



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

Distr.
RESTRICTED*

CAT/C/38/D/281/2005**
5 June 2007

Original: ENGLISH

COMMITTEE AGAINST TORTURE
Thirty-eighth session
(30 April – 18 May 2007)

DECISION

Communication No. 281/2005

<u>Submitted by:</u>	Ms. Elif Pelit (represented by counsel)
<u>Alleged victim:</u>	The complainant
<u>State party:</u>	Azerbaijan
<u>Date of complaint:</u>	21 September 2005 (initial submission)
<u>Date of present decision:</u>	1 May 2007

Subject matter: Deportation to a country where complainant may be at risk of torture

Procedural issue: Level of substantiation of claim

Articles of the Convention: 3, 22

Rules of Procedure: Rules 108 (1), 109

[ANNEX]

* Made public by decision of the Committee against Torture.

** Re-issued for technical reasons

ANNEX

**DECISION OF THE COMMITTEE AGAINST TORTURE UNDER ARTICLE 22 OF THE
CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR
DEGRADING TREATMENT OR PUNISHMENT**

Thirty-eighth session

Concerning

Communication No. 281/2005

<u>Submitted by:</u>	Ms. Elif Pelit (represented by counsel)
<u>Alleged victim:</u>	The complainant
<u>State party:</u>	Azerbaijan
<u>Date of the complaint:</u>	21 September 2005 (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 1 May 2007,

Having concluded its consideration of complaint No. 281/2005, submitted to the Committee against Torture on behalf of Ms. Elif Pelit 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 complainant is Ms. Elif Pelit, born in 1972, a Turkish national of Kurdish origin, who at the time of submission of the communication was facing deportation from Azerbaijan to Turkey; she claimed that, in case of her forced removal to Turkey, she would risk torture in violation of article 3 of the Convention. She is represented by counsel.

1.2 By Note Verbale of 22 September 2005, the Committee transmitted the complaint to the State party, together with a request, under Rule 108, paragraph 1, of the Committee's Rules of Procedure from the Special Rapporteur on Interim Measures not to deport the complainant to Turkey, while her complaint is under consideration. On 1 December 2005, the State party informed the Committee that it would not deport the complainant, pending the Committee's final decision. Notwithstanding, on 13 October 2006, the State party extradited

the complainant to Turkey^{††}. By Note Verbale of 30 April 2007, the State party informed the Committee that the complainant was released from custody by decision of the Istanbul Court for Grave Crimes of 12 April 2007.

The facts as submitted by the complainant

2.1 From 1993 to 1996, the complainant was detained in Turkey on charges of “subversive activities and terrorism” for the PKK (Communist Party of Kurdistan). She was released after her acquittal by the Istanbul State Security Court, based on the insufficiency of evidence. She claims that while in detention, she was tortured, although she does not describe the acts of torture nor provides any medical certificate in corroboration.

2.2 In 1998, the complainant fled to Germany, where she was granted refugee status. In 2002 she began working as a journalist for a pro-Kurdish news agency. In February 2003, she was sent to Iraq to cover the events there. In November 2003, she covered a PKK press conference in Northern Iraq, which was broadcast on Al-Jazeera TV. In May 2004, the news agency’s office in Mosul was attacked by unidentified armed individuals, who took away her travel documents. On 6 November 2004, she entered Azerbaijan to contact the German Embassy and have her travel documents re-issued. Azerbaijani authorities then arrested her for illegal entry into the country.

2.3 On 3 December 2004, the Istanbul District Court for Grave Crimes sentenced the complainant in absentia to 10 years’ imprisonment, for her involvement in subversive activities for the PPK, because she attended a meeting in Northern Iraq as a journalist to cover a meeting of PKK members. On 6 December 2004, the Istanbul District Court requested her extradition from Azerbaijan.

2.4 On 17 March 2005, the Sharursk Court in Nakhchvan (Azerbaijan) sentenced her to a fine for illegal entry. Although the court ordered her release, she was arrested in the courtroom by agents of the Ministry of the Interior, who brought her to Baku and placed her in detention. On 2 June 2005, the Court for Serious Crimes of Azerbaijan decided to extradite her to Turkey. On 2 September 2005, the Court of Appeal confirmed this decision. This judgment became executory immediately. On 14 September 2005, the complainant lodged an appeal in the Supreme Court, but this appeal does not have suspensive effect, and she risks extradition at any time.

The complaint

3. The complainant claims that her deportation to Turkey would violate article 3 of the Convention, as there are substantial grounds for believing that, if deported, she would be subjected to torture or other inhuman treatment and forced to confess guilt. She would immediately be taken into custody and questioned by the Department for Fight against Terrorism. In the past years, Azerbaijan has returned an important number of individuals accused of links with the PKK to Turkey.

^{††} See paragraph 8.1

State party's observations on admissibility

4.1 On 1 January 2005, the State party challenged the admissibility of the communication, because the complainant did not produce sufficient proof in support of her allegation that in case of removal she would be at a foreseeable, real and personal risk of being subjected to torture or other inhuman treatment within the framework of article 3 of the Convention.

4.2 The State party observes that the general situation in Turkey at present does not allow to assume that persons (among them Kurds) deported to Turkey face any danger of torture. In 2003, the Reintegration into Society Act was adopted with the aim to stop the persecution of PKK members; several European Union Countries share this view.

4.3 The State party reiterates that under the jurisprudence of the Committee, a consistent pattern of gross violations of human rights in the country does not give sufficient grounds for the determination of a real risk of being tortured in the event of deportation; there must be "special grounds" indicating that an individual, personally, is facing a threat of being tortured. As pointed out by the Committee, substantial grounds must exist for an individual to claim that he or she faces a foreseeable, real and personal risk of being subjected to torture in the accepting country. The State party recalled the Committee's view that the burden of proof lies on the complainant and the risk of torture must be estimated on more serious grounds than those of mere theory and suspicion.

4.4 According to the State party, the above criteria are inconsistent with the author's allegation, to the effect that she "very probably" would face torture if extradited, because of an event that occurred as long ago as 1993.

4.5 The State party invoked the Committee's General Comment No.1, pursuant to which the risk has to be "highly probable, personal and present". An incident that took place almost 13 years ago cannot be considered as "recent". Besides, the applicant did not present any proof about her mistreatment, as is suggested on items (b) and (c) of the General Comment.

4.6 The State party observed that the Committee has constantly affirmed that the appraisal of facts and of proof on a certain case is not a prerogative of the Committee, but of the courts of the States parties to the Convention, if these courts do not violate the principle of independence; according to the State party this is not the case in the complainant's case.

4.7 In the present case, the courts of Azerbaijan have not determined the existence of "special grounds" and the presence of a "real, foreseeable and personal" risk of E.P. to undergo torture, if returned to Turkey. The complainant also did not carry out any political activity, which would have exposed her to particular risks.

4.8 The State party also affirmed that it has received diplomatic assurances from Turkey about the application of Article 14 of the European Convention on Extradition on the "Rule of Specialty" to Ms. Pelit. In case of her extradition, the complainant would not face any criminal prosecution for a crime committed prior to her transfer, other than the offence for which her extradition was requested.

The complainant's comments on the State party's observations

5.1 On 20 February 2006, the complainant commented on the State Party's observations. She reiterates that she was tortured in Turkey during detention between 1993 and 1996. She affirmed that it is generally accepted that prior experiences of torture create a well-founded fear of being again subjected to this form of persecution upon return of a refugee to her country of origin. At that time she was subjected to torture on suspicion of PKK links. Today the same reasons are the basis of the current extradition request. Thus, according to her, the requirements of article 8 (b) of the Committee's General Comment No.1 are met.

5.2 The complainant reiterated that she has obtained refugee status in Germany, where she claimed past torture during her asylum application, and notes that her past torture was found credible by German authorities.

5.3 As to the State party's affirmation that the situation in Turkey has evolved, she observed that while Turkey has improved its record on torture, individuals in situations similar to hers have reportedly been subjected to torture in the recent past.

5.4 The complainant noted that the documents^{††} presented by the Turkish authorities are vague and unclear. In substantiation, she provided the following translation of a part of an unspecified document: "Considering Elif Pelit's membership in the illegal terrorist organization (as per the Article 168.2 of the Penal Code), she is sentenced to arrest in absentia. The arrest term is considered and has started on 2 December 2004 and will thus end on 3 December 2014."

5.5 The complainant claimed that Turkey was seeking her extradition to punish her for her political opinions; her punishment was likely to include torture.

5.6 The complainant requests her immediate release, to enable her to return in Germany, where she enjoyed the status of refugee.

Issues and proceedings before the Committee

Admissibility considerations

6.1 The Committee examined the admissibility of the communication during its 36th session, in May 2006. It ascertained that the same matter was not and is not being considered under another procedure of international investigation or settlement, and noted that the State party has not objected that domestic remedies have been exhausted. It noted the State party's indication that it had received, from the Turkish authorities, diplomatic assurances in relation to the application in the complainant's respect of the "rule of specialty", pursuant to article 14 of the European Convention on Extradition, and noted that the complainant had not presented any observation in this respect. It further observed that the matter in the present case was not about on which grounds and whether the complainant would be judged in the event of her removal to Turkey, but about whether she would be at risk of torture there.

6.2 The Committee further noted that the State party has challenged the admissibility of the communication because the complainant had failed to produce sufficient proof that in the

^{††} It is unclear which documents the complainant exactly refers to.

event of her removal, she would be at a foreseeable, real and personal risk of being subjected to torture or other inhuman treatment within the meaning of article 3 of the Convention. It also noted that the complainant contended that she was tortured in Turkey between 1993 and 1996, on suspicion of PKK links and that same reasons were the basis of her extradition request. The complainant had obtained refugee status in Germany, on these very grounds. Finally, the Committee noted the complainant's claim that although the general situation in Turkey has evolved in the past years, there have been cases of individuals suspected of links with the PKK being subjected to torture. The Committee concluded that the communication was admissible and invited the State party to present its observations on the merits.

State party's observations

7.1 By submission of 9 October 2006, the State party recalls the facts of the case: Ms. Pelit was arrested in Turkey in 1993. In 1996, the Istanbul State Security Court discharged her for lack of evidence. In 1998, she arrived in Germany on forged documents and obtained political asylum there in 1999.

7.2 On 6 November 2004, she was arrested in Azerbaijan and charged with illegal border crossing. When crossing the border, she was accompanied by armed individuals who retired after an exchange of gunfire with Azeri border guards. On 17 March 2005, the Sharursk District Court found her guilty under article 318.2 and fined her. After the payment of the fine, she was released.

7.3 During the preliminary investigation, on 6 December 2004, the Turkish authorities addressed an extradition request to the Ministry of Justice of Azerbaijan. The request was made pursuant to the 1957 European Convention on Extradition, and on the basis of a decision of 3 December 2004 by the Istanbul City Court for Particularly Serious Crimes, under which Ms. Pelit was charged pursuant to article 168/2 of the Criminal Code. An arrest warrant was issued against her in this relation. On this ground, the complainant was arrested again on 17 March 2005 and her case was transmitted to the Azerbaijan Court for Serious Crimes which is competent to deal with extradition cases. On 2 June 2005, this Court authorised the complainant's extradition. An appeal against this decision was filed with the Appeal Court, on 20 June 2005. On 2 September 2005, the Appeal Court confirmed the extradition. On 14 September 2005, the complainant's lawyer filed a cassation appeal in the Supreme Court. On 25 October 2005, the Supreme Court declared itself incompetent to deal with the appeal.

7.4 As to the complainant's allegations that she was granted refugee status and that article 33 of the Refugees Convention should have been applied in her case, the State party notes that she was recognised as a refugee by a German court in 1999. Foreign courts' decisions are not enforceable in Azerbaijan. In order to secure recognition of a foreign court's decision, a specific application should be made by the Supreme Court, under the provisions of the Civil Procedure Code. In the present case, no such request was made to the Supreme Court to have the German court's 1999 decision recognised.

7.5 According to the State party, refugee status is granted in Azerbaijan by the State's Committee on Refugee issues. The complainant was never granted such status. The State party notes that the UNHCR Office in Baku presented a statement to the Court for Serious Crimes, in which it observed that refugee status granted by a party to the 1951 Refugee

Convention must be recognised by all other parties to the Convention. The State party assumes that the Baku UNHCR Office referred to letter (f) of the Conclusion No 12 of the UNCHR's Executive Committee "*On the extraterritorial effect of the determination of refugee status*"^{§§}. However, this conclusion is of recommendatory nature only. The State party invokes another non binding conclusion of the UNHCR Executive Committee - No 8 - *On the Determination of Refugee Status*, according to whose (f), "the acceptance by a Contracting State of refugee status as determined by other States parties to these instruments would be generally *desirable*". However, letter (g) of the Conclusion No 12 provides that "refugee status as determined in one Contracting State should only be called into question by another Contracting State in exceptional cases, when it appears that the person manifestly does not fulfil the requirements of the Convention". According to the State party, if there were serious grounds such as "participation in the activities of illegal structures", and information from the Azeri security services that the complainant was an active member of the PKK, the competent State party authorities were right to question the complainant's refugee status.

7.6 According to the State party, Ms. Pelit's case does not fall under the scope of article 1 F(b) of the Refugee Convention, given that she committed a serious crime of non-political character outside of the country which granted her asylum, prior to her arrival in the asylum country. In addition, pursuant to letter (g) of UNHCR Executive Committee Conclusion No 17^{***}, "protection in regard to extradition applies to persons who fulfil the criteria of the refugee definition and who are not excluded from refugee status by virtue of Article 1(F) b".

7.7 According to the State party, the Azeri courts had no reason to consider that the crime for which the complainant's extradition was requested was of political nature or was related to a political crime, which is needed in order to refuse an extradition request pursuant the European Convention on Extradition. The Courts noted that Ms. Pelit had been arrested in Turkey on two past occasions, as a suspected member of a terrorist organisation, but had been released because of lack of evidence. This, according to the State party, demonstrates the impartiality of the Turkish courts in her case. The Azeri courts also considered whether the crimes imputed to the complainant constituted crimes under Azeri law (e.g. articles 278 and 279 of the Criminal Code).

7.8 The State party invokes UN Security Council Resolution 1373 of 28 September 2001, which prohibits the granting of asylum to individuals who finance, plan, support, or perform terrorist acts. The State party recalls the Committee's own statement of 22 November 2001, when the Committee expressed its confidence that whatever responses to the threat of international terrorism are adopted by State parties, such responses will be in conformity with their obligations under the Convention against Torture.

7.9 The State party recalls that letter (f) of UNHCR Executive Committee Conclusion No.17, stresses that "nothing in the present conclusions should be considered as affecting the

^{§§} "The Executive Committee: ... (f) Considered that the very purpose of the 1951 Convention and the 1967 Protocol implies that refugee status determined by one Contracting State will be recognized also by the other Contracting States".

^{***} Conclusion No 17, *Problems of extradition affecting refugees*.

necessity for States to ensure, on the basis of national legislation and international instruments, punishment for serious offences, such as the unlawful seizure of aircraft, the taking of hostages and murder". The term "*such as*" indicates that the list of crimes is not exhaustive, and that the 1980 list is obsolete as it does not contain serious crimes recognised by the international community since then (for example terrorism). Azeri courts correctly concluded that Ms. Pelit's acts qualified as serious crimes under paragraph 1 F (b) of the Refugee Convention. Therefore, the principle of non-refoulement does not apply in her case.

7.10 The State party recalls that the overall situation of human rights in Turkey does not permit the belief that individuals in general, and Kurds in particular, who are sent back there, risk to be subjected to torture. After the adoption by Turkey of the Reintegration into Society Act in 2003, numerous acts of persecutions against PKK supporters have ceased. Several European countries share this opinion^{†††}. Even if a consistent pattern of gross violations exists in a country, this does not, by itself, automatically give sufficient grounds to believe that a real risk of torture exists for an individual who has to be returned there. For the State party, the complainant has not demonstrated that she would likely be subjected to torture if extradited, as she was already tortured in 1993.

7.11 The State party recalls the Committee's jurisprudence that it is not for the Committee but for the State parties' courts to evaluate facts and evidence in a particular case, except if the courts openly violate the principle of impartiality. In the present case, the Azeri courts did not find any "particular grounds" nor the presence of "a real, foreseeable and personal" risk of torture for the complainant. The courts determined that the complainant had not performed any political activities that would make her more vulnerable to a risk of torture in case of her extradition^{†††}.

7.12 In addition, the Azeri authorities received diplomatic assurances about the application of article 14 of the European Convention on Extradition (Rule of speciality). Thus, in the event of the complainant's return to Turkey, she would not be prosecuted for any other crime than the one mentioned in the arrest warrant. The Azeri authorities received clear and convincing diplomatic assurances from Turkey which clearly ruled out torture and other forms of inhuman treatment against Ms. Pelit after extradition. Pursuant to these guarantees, the Azeri authorities have various possibilities to monitoring respect of Ms. Pelit's rights. This, according to the State party, complies with the recommendations of the UN Special Rapporteur on Torture in similar situations.

7.13 The State party further notes that the complainant could always complain to the European Court of Human Rights if she considers that her rights are breached.

7.14 With reference to different decisions of the Committee and the European Court of Human Rights, the State party recalls that the alleged risk of torture must be real, and not a mere possibility. The existence of such risk must be corroborated by prima facie evidence. No such evidence was put forward in the present case.

^{†††} In this relation, the State party refers to the observations made by the Netherlands in the context of Communication No 135/1999, S.G. v. the Netherlands, Views (no violation) adopted on 12 May 2004.

^{†††} The State party refers to letter (e) of the Committee's General Comment.

7.15 The State party concludes that the complainant failed to submit sufficient evidence that she faces a foreseeable, real and personal risk of torture and other ill-treatment contrary to article 3 of the Convention.

8.1 On 17 October 2006, the complainant's lawyer informed the Committee that Ms. Pelit had been extradited to Turkey on 13 October 2006. The lawyer has not been informed of this prior to his client's removal.

8.2 In the light of this information, the Committee, acting through its Special Rapporteur on Interim Measures, addressed a Note Verbale to the State party on 17 October 2006, in which it recalled that failure to respect a call for interim measures of protection undermines protection of the rights enshrined in the Convention. The State party was requested to provide clarifications in relation to the current status and whereabouts of Ms. Pelit.

8.3 On 8 November 2006, the State party reiterated the information contained in its submission of 9 October 2006. It added that it had contacted the Turkish authorities to arrange a meeting of an authorised representative with the complainant, to verify her situation and her health. The State party's submission was transmitted to counsel with a request for comments, but no reply has been received.

8.4 The Committee discussed the situation of the complainant during its 37th session, in November 2006. It decided to address a letter to the State party. In this letter, dated 24 November 2006, the Committee expressed grave concern about the manner in which the State party acted in the case. The Committee requested the State party to provide it with timely information on the current whereabouts and state of well-being of Ms. Pelit. On 8 February 2007, the State party was once more invited to present comments in this relation.

9.1 On 26 February 2007, the State party produced updated information on the status of the complainant in Turkey. It notes that since the extradition of the complainant, the Azeri Embassy in Turkey has engaged in regular monitoring of the conditions in which the complainant is detained, and a counsellor of the Embassy has had private conversations with her.

9.2 The complainant is currently detained in the penitentiary institution "Gebze M Tipli Kapali Infaz Kurumu" (Gebze City), and in a conversation with her, she had confirmed that she is detained under normal conditions. She has access to her lawyer and may have a phone conversation during five minutes every week. Every day, she is provided with newspapers.

9.3 The State party observes that detainees cannot receive food from outside, but the complainant is provided with meals three times per day. In her conversation with the Embassy counsellor, she expressed general satisfaction about the food, although she noted that sometimes, it was of poor quality. She had passed a medical check in the penitentiary institution and no health problems were detected.

9.4 In another private conversation with the Embassy representative, the complainant confirmed that she had not been subjected to torture or ill-treated by the penitentiary authorities. She also affirmed that her health conditions were satisfactory. The State party adds that it will continue to monitor the complainant's situation.

Issues and proceedings before the Committee

Breach of article 22 of the Convention

10.1 The Committee begins by noting that the author was removed to Turkey on 13 October 2006 despite a request for interim measures pursuant to rule 108 (9) of the rules of procedure, pursuant to which the State party was requested not to remove the complainant while her communication was pending before the Committee.

10.2 The Committee remains deeply concerned by the fact that the State party, after having initially acceded to the Committee's request, later disregarded it and removed the author to Turkey. The State party is requested to avoid such actions in the future. The Committee recalls^{§§§} that the State party, by ratifying the Convention and voluntarily accepting the Committee's competence under article 22, undertook to cooperate with the Committee in good faith in applying and giving full effect to the procedure of individual complaint established there under. The State party's expulsion of the complainant in spite of the Committee's request for interim measures nullified the effective exercise of the right to complaint conferred by article 22, and has rendered the Committee's final decision on the merits futile and devoid of object. The Committee thus concludes that by expelling the complainant under the circumstances described above, the State party breached its obligations under article 22 of the Convention.

Consideration of the merits

11. On the merits of the claim under article 3, the Committee has noted that in the present case, the complainant was recognised as a refugee in Germany, as it had been concluded that she would be at risk of persecution if she was returned to Turkey. Her refugee status remained valid at the time of her deportation to Turkey by the State party authorities. The Committee recalls Conclusion No 12 of the UNHCR's Executive Committee "*On the extraterritorial effect of the determination of refugee status*", pursuant to whose letter (f) "the very purpose of the 1951 Convention and the 1967 Protocol implies that refugee status determined by one Contracting State will be recognized also by the other Contracting States". The State party has not shown why this principle was not respected in the complainant's case, in circumstances where the general situation of persons such as the complainant and the complainant's own past experiences raised real issues under article 3. The Committee further notes that the Azeri authorities received diplomatic assurances from Turkey going to issues of mistreatment, an acknowledgment that, without more, expulsion of the complainant would raise issues of her mistreatment. While a certain degree of post-expulsion monitoring of the complainant's situation took place, the State party has not supplied the assurances to the Committee in order for the Committee to perform its own independent assessment of their satisfactoriness or otherwise (see its approach in *Agiza v Sweden*), nor did the State party detail with sufficient specificity the monitoring undertaken and the steps taken to ensure that it both was, in fact and in the complainant's perception, objective, impartial and sufficiently trustworthy. In these circumstances, and given that the State party had extradited the complainant notwithstanding that it had initially agreed to comply with the Committee's request for interim measures, the Committee considers that the manner in which the State

^{§§§} See, inter alia, *Brada v. France*, Communication No. 195/2002, Views adopted on 17 May 2005, paragraph 13.4.

party handled the complainant's case amounts to a breach of her rights under article 3 of the Convention.

12. 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 extradition of the complainant to Turkey constituted a breach both of articles 3 and 22 of the Convention.

13. Pursuant to rule 112, paragraph 5, of its rules of procedure, the Committee wishes to be informed, within 90 days, of the steps the State party has taken in response to the views expressed above.

[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.]
