

**Mohamed Refaat Abdoh Darwish v. Austria, Communication No.
679/1996 (31 March 1995), CCPR/C/60/D/679/1996.**

Communication No. 679/1996*

Submitted by: Mohamed Refaat Abdoh Darwish

Victim: The author's brother, Salah Abdoh Darwish Mohamed

State party: Austria

Date of communication: 31 March 1995 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 28 July 1997,

Adopts the following:

Decision on admissibility

1. The author of the communication is Mohamed Refaat Abdoh Darwish, the brother of Salah Abdoh Darwish Mohamed, an Egyptian citizen currently imprisoned in Austria. The author states that his brother is not able to file a complaint himself because of the conditions of his imprisonment. He claims that his brother is a victim of violations by Austria of articles 7, 14 (1), 14 (2), and 14 (3) of the International Covenant on Civil and Political rights.

The facts as presented by the author

2.1 The brother of the author was arrested at the end of January 1992 and charged with the murder of his divorced wife, Elfriede Patschg, on 29 January 1992. In the course of the investigations, his brother was also charged with wilfully casting false suspicion on the former husband of the victim, Kurt Maier. On 12 November 1992 the brother of the author was found guilty as charged and sentenced to life imprisonment by the Criminal Court of Graz. On 6 May 1993 the Austrian Supreme Court dismissed the appeal. With this, it is submitted, all domestic remedies have been exhausted.

2.2 The case for the prosecution was that, on 29 January 1992, Elfriede Patschg died as a result of several blows on the head, strangling, and twenty-one stabs with a kitchen-knife.

2.3 According to the author, the prosecution mainly relied on the expert testimony of one Dr. Zigeuner and the evidence of one Milan Reba as well as on the fact that, on 14 June 1988, the victim had appointed the defendant as her sole heir. In his testimony, Dr. Zigeuner attested that the defendant was motivated by hatred, rage, jealousy, sadism and vindictiveness as well as selfishness. Milan Reba testified that he noticed at nightfall a person on the balcony of the flat of the deceased at the time of the incident and at trial identified this person as the defendant.

2.4 The defence of the author's brother was based on alibi and on the fact that Milan Reba in the course of previous interrogations had testified that he did not recognize the person on the balcony.

2.5 On 4 February 1993 the defendant's lawyer filed the grounds of appeal which mainly concerned the severity of the penalty and the evaluation of the evidence. With respect to the evaluation of the evidence, he pointed out that the evidence Milan Reba had given in Court was inconsistent with the previous evidence he had given in the course of the investigations. He also stated that there were no traces of blood to be found on the clothes of the defendant, and that a good relationship had always existed between the deceased and the defendant and therefore the defendant had no motive for the murder. He claimed that the Court had not respected the principle "in dubio pro reo" and had shifted the burden of proof upon the defendant. The Austrian Supreme Court dismissed the appeal on 6 May 1993.

The complaint

3.1 It is submitted by the author that his brother is a victim of a violation of article 7 of the Covenant in view of the conditions of his detention. The author claims that after his arrest his brother received no medical treatment for a broken hand and that therefore his hand is now disfigured. The author further states that, after the judgement of the Court, his brother was held in solitary confinement for eight days in a cell without any daylight and that he was treated with medication which affected his mental capacities. The author claims that under the conditions of his detention, his brother attempted a suicide by cutting his arteries.

3.2 The author further points out, that, because of the solitary confinement, his brother was not able to file an appeal in time.

3.3 With reference to article 14, paragraph 3(a), the author points out that his brother was arrested when he was in hospital to receive medical treatment for his broken hand, that the reasons for his arrest were not revealed to him, and that he had no possibility to inform his family or the Egyptian embassy of his arrest. The author claims that there was no reason to detain his brother because there was no evidence against him, e.g. no traces of blood were found on his clothes and there was no indication that his brother had been at the scene of the crime.

3.4 As to article 14, paragraphs 1 and 2, the author submits that his brother was not regarded as innocent during the trial but that the burden of proof lay with him. He claims that the Court was not able to prove the guilt of his brother because there was no evidence. The author further claims that the court did not take into consideration the police report and the evidence of friends of his brother that could prove the good relations between his brother and the deceased, and that the public prosecutor hid documents that proved his brother's ignorance of the last will of the deceased in his favour.

3.5 Referring to article 14, paragraph 3(e), the author claims that there was one Nabil Tadruss who, in the course of the previous investigations, gave evidence that the defendant was together with him at home at the time of the incident, but that the public prosecutor hid the relevant documents. According to the author, his brother was not allowed to summon this witness in court.

3.6 The author further claims a violation of article 14, paragraph 3(f), because the Palestinian interpreter of the Court didn't translate correctly the words of his brother; he does not, however, specify his complaint, nor does he give examples of incorrect translation.

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

The State party's observations and the author's comments

4.1 By submission of 23 May 1996, the State party recalls the facts of the arrest and trial. It is submitted that Mr. Darwish' ex-wife was murdered on 29 January 1992, at about 6 a.m., by several heavy fist blows at her head, strangling and 21 stabs with a kitchen knife. Her body was found the following day. On 30 January 1992, Mr. Darwish was taken into custody at 7.00 pm while being in the Graz Accident Hospital, where he had been admitted on 29 January 1992, at 9.40 a.m., because of injuries which he claimed to have sustained in a traffic accident earlier that morning. He was transferred to the detention centre of the Regional Criminal Court of Graz on 1 February 1992 at 6.30 p.m.

4.2 On 12 November 1992, the Regional Criminal Court of Graz found him guilty of intentionally killing his ex-wife and of slandering her first husband in the course of the

preliminary investigations by falsely charging him. His appeal was dismissed on 6 May 1993 by the Supreme Court.

4.3 The State party argues that the author has not shown that he is entitled to present a complaint on his brother's behalf to the Committee. The State party states that there is nothing to prevent the alleged victim himself from submitting a communication under the Optional Protocol. According to the State party, the communication is thus inadmissible.

4.4 The State party further notes that the author has had correspondence with the secretary of the European Commission of Human Rights. It recalls its reservation under article 5, paragraph 2(a), of the Optional Protocol, that the Committee shall not consider any communication from an individual when the same matter has already been examined by the European Commission. According to the State party, the Committee is thus precluded from examining the present communication.

4.5 As regards the claim that the author's brother did not receive medical treatment for his broken hand, the State party argues that this claim constitutes an abuse of the right of submission. It recalls that he received medical treatment in the Graz Accident Hospital and that whenever necessary he received medical attention. The State party mentions as example that he was taken to the hospital on 31 January 1992 when he complained about pain in his hand during the interrogation. He also underwent routine medical examinations and a forensic specialist examined him as well and found that the fracture could not have been caused in the manner explained by Mr. Darwish. Furthermore, the State party submits that domestic remedies have not been exhausted, since he did not avail himself of the remedies under sections 120 to 122 of the Execution of Criminal Sentences Code, which are also applicable to remand prisoners.

4.6 The State party also rejects the claim under article 14, paragraph 3(a), of the Covenant as an abuse of the right of submission. The State party submits that the record of Mr. Darwish' first interrogation, on 30 January 1992, at 10.35 p.m., shows that he was informed for the reasons of his arrest. Further, on 31 January 1992, he was informed that he could arrange for a person of his trust, a lawyer or the Consulate of his country to be informed of his arrest. The State party provides a copy of the form signed by the author's brother, in which he names two individuals and a lawyer he wishes to be informed, but in which he leaves out the Egyptian Consulate.

4.7 The State party further argues that the claim that there were no sufficient reasons to keep the author's brother in custody, as well as the claim that the presumption of innocence was violated, lacks all foundation. In this context, the State party notes that the author's brother was unanimously found guilty by a eight member jury.

4.8 As regards the claim that the alibi witness for the defence was not allowed to testify, the State party points out that the trial transcript shows that this witness was examined at length, but at no time gave him an alibi. The State party adds that during the first confrontation with this witness, the author's brother asked him in Arabic to give him a false alibi, which the witness refused to do. The Court's interpreter informed the Court

about this incident. In the circumstances, the State party argues that this claim constitutes an abuse of the right of submission.

4.9 The State party rejects the author's claim that the interpreter did not translate correctly. According to the State party, the complaint against the interpreter was inspired by his informing the Court of the incident with the witness. The interpreter was then replaced by another one, and neither the accused nor his lawyer ever challenged the interpretation.

5.1 By letter of 5 July 1996, the author submits that it is clear that his brother's little finger is deformed and that this was caused by the negligence of the Austrian authorities. He also recalls that his brother was given medication which affected his memory and indicates that more than once his brother was kept in a cell without lights and that he was sick.

5.2 The author maintains that there was no evidence to base his brother's conviction on. He recalls that there were no traces of blood on his brother's clothes, nor were there fingerprints on the knife. The author also maintains that the general solicitor hid the documents in which the alibi witness had testified that his brother had been with him at the time of the murder.

5.3 The author states that his brother had a right to correct interpretation and that persons attending the trial tried to tell the judge that the interpreter was translating incorrectly.

Issues and proceedings before the Committee

6.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with article 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

6.2 The State party submits that the author has entered into correspondence with the Secretariat of the European Commission on Human Rights and recalls its reservation under article 5, paragraph 2(a), of the Optional Protocol. The Committee has ascertained, however, that the author's complaint is not being nor has been formally examined by the European Commission. The communication is thus not inadmissible on this ground.

6.3 As regards the author's claim that his brother did not receive medical attention, the Committee considers that if this were the case, there is no indication that he complained to the prison authorities or made use of the procedure laid down in the sections 120 to 122 of the Execution of Criminal Sentences Code. This part of the communication is thus inadmissible for non-exhaustion of domestic remedies, under article 5, paragraph 2(b), of the Optional Protocol.

6.4 Part of the author's claim under article 14 of the Covenant relates to the evaluation of facts and evidence by the judge and jury. The Committee refers to its prior jurisprudence and reiterates that it is generally not for the Committee, but for the appellate Courts of

States parties, to evaluate the facts and evidence in a specific case, unless it can be ascertained that the evaluation was clearly arbitrary or amounted to a denial of justice. The material before the Committee does not show that the conduct of the trial suffered from such defects. Accordingly, this part of the communication is inadmissible as incompatible with the provisions of the Covenant, pursuant to article 3 of the Optional Protocol.

6.5 The Committee considers that the author's remaining claims have not been substantiated, for purposes of admissibility, and they are thus inadmissible under article 2 of the Optional Protocol.

6.6 The State party has submitted that the author is not authorized to present the communication on behalf of his brother since the latter could himself have brought his claim before the Committee. Since the communication is inadmissible on other grounds, the Committee is of the opinion that it need not examine the State party's assertion.

7. The Human Rights Committee therefore decides:

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

* The following members of the Committee participated in the examination of the present communication: Mr. Nisuke Ando, Mr. Prafullachandra N. Bhagwati, Mr. Thomas Buergenthal, Ms. Christine Chanet, Lord Colville, Ms. Elizabeth Evatt, Ms. Pilar Gaitan de Pombo, Mr. Eckart Klein, Mr. David Kretzmer, Mr. Rajsoomer Lallah, Ms. Cecilia Medina Quiroga, Mr. Fausto Pocar, Mr. Martin Scheinin, Mr. Danilo Turk and Mr. Maxwell Yalden.

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