideration of merits

7.1. The Committee must determine whether the forced return of the complainants to Turkey would violate the State party's obligations 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 or she would be in danger of being subjected to torture.

7.2. The Committee must decide, pursuant to paragraph 1 of article 3, whether there are substantial grounds for believing that the complainants would be in danger of being subjected to torture upon return to Turkey. In reaching this decision, the Committee must take into account all relevant considerations, pursuant to article 3, paragraph 2, including the existence of a consistent pattern of gross, flagrant or mass violations of human rights. In this regard, the Committee notes the State party's argument that certain improvements have been made to the human rights situation, including through a zero-tolerance policy and relevant legislative changes. It also notes the complainants' argument that despite the changes, there remain reports of incidents of torture during police custody.

7.3. The aim of the present determination, however, is to establish whether the first-named complainant would be personally at risk of being subjected to torture in Turkey after his return. Even if a consistent pattern of gross, flagrant or mass violations of human rights existed in Turkey, such existence would not as such constitute a sufficient ground for determining that he would be in danger of being subjected to torture after his return to that country; specific grounds must exist indicating that he would be personally at risk.

² G.R.B v Sweden, 83/1997, Views adopted on 15 May 1998.

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.³

7.4. The Committee recalls its general comment on the implementation of article 3 in which it states, *inter alia*, that the risk of torture “must be assessed on grounds that go beyond mere theory or suspicion. However the risk does not have to meet the test of being highly probable”.⁴

7.5. The Committee notes that the State party does not dispute the first-named complainant’s involvement with the PKK, but rather argues that his involvement was at a low level. It notes that while the State party denies that he would be of much interest to the Turkish authorities now, it admits, as did the Migration Board itself, that if he is pursued by the Turkish authorities, there is a risk that he will be arrested, detained pending trial and sentenced to a long term of imprisonment (*paras.4.11 and 4.12*). It also notes that the complainants have provided information on a criminal case initiated against the first-named complainant, number 1999/190 (*para. 5.2*), which, remains uncontested by the State party. Thus, in the Committee’s view sufficient information has been provided to indicate that the first-named complainant is likely to be arrested if returned to Turkey.

7.6. The Committee observes that, according to various sources there are serious allegations that the security and police forces continue to use torture, in particular during questioning and in detention centers despite the government’s policy of zero tolerance of torture. The Committee also notes that according to the State Party’s own submission in 2007 (*see para. 4.8 above*) the number of reports of ill-treatment has increased. More than one of the reports submitted by the State party describe that despite the legislative measures taken by the Turkish Government perpetrators often enjoy impunity, and question the effectiveness of the reform. Many of the recent reports quoted by the State party also indicate that there are an increasing number of reports of ill-treatment and torture committed by members of the security and police forces outside official premises and thus more difficult to detect and document. The Committee also takes note of the statement from the report by the Swedish Ministry of Foreign Affairs quoted by the State party that members of the PKK should be considered a specific target group for individual civil servants who violate the prohibition on using torture. It also notes that according to the Diyarbakir Branch of Human Rights Association, those persons, who defected from PKK are subjected to enforced confessions to reveal the names of their former comrades.

7.7. In conclusion, the Committee notes that the complainant was a member of the PKK for 14 years; and that there are strong indications that he is wanted in Turkey, to be tried under anti-terrorist laws and thus is likely to be arrested upon arrival and subjected to enforced confessions. In light of the foregoing, the Committee considers that the complainants have provided sufficient evidence to show that the first-named complainant personally runs a real and foreseeable risk of being subjected to torture were he to be returned to his country of origin.

7.8. As the case of the second-named complainant is dependent upon the case of the first, the Committee does not find it necessary to consider the case of the former, a minor child of the first-named complainant, separately.

7.9. The Committee against Torture, acting under article 22, paragraph 7, of the Convention against Torture and Other Inhuman or Degrading Treatment or Punishment,

³ MAK v. Germany, 214/2002. Views adopted 5 May 2004.

⁴ A/53/44, annex IX, para.6

considers that the State party's decision to return the complainants to Turkey would constitute a breach of article 3 of the Convention.

8. In conformity with article 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 these Views.

[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.]
