

COMMITTEE AGAINST TORTURE

Tapia Paez v. Sweden

Communication No 39/1996

28 April 1997

CAT/C/18/D/39/1996

VIEWS

Submitted by: Gorki Ernesto Tapia Paez (represented by counsel)

Alleged victim: The author

State party: Sweden

Date of communication: 19 January 1996

Date of decision of admissibility: 8 May 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 28 April 1997,

Having concluded its consideration of communication No. 39/1996, submitted to the Committee against Torture by Mr. Ernesto Tapia Paez 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 communication, his counsel and the State party,

Adopts its

Views under article 22, paragraph 7, of the Convention

1. The author of the communication is Mr. Gorki Ernesto Tapia Paez, a Peruvian citizen, born on 5 October 1965, at present residing in Sweden, where he is seeking recognition as a refugee. He claims that his forced return to Peru would constitute a violation by Sweden

of article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. He is represented by counsel.

The facts as submitted by the author

2.1 The author states that since 1989 he has been a member of Shining Path, an organization of the Communist Party of Peru. On 2 April 1989, he was arrested during a razzia at the university where he was studying. He was taken to the police station for identification and released after 24 hours. On 1 November 1989, the author participated in a demonstration at which he handed out leaflets and handmade bombs. The police arrested about 40 persons, among them the leader of the author's cell. According to the author, this person was forced to reveal the names of the other cell members. The same day, the author's house was allegedly searched by the police and the author decided to go into hiding until 24 June 1990, when he left Peru with a valid passport issued on 5 April 1990.

2.2 The author states that he is a cousin of José Abel Malpartida Paez, a member of Shining Path, who was arrested and allegedly killed by the police in 1989, and of Ernesto Castillo Paez, who disappeared on 21 October 1990. The author's mother and the father of the missing Ernesto Castillo Paez obtained assistance from a Peruvian lawyer to investigate his whereabouts. The lawyer subsequently received a letter bomb, which seriously injured him, upon which he fled the country and was granted asylum in Sweden. Several members of the author's family have fled Peru; some of them were granted asylum in Sweden or the Netherlands.¹ The author's brother has filed an application with the European Commission of Human Rights, which was declared admissible on 18 April 1996. On 6 December 1996, the Commission adopted its report in which it found that the applicant's expulsion to Peru would not violate article 3 of the Convention.

2.3 The author arrived in Sweden on 26 June 1990 and applied for political asylum on 6 August 1990. On 30 March 1993, the Swedish Board of Immigration rejected his application for political asylum, considering that the author had participated in serious non-political criminality. On 16 December 1994, the Aliens Appeal Board found that the author had undoubtedly been politically active but that he could not be regarded as a refugee according to chapter 3, paragraph 2, of the Aliens Law. The Appeal Board considered that, although the author could be seen as a de facto refugee, his armed political activities fell within the framework of article 1 F. of the 1951 Convention relating to the Status of Refugees, and therefore particular reasons existed not to grant him asylum. The Appeal Board forwarded the case to the Swedish Government for decision. On 12 October 1995, the Government confirmed the earlier decision not to grant the author asylum.

The complaint

3.1 The author claims that his return to Peru would constitute a violation by Sweden of article 3 of the Convention; the author states that the police usually torture people in cases concerning "terrorism and treason". The author asks the Committee to request Sweden not to expel him while his communication is under consideration by the Committee.

3.2 In support of the author's claim, reference is made to an enclosed letter, dated 18 August 1994, from the Office of the United Nations High Commissioner for Refugees' regional office concerning the author's mother. The letter states that the mother's "subjective fear of persecution can be supported by objective elements". Reference is also made to a letter by Human Rights Watch of 26 October 1995, concerning another Peruvian refugee claimant, which states that "returnees from Sweden are now considered to be de facto Shining Path guerrillas". Finally, reference is made to an enclosed copy of a July 1995 report by Human Rights Watch attesting to the practice of torture in Peru.

3.3 It is stated that the same matter has not been submitted for examination under any other procedure of international investigation or settlement.

State party's observations

4. On 15 February 1996, the Committee, through its Special Rapporteur, transmitted the communication to the State party for comments and requested it not to expel the author while his communication was under consideration by the Committee.

5.1 By its submission of 12 April 1996, the State party challenges the admissibility of the communication but also addresses the merits of the case. It requests the Committee, should it not find the communication inadmissible, to examine the communication on its merits as soon as possible. It informs the Committee that its national Immigration Board has stayed the enforcement of the expulsion order against the author until 25 May 1996.

5.2 As regards domestic procedures, the State party explains that the basic provisions concerning the right of aliens to enter and to remain in Sweden are contained in the 1989 Aliens Act. For the determination of refugee status there are normally two instances, the Swedish Immigration Board and the Aliens Appeal Board. In exceptional cases, an application is referred to the Government by either of the two boards. Chapter 8, section 1, of the Act corresponds to article 3 of the Convention against Torture and states that an alien who has been refused entry or who is to 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 it will otherwise be in conflict with humanitarian requirements to enforce the decision on refusal of entry or expulsion.

5.3 As regards the facts of the author's story, the State party emphasizes that he was able to leave his country with a valid passport, issued after the police allegedly were looking for him. The author has never claimed to have bribed officials into giving him a passport, indicating, according to the State party, that the author was not being sought by the police when he legally left the country in June 1990. Further, the State party emphasizes that according to the author's own statements, he was never arrested, detained, prosecuted or

sentenced for his activities for Shining Path. The only time he was arrested, in April 1989, he was released after 24 hours without having been tortured.

5.4 The State party explains that the Government, when deciding that the author should not be granted asylum in Sweden, also took into account whether the enforcement of the expulsion order would violate chapter 8, section 1, of the Aliens Act. The Government, after having carefully examined all elements of the author's case, concluded that it would not.

5.5 The State party argues that the communication is inadmissible as incompatible with the provisions of the Convention, for lacking the necessary substantiation.

6.1 As to the merits of the communication, the State party refers to the Committee's jurisprudence in the case of Mutombo v. Switzerland,² and the criteria established by the Committee, first, that a person must personally be at risk of being subjected to torture and, second, that such torture must be a necessary and foreseeable consequence of the return of the person to his or her country.

6.2 As regards the general situation of human rights in Peru, the State party, aware of the information collected by international human rights organizations, submits that political violence in the country has decreased. The State party further submits that a number of refugee claimants, allegedly members of Shining Path, have been deported to Peru from Sweden and that no substantiated reports of torture or ill-treatment of those persons upon their return to Peru exist. In this connection, the State party points out that its embassy in Lima has been in contact with some of the deportees and that no incidents have been reported. The State party argues that the author will not be in a worse situation than that of those who were deported earlier. The State party notes that no consistent pattern of gross, flagrant or mass violations of human rights exists in Peru.

6.3 The State party further recalls the terrorist character of Shining Path and contends that crimes committed in the name of that organization should not constitute a reason for granting asylum. The State party refers in this context to article 1 F. of the 1951 Convention relating to the Status of Refugees.

6.4 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 of a person being 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.

6.5 The State party explains its reasons for concluding that there are no substantial grounds for believing that the author would personally be at risk of being subjected to torture upon his return to Peru. It recalls that the author has been arrested only once, in April 1989 and was released after 24 hours, and that there are no indications that he was subjected to torture. Further, the author was able to obtain a valid passport and to use it to leave Peru. It appears that he is not wanted by the police for terrorist or other acts. There is no indication that his

activities for Shining Path are known to the authorities. Moreover, the State party argues that even someone wanted by the police for criminal acts does not necessarily risk being subjected to torture. According to the State party's sources, such a person will be arrested at the airport upon arrival, transported to a detention centre and placed under the supervision of a public prosecutor. The State party submits that the risk of torture in a detention centre is very limited. Finally, the State party explains that the author is free to leave Sweden at any time to a country of his choice.

6.6 With reference to the arguments summarized above, the State party argues that no sufficient evidence exists to demonstrate that the risk of the author being tortured is a foreseeable and necessary consequence of his return.

Counsel's comments

7.1 In her comments on the State party's submission, counsel challenges the State party's interpretation of article 1 F. of the 1951 Convention relating to the Status of Refugees and argues that the author's membership of Shining Path does not suffice to exclude him from the protection of that Convention.

7.2 As regards the general situation of human rights in Peru, counsel refers to the United States Department of State Country Report on Human Rights Practices for 1995, which states that torture and brutal treatment of detainees are common and that Government security forces still routinely torture suspected subversives at military and police detention centres.

7.3 As regards the author's valid passport, counsel states that this was indeed obtained through bribes, without further specifying her contention. She claims that it is possible to obtain a passport and leave the country despite serious problems with the authorities.

7.4 As regards the State party's statement that it is not aware of any case in which reliable information exists that a person was tortured upon being returned from Sweden to Peru, counsel refers to the case of Napoleon Aponte Inga, who, upon his return, was arrested at the airport and accused of having been a terrorist ambassador in Europe. He was brought to trial, acquitted after four months and then released. According to counsel, during his detention he was subjected to torture.

7.5 Counsel concludes that the State party underestimates the risk of the author being subjected to torture upon his return. She refers to reports indicating that torture is widely practised in Peru and states that the author belongs to a well-known family, one of his cousins having been killed by security forces and another cousin having disappeared.

The Committee's admissibility decision

8. At its sixteenth session, the Committee considered the admissibility of the communication and found that no obstacles to the admissibility of the communication existed.

9. The Committee noted that both the State party and author's counsel forwarded observations on the merits of the communication and that the State party had requested the Committee, if it were to find the communication admissible, to proceed to the examination of the merits of the communication. Nevertheless, the Committee considered that the information before it was not sufficient to enable it to adopt its Views.

10.1 In particular, the Committee wished to receive from author's counsel more precise and detailed information and substantiation of the claim that the author's house was searched by the police on 1 November 1989, in particular whether there were witnesses to this search and how the author found out about it. The Committee also wished to be informed whether the police returned to the house to look for the author on further occasions and when and under what circumstances the author went into hiding.

10.2 With regard to the author's passport, counsel was requested to elaborate on how the author obtained his passport on 1 April 1990 and by whom the passport was issued. The Committee further appreciated receiving information as to the precise date on which the author left his country and his means of transportation. Counsel was requested to explain whether the author took any precautions and, if so, what ones, so as to not be stopped at the border, since he was travelling under his own name. Finally, the Committee wished to know what indications the author had that the police were looking for him at the present time and why he believed that if he were returned he would be in danger of being subjected to torture.

10.3 The Committee also wished to receive from the State party more detailed information regarding its statement that it was not aware of returnees from Sweden being tortured or ill-treated upon return. The Committee would appreciate it if the State party would clarify why the author's mother and his sisters were allowed to stay in Sweden but not the author. In particular, the Committee would like to know whether the distinction between the author and his mother and sisters was based solely on the exception under article 1 F. of the 1951 Convention relating to the Status of Refugees, or whether additional grounds existed to give the mother and sisters protection, but not the author.

11. Accordingly, on 8 May 1996, the Committee decided that the communication was admissible.

State party's observations on the merits

12.1 By its submission of 12 September 1996, the State party explains that its conclusion that no consistent pattern of gross, flagrant or mass violations of human rights exists in Peru is based on recent information received from the embassy in Lima. The embassy referred, inter alia, to the 1995 report of the local Peruvian human rights organization, La Coordinadora, which supports the State party's conclusion that it is mostly poor people, peasants and young criminals who are exposed to torture during police interrogations.

12.2 The State party reiterates that there are no substantial grounds for believing that the author personally would be at risk of being subjected to torture upon his return to Peru, and states that this conclusion is based on information from its embassy in Lima with regard to

the treatment of returned Peruvians, who have unsuccessfully requested asylum abroad by referring to activities they carried out for the benefit of Sendero Luminoso. The embassy has obtained this information through interviews and contacts with well-informed persons and human rights organizations in Peru. The State party does not reveal its sources for reasons of protection.

12.3 The State party acknowledges that the author's mother and sisters have been given de facto refugee status because they belong to a family the members of which have been involved with Sendero Luminoso. The State party adds that the author's mother and sisters had been given the benefit of the doubt. The author, however, has himself been active for Sendero Luminoso, an organization to which article 1 F. of the 1951 Convention relating to the Status of Refugees applies. In this context, the State party explains that it was not the membership of Sendero Luminoso that was decisive but the author's own statements according to which he had handed out home-made bombs in November 1989, which were actually used against the police. According to the State party, there was no reason why the author should be allowed to stay in the country and there were no obstacles to the enforcement of the expulsion order.

12.4 The State party reiterates that there is no indication that the authorities attempted to prevent the author from leaving Peru, which supports the State party's view that he is of no interest to the Peruvian police. The State party submits that it has requested its embassy in Lima to investigate the matter and that the embassy, on 14 August 1996, reported that the author has not been and is not wanted by the police for terrorist or similar acts in Peru.

12.5 The State party further questions the author's trustworthiness, since he has not been able to mention his cell leader's name or the name of the friend who informed him that he was wanted by the police.

12.6 The State party maintains that the author has not substantiated his assertion that an enforcement of the expulsion order to Peru would violate article 3 of the Convention. In this context, the State party observes that it is a general principle that the burden of proof lies with the person submitting a claim.

Counsel's observations

13.1 By its submission of 16 September 1996, counsel explains that on 1 November 1990, when the author's home was searched, his mother and his brother were present. At 7 p.m., the door was banged on by two men in civilian clothes who asked for the author. When they were told that he was not at home, they searched his room and took books and other documents with them. During the search, a car without registration plates was parked outside the house, occupied by two armed men. When the men left, they told the author's mother to tell him to present himself the following day at DIRCOTE, the anti-terrorist police force, as they wanted to question him about his university friends. They added that if he did not appear, things would be worse for him. After the police left, the author's brother went to see the author's friends and asked them to tell him not to return home. Counsel adds that the police did not come again to the house to look for the author.

13.2 As regards the author's passport, counsel states that it was issued by the Dirección de Migraciones in Lima and that the author's friend did all the work for him. Counsel explains that, at the time, everybody could obtain a legal passport without a problem. One could also use tramitadores, who would apply for passports in the name of others for a fixed fee. Counsel refers to a letter from Amnesty International, Swedish section, of 10 May 1995, addressed to the Swedish Government, which stated that the fact that a Peruvian asylum seeker has left the country legally with a passport should not be considered very important when considering his case.

13.3 The author left the country on 24 June 1990 by plane (Aeroflot). Friends bribed a person at the airport, and for protection the author was accompanied by a member of parliament (of the Unión de Izquierda Revolucionaria) and former member of the Comisión de Justicia y Derechos Humanos in Peru.

13.4 Counsel maintains that the author would be in danger if returned to Peru. She bases this on the fact that two of his cousins have been victims of severe persecutions. In this context, counsel recalls that one of the author's cousins disappeared and another was killed. Since he belongs to a politically active family, the author has every reason to fear for his security if he were to return to Peru.

13.5 Counsel adds that the author's fears have grown because of newspaper articles in Peru about the case of his brother which is before the European Commission of Human Rights, in which it is mentioned that his brother is a member of Sendero Luminoso.

13.6 In a further submission of 24 October 1996, counsel refers to a publication by Human Rights Watch/Helsinki of September 1996, entitled "Swedish asylum policy in a global human rights perspective". In the publication, criticism is expressed about Swedish policy towards Peruvian asylum seekers. According to Human Rights Watch, reforms in Peru have been minimal, travel documents can be easily obtained by bribing officials and faceless courts continue to prosecute civilians.

13.7 According to counsel, the Human Rights Watch/Helsinki reports show how badly informed the Swedish authorities are about the situation in Peru. She refers to three cases of refoulement which suggest, according to counsel, that the primary aim of the Swedish policy is to limit immigration.

13.8 As regards the State party's claim that the author would not be in danger of being tortured upon his return to Peru, counsel notes that the State party bases itself on unrevealed sources. Counsel argues that the State party's mere reference to a non-provided report does not suffice as proof and requests a copy of the written report by the embassy, with the name of the sources deleted if necessary.

13.9 Counsel also refers to information provided by the Swedish embassy in Lima in the case of the author's mother, which proved to be wrong on the facts. This, she claims, means that information provided by the Swedish embassy must be treated with caution. Counsel also refers to the case of Napoleon Aponte Inga (who was tortured upon his return to Peru),

of which the Swedish embassy seems to be unaware, although he was finally granted de facto asylum in Sweden.

13.10 Counsel submits that, while the situation in Peru may have improved as regards disappearances and judicial killings, the use of torture is still widespread and systematic. She refers to a report of Human Rights Watch/Americas of August 1996, which indicates that torture is generally practised in cases involving terrorism and thus contradicts the State party's argument that it is mainly poor people, peasants and young criminals who suffer torture.

13.11 Counsel contests the State party's argument that the author is untrustworthy because he cannot name the leader of his cell. She refers to her submission of 7 November 1990 to the Immigration Board in which she disclosed the name of the cell leader.

13.12 Finally, the author refers to the importance attached by the Office of the United Nations High Commissioner for Refugees to the experience of relatives. In this context, she recalls that two of the author's cousins were killed for political reasons and another cousin was granted political asylum in the Netherlands. Counsel also submits that although the author has been active for Sendero Luminoso, he himself never committed any crime against peace, a war crime or a crime against humanity, and therefore he should not be excluded from protection under article 1 F. of the 1951 Convention relating to the Status of Refugees.

Issues and proceedings before the Committee

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

14.2 The Committee must decide, pursuant to article 3, paragraph 1, whether there are substantial grounds for believing that Mr. Tapia Paez would be in danger of being subjected to torture upon return to Peru. 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. 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 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.

14.3 The Committee notes that the facts on which the author's asylum claim are based are not in dispute. The author is a member of Sendero Luminoso and on 1 November 1989 participated in a demonstration where he handed out leaflets and distributed handmade

bombs. Subsequently, the police searched his house and the author went into hiding and left the country to seek asylum in Sweden. It is, further, beyond dispute that the author comes from a politically active family, that one of his cousins disappeared and another was killed for political reasons, and that his mother and sisters have been granted de facto refugee status by Sweden.

14.4 It appears from the State party's submission and from the decisions by the immigration authorities in the instant case, that the refusal to grant the author asylum in Sweden is based on the exception clause of article 1 F. of the 1951 Convention relating to the Status of Refugees. This is illustrated by the fact that the author's mother and sisters were granted de facto asylum in Sweden, since it was feared that they may be subjected to persecution because they belong to a family which is connected to Sendero Luminoso. No ground has been invoked by the State party for its distinction between the author, on the one hand, and his mother and sisters, on the other, other than the author's activities for Sendero Luminoso.

14.5 The Committee considers that the test of article 3 of the Convention is absolute. Whenever substantial grounds exist for believing that an individual would be in danger of being subjected to torture upon expulsion to another State, the State party is under obligation not to return the person concerned to that State. The nature of the activities in which the person concerned engaged cannot be a material consideration when making a determination under article 3 of the Convention.

14.6 In the circumstances of the instant case, as set out in paragraph 14.3 above, the Committee considers that the grounds invoked by the State party to justify its decision to return the author to Peru do not meet the requirements of article 3 of the Convention.

15. In the light of the above, the Committee is of the view that, in the prevailing circumstances, the State party has an obligation to refrain from forcibly returning Mr. Gorke Ernesto Tapia Paez to Peru.

1/ His brother's application was refused in Sweden, while his mother and two sisters have been granted asylum as de facto refugees.

2/ Communication No. 13/1993, Mutombo v. Switzerland; Views adopted on 27 April 1994.

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