

Case Law

J.H.A. v. Spain

COMMITTEE AGAINST TORTURE: Forty-first session
(3-21 November 2008)

CAT/C/41/D/323/2007 21 November 2008

DECISION Communication No. 323/2007

Submitted by: J.H.A. On behalf of: P.K. *et al.*

State party: Spain

Date of the complaint: 7 May 2007 (initial submission)

Date of the present decision: 10 November 2008

Subject matter: Detention of 23 Indian immigrants in Mauritania under Spanish control

Substantive issues: Procedural issues: Lack of jurisdiction of the State party, absence of *locus standi*, failure to exhaust available domestic remedies Article of the Convention.

* Made public by decision of the Committee against Torture.

The Committee against Torture, established under article 17 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Meeting on 11 November 2008,

Having concluded its consideration of complaint No. 323/2007, submitted by J.H.A. under article 22 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,

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

Adopts the following:

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

1.1 The complainant is J.H.A., a Spanish citizen and member of the non-governmental organization *Colectivo por la Justicia y los Derechos Humanos*.

He is acting on behalf of P.K. *et al.*, all Indian citizens detained in Mauritania at the time of submission of the complaint.

1.2 In accordance with article 22, paragraph 2, of the Convention, the Committee transmitted the complaint to the State party by a *note verbale* dated 22 June 2007. At the same time, the Committee requested the State party to take the necessary measures within its power to ensure adequate conditions of detention for the alleged victims, including access to a lawyer and the right to be heard by the competent authorities.

Factual background

2.1 On 31 January 2007, the Spanish maritime rescue tug *Luz de Mar* sailed from Tenerife in the Canary Islands, Spain, in response to a distress call sent by the cargo vessel *Marine I*, which had capsized in international waters with 369 immigrants from various Asian and African countries on board.

2.2 On 4 February 2007, the *Luz de Mar* reached the *Marine I* and towed it. At that time, diplomatic negotiations began between Spain, Senegal and Mauritania regarding the fate of *Marine I*, as a result of which the two ships remained anchored off the Mauritanian coast for eight days.

2.3 On 9 February, a Spanish Civil Guard patrol boat carrying members of the non-governmental organization *Médecins du Monde*, a representative of the Spanish Ministry of the Interior and Civil Guard personnel, accompanied by a delegation from Guinea, which had come to identify persons of African origin aboard the *Marine I*, tried to reach the place where the ships were anchored. However, the operation was hampered by poor sea conditions. On 11 February, the operation resumed, with the additional presence of Spanish Red Cross personnel and Mauritanian health personnel. After boarding the *Marine I*, members of the operation provided health care to the passengers, who were in a poor state of health.

2.4 On 12 February, the Spanish and Mauritanian Governments concluded an agreement that allowed the passengers of the cargo vessel to disembark in the port of Nouadhibou, Mauritania, the same day.¹ In the hours that followed, the Spanish national police force proceeded to identify the immigrants who had landed. Of these, 35 persons of Asian origin were transferred to the Canary Islands to initiate asylum application procedures on the advice of the Spanish Commission for Refugee Assistance (CEAR).

¹ The complainant notes that this agreement provided for the payment of €650,000 to Mauritania by Spain for transfer of the immigrants to Mauritania.

Another 35 persons, of African origin, were transferred to the Canary Islands on 13 February on an aircraft chartered by Spain. The complainant argues that neither the proper procedures nor the guarantees provided for under Spanish legislation governing aliens were observed during this transfer. He adds that, according to official Spanish sources, the place to which the persons were transferred had to be kept secret for security reasons. On 16 March, these individuals were transferred to Guinea, although their precise whereabouts remain unknown.

2.5 On 14 February 2007, the immigrant identification process was completed. According to the complainant, all but 23 of the alleged victims requested asylum or signed voluntary repatriation agreements and were repatriated to India or Pakistan with the assistance of the International Organization for Migration (IOM). During the recognition procedure, the alleged victims declared that the reason for their departure from India was fear of ostensible persecution as a result of the conflict in Kashmir.

2.6 The 23 alleged victims, who refused to sign voluntary repatriation agreements, remained in detention under Spanish control in Nouadhibou in a former fish-processing plant. The complainant states that the vessel on which the immigrants were detained lacked sufficient light and ventilation and that the detainees were not allowed out. He added that although the vessel was large, the detainees were obliged to remain confined in a restricted area and to sleep on the ground, on plastic and blankets. He reports that access to toilet and shower facilities was subject to the authorization of the guards supervising the detainees, and that the latter were occasionally forced to urinate in bottles.

2.7 On 4 April 2007, the complainant submitted a complaint to the Office of the Attorney General, which was deemed inadmissible.

2.8 On 6 April, the alleged victims began a hunger strike in protest against their situation; they ended the strike three days later, after allegedly reaching an agreement with the Spanish authorities, which had offered them three options: remaining in the detention centre indefinitely, repatriation or transfer to one of the following third countries: Morocco, Senegal, Mali, Egypt or South Africa. The complainant states that the detainees exercised the third option.

2.9 At the time the complaint was submitted, three months after they had left the *Marine I*, the alleged victims were still being detained in the place and conditions described. The complainant states that although the alleged victims were detained in Mauritania, they were effectively under Spanish control. He alleges that Spain assumed responsibility for them by

rescuing them in international waters and was in charge of their supervision during the entire period of their detention in Nouadhibou.

2.10 The complainant argues that the alleged victims were unable to submit a complaint to the Committee themselves because they were detained in Mauritania, ostensibly without access to a lawyer and with no possibility of contacting their families. He notes that most of them have a low cultural level and therefore do not know their rights.

The complaint

3.1 The complainant alleges that Spain has violated article 1, paragraph 1, articles 3, 11, 12 and 13, article 14, paragraph 1, and article 16, paragraph 1, of the Convention.

3.2 He argues that the treatment of the alleged victims amounts to torture as defined in article 1.

3.3 He alleges a violation of article 3 because, if returned to India, the alleged victims would be subjected to torture or cruel, inhuman and degrading treatment, taking into account the conflict in Kashmir and the persecution they would allegedly face as a result of this conflict.

The State party's observations on admissibility

4.1 In its *note verbale* dated 21 August 2007 the State party argues that the complaint is inadmissible because the complainant is not competent to represent the alleged victims. The State party points out that, as he himself acknowledges, the complainant has not been empowered to act on anyone's behalf before the Committee.

4.2 The State party also maintains that the complaint is inadmissible because the complainant has failed to exhaust domestic remedies, having never attempted to initiate proceedings in Spain. It reports that proceedings relating to this matter are taking place at the national level, having been instituted by the Spanish Commission for Refugee Assistance (CEAR), which was duly authorized to do so by the alleged victims; these proceedings led to the filing of an application for the remedy of administrative litigation on 5 March 2007, a decision on which is currently pending in the National High Court.

4.3 The State party maintains that the complainant's account of the incidents is biased and tendentious. It denies that detainees were "piled on top of each other" in the Nouadhibou detention facility, and it maintains that

the vessel in which the detainees were found was spacious and adequate for an extended stay. It adds that the 369 immigrants on board the *Marine I* were in very poor hygiene (scabies) and health (dehydration and disease) when they were rescued in international waters, and that they received emergency humanitarian and medical treatment on board the ship.

4.4 The State party points out that its actions were at all times consistent with the SOLAS and SAR Conventions,² and that it was Senegal, the State in whose area of responsibility for rescue at sea the vessel was located, that authorized their transfer to the nearest port, which happened to be Nouadhibou, Mauritania. The emergency diplomatic agreement concluded with the Mauritanian authorities allowed Spain to provide technical support to Mauritania in the form of humanitarian and medical assistance.

4.5 The State party notes that both the Office of the United Nations High Commissioner for Refugees (UNHCR) and the International Organization for Migration (IOM) participated in the identification and repatriation of the persons on board the *Marine I*, and that both of these organizations commended the Spanish Government on the way it had handled the situation. It points out that during the identification of the persons on board the vessel, IOM informed each of the interviewees individually of their right to request asylum and refugee status. Those interviewees who believed that they fell into one of the categories established under asylum and refugee law were taken to the Canary Islands for a decision by the Spanish Government; there they were again interviewed by representatives of UNHCR.

4.6 The State party points out that both IOM and the identification missions from India and Pakistan sought to interview the 23 alleged victims on numerous occasions and that the latter objected to such interviews. According to statements by the UNHCR spokesperson in Spain, a team of lawyers from the Office met with the 23 immigrants; UNHCR subsequently issued a communiqué through the team stating that the interviewees' profile was not strong enough to warrant their being granted refugee status and that they had not given sufficient evidence to indicate that their lives would be in danger if they returned to their countries of origin. On 20 April 2007, the High Commissioner for Refugees addressed a letter to the President of the Government of Spain affirming that "[there was] no one in this group who [required] international protection".

² The International Convention for the Safety of Life at Sea, 1974 (SOLAS Convention) and the International Convention on Maritime Search and Rescue, 1979 (SAR Convention).

4.7 According to the State party, as soon as the passengers of the *Marine I* disembarked, the Spanish Government ensured that they were directly transferred to a reception centre that had been adequately equipped with tents and cots. The individuals received three hot meals a day adapted to their dietary requirements. They also received prompt medical treatment from the Red Cross and *Médecins du Monde*; they were treated for scabies and underwent surgical procedures. They were also allowed to take one shower a day and were given a change of clothes once a week.

4.8 Lastly, the State party affirms that the diplomatic agreement concluded with Mauritania provided, inter alia, for the temporary presence in Mauritanian territory of Spanish security forces to provide the Mauritanian authorities with technical support and to ensure that intake and repatriation operations proceeded normally. It consequently denies that the immigrants were ever irregularly detained.

The complainant's comments

5.1 On 18 October 2007, the complainant reiterated his arguments regarding his capacity to represent the alleged victims and the exhaustion of domestic remedies. He states that the existence of a domestic procedure initiated by CEAR does not prevent the Committee from ruling on the present complaint, especially as the application for the remedy in question was rejected.

5.2 The complainant maintains that the only safe port in the area to which the immigrants on board the *Marine I* could have been transferred was in the Canary Islands, Spain, given the living conditions in African coastal countries. He notes that it took two weeks from the time the vessel was found until it was taken to Mauritania and that during this time no medical or humanitarian assistance was provided to the passengers, nor was any of them evacuated on health grounds, and that it was only when they disembarked that "serious" first aid, which by law must be provided immediately, was made available. The complainant maintains that during these two weeks the 369 persons on board the *Marine I* were crammed together below deck, receiving food by means of ropes, and that no medical personnel was able to provide assistance or board the vessel to ascertain their state of health.

5.3 The complainant maintains that because Mauritania had not signed the SAR Convention, it did not feel obliged to admit the immigrants to its territory and that Spain paid Mauritania to take them in, while the immigrants, according to newspaper reports, were kept under Spanish and Mauritanian control.

5.4 Lastly, the complainant reiterates his allegations regarding the conditions of detention of the alleged victims as described in the initial complaint.

State party's observations on the merits

6.1 In notes dated 18 December 2007 and 3 January 2008, the State party reiterates its arguments regarding the admissibility of the complaint, namely the complainant's alleged lack of competence to submit a complaint to the Committee under article 22 of the Convention and the failure to exhaust domestic remedies. It likewise maintains that Spain bears no responsibility because the incidents took place outside its jurisdiction. It points out that the action it took far exceeded its international obligations relating to assistance and rescue at sea, which were limited to rescuing the boat and bringing it to a safe port without any concomitant responsibility for the treatment, care and repatriation of the passengers who had been on board.

6.2 The State party informs the Committee that, in its decision of 12 December 2007, the National High Court rejected the application for administrative litigation submitted by CEAR under the Special Act for the protection of fundamental human rights. The National High Court held that the incidents in question constituted political acts on the part of the Government, namely acts of humanitarian assistance performed pursuant to international norms, and that they were exempt from judicial prosecution under Act No. 29/1988 of 13 July 1988, regulating the remedy of administrative litigation. The High Court also held that the measures agreed in respect of the persons offloaded at Nouadhibou were taken by the Mauritanian authorities pursuant to the laws of that country, and that it was thus up to the Mauritanian courts to determine whether the irregularities alleged by CEAR had actually occurred. The State party notes that the aforementioned decision is likely to be reviewed and that it confirms that domestic procedures relating to this matter do exist, and it argues that the complainant is acting inappropriately and in abuse of the right to submit complaints.

6.3 According to the final report of *Médecins du Monde* issued on 29 July 2007, 6 of the 23 alleged victims were taken to Melilla, Spain; 1 was granted refugee status by Spain while the remaining 5 were permitted to take up residency in Spain on humanitarian grounds.

6.4 Lastly, the State party reiterates its previous arguments relating to the conditions of detention of the alleged victims and contests the complainant's description of events.

The complainant's comments

7.1 On 18 February 2008, the complainant reiterated his previous arguments on admissibility and the merits of the complaint.

7.2 The complainant maintains that the action taken by the State party was not motivated by humanitarian considerations but by an international obligation, and that it had assumed its responsibility for the alleged victims at every phase of its action.

7.3 According to information contained in press articles submitted by the complainant, in July 2007, 13 of the 23 alleged victims were repatriated, 4 were sent to Portugal and 5 were taken to the short-stay residential facility for immigrants (CETI) in Melilla, Spain. The complainant invites the Committee to visit this facility to take statements from the five detainees. He claims that as a volunteer social activist he lacks the necessary resources and permits to travel to Melilla and take part in this investigation.

Issues and proceedings before the Committee

8.1 Before considering any claims contained in a communication, the Committee against Torture must decide whether or not it is admissible under article 22 of the Convention.

8.2 The Committee takes note of the State party's argument that the complainant lacks competence to represent the alleged victims because the incidents forming the substance of the complaint occurred outside Spanish territory. Nevertheless, the Committee recalls its general comment No. 2, in which it states that the jurisdiction of a State party refers to any territory in which it exercises, directly or indirectly, in whole or in part, de jure or de facto effective control, in accordance with international law.³ In particular, it considers that such jurisdiction must also include situations where a State party exercises, directly or indirectly, de facto or de jure control over persons in detention. This interpretation of the concept of jurisdiction is applicable in respect not only of article 2, but of all provisions of the Convention, including article 22. In the present case, the Committee observes that the State party maintained control over the persons on board the *Marine I* from the time the vessel was rescued and throughout the identification and repatriation process that took place at Nouadhibou. In particular, the State party exercised, by virtue of a diplomatic agreement

³ General comment No. 2 (2007), CAT/C/GC/2/CRP.1/Rev.4, para. 16.

concluded with Mauritania, constant de facto control over the alleged victims during their detention in Nouadhibou. Consequently, the Committee considers that the alleged victims are subject to Spanish jurisdiction insofar as the complaint that forms the subject of the present communication is concerned.⁴

8.3 The Committee takes note of the State party's contention that the complainant is not competent to represent the alleged victims because they did not authorize him to do so. The complainant has affirmed that the alleged victims could not themselves submit a complaint to the Committee on account of their conditions of detention in Mauritania. The Committee would point out that, in accordance with subparagraph (a) of rule 107 of its rules of procedure, the individual designated to submit a complaint under article 22 of the Convention is the victim himself/herself, his/her relatives or designated representatives or others on his or her behalf when it appears that the victim is unable personally to submit the complaint, and when appropriate authorization is submitted to the Committee. In the present case, the alleged victims should have expressly authorized the complainant to approach the Committee on their behalf, unless it was impossible for them to do so, given their situation.⁵ The Committee observes that during their detention in Nouadhibou the alleged victims were interviewed by representatives of UNHCR, IOM and the non-governmental organization *Médecins du Monde*. It likewise observes that, with the authorization of the alleged victims, the Spanish Commission for Refugee Assistance applied for a remedy at the domestic level relating to the same events. Thus, the information before the Committee does not permit the Committee to conclude that it would not have been possible at any time to reach the alleged victims in order to obtain their consent to be represented before the Committee, particularly when application for a domestic remedy had already been made in connection with their situation. Nor can it be concluded that alleging a lack of financial resources exempts the complainant from obtaining the consent of the alleged victims who were subsequently moved to Melilla to act on their behalf. In such circumstances, the Committee considers that the complainant lacks competence to act on behalf of the alleged victims in accordance with article 22, paragraph 1, of the Convention.

⁴ See the Committee's decision in *Guengueng et al. v. Senegal*, communication No. 181/2001, adopted on 17 May 2006, para. 9.3.

⁵ See the decisions of the Human Rights Committee on admissibility in *E.H.P. v. Canada* (communication No. 67/1980), adopted on 27 October 1982, para. 8 (a); and *X v. Serbia* (communication No. 1355/2004), adopted on 26 March 2007, para. 6.3; and its Views in *Sultanova v. Uzbekistan* (communication No. 915/2000), adopted on 30 March 2006, para. 6.2; *Abbassi v. Algeria* (communication No. 1172/2003), adopted on 28 March 2007, para. 7.3; and *Benhadj v. Algeria* (communication No. 1173/2003), adopted on 20 July 2007, para. 7.3.

8.4 Having concluded that the complainant does not have *locus standi*, the Committee considers that there is no need to rule on the question of exhaustion of domestic remedies.

9. Accordingly, the Committee decides:

- (a) That the communication is inadmissible;
- (b) That this decision shall be communicated to the State party and to the complainant.