



COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

COURT (PLENARY)

CASE OF IRELAND v. THE UNITED KINGDOM

(Application no. 5310/71)

JUDGMENT

STRASBOURG

18 January 1978

SEPARATE OPINION OF JUDGE ZEKIA

With respect, I subscribe to the main part of the judgment of the Court. I maintain, however, a different view as to the notion and concept of the word "torture" occurring in Article 3 (art. 3) of the Convention. Moreover, I entertain a lot of doubt whether the Court is justified in setting aside a unanimous conclusion of the Commission in respect of torture which has not been contested by the representatives of the two High Contracting States who took part in the proceedings before the Court.

I feel tempted also to deal briefly with the principle underlying the onus of proof and the discharge of such onus in a case where a Contracting State is alleged to have violated its obligation under an Article of the Convention.

A. Torture

Admittedly the word "torture" included in Article 3 (art. 3) of the Convention is not capable of an exact and comprehensive definition. It is undoubtedly an aggravated form of inhuman treatment causing intense physical and/or mental suffering. Although the degree of intensity and the length of such suffering constitute the basic elements of torture, a lot of other relevant factors had to be taken into account. Such as: the nature of ill-treatment inflicted, the means and methods employed, the repetition and duration of such treatment, the age, sex and health condition of the person exposed to it, the likelihood that such treatment might injure the physical, mental and psychological condition of the person exposed and whether the injuries inflicted caused serious consequences for short or long duration are all relevant matters to be considered together and arrive at a conclusion whether torture has been committed.

It seems to me permissible, in ascertaining whether torture or inhuman treatment has been committed or not, to apply not only the objective test but also the subjective test.

As an example I can refer to the case of an elderly sick man who is exposed to a harsh treatment - after being given several blows and beaten to the floor, he is dragged and kicked on the floor for several hours. I would say without hesitation that the poor man has been tortured. If such treatment is applied on a wrestler or even a young athlete, I would hesitate a lot to describe it as an inhuman treatment and I might regard it as a mere rough handling. Another example: if a mother, for interrogation, is separated from her suckling baby by keeping them apart in adjoining rooms and the baby, on account of hunger, starts yelling for hours within the hearing of the mother and she is not allowed to attend her baby, again I should say both the mother and the baby have been subjected to inhuman treatment, the mother by being agonized and the baby by being deprived of the urgent attention of the mother. Neither the mother nor the child has been assaulted.

The salient facts

In August and October 1971, fourteen persons were arrested with a view to extracting confession or information from them. They were submitted to a form of "interrogation in depth" by members of the security forces or persons authorised to do it. The said form of interrogation involved the application of the five techniques which consisted of:

1. hooding the detainees except during interrogation;
2. making them stand continuously against a wall in a spreadeagled and painful posture for prolonged periods of some hours;
3. submitting them to continuous and monotonous noise;
4. depriving them of sleep; and
5. restricting them to a diet of one round of bread and one pint of water at six-hourly intervals.

The five techniques were applied in combination and with premeditation and for hours at a stretch. They caused, if not actual bodily injury, at least intense physical and mental suffering to the persons subjected thereto and also led to acute psychiatric disturbances during interrogation. This practice of interrogation continued interruptedly for some days. This is a short summary of facts and effects relating to the application of the five techniques.

B. Interpretation of Article 3 (art. 3)

Reference was made to the Greek case and also to Article 5 of the Universal Declaration of Human Rights and also to Article 7 of the International Covenant on Civil and Political Rights.

Finally, stress was laid on Resolution 3452 of the United Nations General Assembly of 9 December 1975 which was unanimously adopted.

Paragraph 1 of Article 1 of the Resolution referred to reads:

"For the purpose of this Declaration, torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted by or at the instigation of a public official ... for ... obtaining ... information or confession"

Paragraph 2 of Article 1 reads:

"Torture constitutes an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment."

Paragraph 1, which deals with the meaning to be attached to the word "torture", is more relevant for the purpose of interpretation of Article 3 (art. 3) of the Convention.

It is significant that stress has been laid on the severity of physical and/or mental pain or suffering and it was not felt necessary to qualify the word "severe" with an adjective denoting a high degree of severity in the pain or suffering inflicted.

I do not share the view that extreme intensity of physical or mental suffering is a requisite for a case of ill-treatment to amount to "torture" within the purport and object of Article 3 (art. 3) of the Convention. The nature of torture admits gradation in its intensity, in its severity and in the methods adopted. It is, therefore, primarily the duty and responsibility of the authority conducting the enquiries from close quarters, after taking into account all the surrounding circumstances, evidence and material available, to say whether in a particular case inhuman ill-treatment reached the degree of torture. In other words, this is a finding of fact for the competent authority dealing with the case in the first instance and which, for reasons we give hereunder, we should not interfere with.

C. The uncontested finding

In the instant case, as I said earlier, the Commission was unanimously of the opinion that the effect of the combined application of the five techniques in the case of fourteen persons amounted to torture. This conclusion has not been contested by applicant or respondent Government; what is more, by the representatives of the respondent Government, we have been invited to adhere to the findings of the Commission unless there were compelling reasons or cogent reasons to do otherwise. It was further submitted that it is wrong to suggest that the Court should make its own findings of fact because under the Convention questions of fact, evidence, etc., are primarily for the Commission; the Court will review only where there are compelling grounds.

Adopting the test submitted by the Counsel of the respondent Government, not only can I not find compelling reason or circumstance to go against the finding of the Commission, but I am not even in possession of adequate reason to suspect the soundness of the Commission's finding.

Amounts awarded

The fourteen persons who have undergone the ordeal of the five techniques were awarded compensation by way of settlement ranging from £10,000 to £25,000 sterling each. Surely the amounts awarded constitute a strong indication of the degree of severity and the intensity and length of the suffering caused to the recipients.

No new material before the Court

There was no new material or evidence before the Court, which was not made available to the Commission, relating to the application of the five techniques and its effects.

For the reasons I have endeavoured to give, I am of the view that the Commission rightly found that a contravention of Article 3 (art. 3) for torture in respect of certain cases has taken place.

On whom lies the burden to discharge the onus of proof.

When a Contracting State is alleged to have committed a violation of a specific Article or Articles of the Convention by disregarding its obligation under it and such allegation is denied, surely there is a burden of proof to be discharged in some way or other in order to substantiate such accusation before an authorised organ of the Convention. What is material here is not whether a burden of proof does exist or not - it is an elementary rule of justice that it does exist and the fact that the presumption of innocence is codified by Article 6 para. 2 (art. 6-2) of the Convention is a strong indication of it - but by whom and how such onus should be discharged.

The national courts are bound both in civil and criminal matters by their procedural rules. A defendant or an accused might not have to defend his case until and unless some evidence has been adduced to support the charge or claim against him.

The national courts are bound by their rules of evidence governing the admissibility and inadmissibility of evidence to be adduced. Hearsay evidence as well as an unauthenticated documentary evidence, for instance, might be excluded and not heard or produced.

On the other hand, the European Commission of Human Rights, as one of the judicial organs of the Council of Europe, possess unfettered discretion within the purview of Article 28 (art. 28) of the Convention and Rules 39 to 52 of their Rules of Procedure, to conduct investigation and enquiries in the way they think proper and to receive any kind of evidence without restrictions. No doubt, in the evaluation of the probative value of the evidence adduced, the nature of the evidence and of the documents will receive the deserved weight.

The interested Contracting Parties, on the other hand, have to render assistance to the Commission and the sub-committees who undertake investigation in a case. Withholding of evidence and a non-cooperative attitude by a respondent State no doubt might cause the Commission to draw adverse inferences. Having made the above general remarks, I would say that, at the end of proceedings, the Commission or the Court has, on the totality of evidence and material before them, to decide whether the burden of proof required to substantiate an allegation of contravention of the Convention by the respondent State has been discharged or not.