



**International covenant  
on civil and political  
rights**

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HUMAN RIGHTS COMMITTEE  
Eighty-eighth session  
16 October - 3 November 2006

**VIEWS**

**Communication No. 1416/2005**

<u>Submitted by:</u>	Mohammed Alzery (represented by counsel, Ms. Anna Wigenmark)
<u>Alleged victim:</u>	The author
<u>State party:</u>	Sweden
<u>Date of communication:</u>	29 July 2005 (initial submission)
<u>Document references:</u>	Special Rapporteur's rule 97, 102 and 92 decisions, transmitted to the State party on 9 August 2005, 24 October 2005 and 16 January 2006, respectively (not issued in document form).  - CCPR/C/86/D/1416/2005 – admissibility decision adopted on 8 March 2006
<u>Date of adoption of Views:</u>	25 October 2006

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\* Made public by decision of the Human Rights Committee

*Subject matter:* Expulsion on national security grounds, immediately executed following unreviewable executive decision and abusive "security" treatment, of an Egyptian national from Sweden to Egypt with the involvement of foreign agents

*Substantive issues:* Torture or cruel, inhuman or degrading treatment or punishment – exposure to a real risk of torture or cruel, inhuman or degrading treatment or punishment and/or manifestly unfair trial in a third State – no respect for due process in process of expulsion of an alien - ineffective domestic remedies against alleged violations – frustration of the right to effective complaint

*Procedural issues:* Proper authorisation of counsel – examination by another international procedure of investigation or settlement – applicability of State party's procedural reservation – abuse of rights of submission – undue delay in submission of communication – substantiation, for purposes of admissibility

*Articles of the Covenant:* 2, 7, 13 and 14

*Articles of the Optional Protocol:* 1, 2, 3 and 5 paragraph 2(a)

On 25 October 2006, the Human Rights Committee adopted the annexed text as the Committee's Views, under article 5, paragraph 4, of the Optional Protocol in respect of communication No. 1416/2005.

[ANNEX]

**ANNEX**

Views of the Human Rights Committee under article 5, paragraph 4, of  
the Optional Protocol to the International Covenant on Civil and Political Rights

Eighty-eighth session

concerning

**Communication No. 1416/2005\***

<u>Submitted by:</u>	Mohammed Alzery (represented by counsel, Ms. Anna Wigenmark)
<u>Alleged victim:</u>	The author
<u>State party:</u>	Sweden
<u>Date of communication:</u>	29 July 2005 (initial submission)
<u>Decision on admissibility:</u>	8 March 2006

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

Meeting on 25 October 2006,

Having concluded its consideration of communication No.1416/2005, submitted to the Human Rights Committee on behalf of Mr. Mohammed Alzery under the Optional Protocol to the International Covenant on Civil and Political Rights,

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

Adopts the following:

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\* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Maurice Glèlè Ahanhanzo, Mr. Edwin Johnson, Mr. Rajsoomer Lallah, Mr. Michael O'Flaherty, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Ivan Shearer, Mr. Hipólito Solari-Yrigoyen and Mr. Roman Wieruszewski.

Pursuant to rule 90 of the Committee's rules of procedure, Committee member Ms. Elizabeth Palm did not participate in adoption of the Committee's decision.

Pursuant to rule 91 of the Committee's rules of procedure, Committee members Ms. Ruth Wedgwood and Mr. Ahmed Tawfik Khalil also did not participate in the adoption of the Committee's decision.

### Views under article 5, paragraph 4, of the Optional Protocol

1. The author of the communication, dated 29 July 2005, is Mr. Mohammed Alzery, an Egyptian national born on 23 September 1968. He claims to be victim of violations by Sweden of articles 2; 7; 13 and 14 of the Covenant, and of article 1 of the First Optional Protocol. He is represented by counsel (see, however, paras. 4.1 and 5.1 *et seq, infra*).

#### Interlocutory decisions

2.1 On 24 October 2005, the Committee, through its Special Rapporteur on New Communications, decided to separate consideration of the admissibility and merits of the communication. In order to be in a position appropriately to resolve the admissibility issues raised, counsel was also requested to demonstrate, in the light of the State party's submissions set out in paragraph 4.1, *infra*, that the power of attorney dated 29 January 2004, in conjunction with the power of attorney dated 7 April 2004, continued to subsist and authorise prosecution of the communication before the Committee.

2.2 The Committee, acting through its Special Rapporteur on New Communications, also decided to direct counsel, further to the powers conferred by Rule 102, paragraph 3, of the Committee's Rules of Procedure, to maintain the confidentiality of certain of the State party's submissions, until further decision of the Special Rapporteur, the Committee's Working Group or the plenary Committee.

2.3 On 16 January 2006, the Committee, through the Special Rapporteur on New Communications, in the light of counsel's comments on the State party's submissions (see paras 5.1 *et seq, infra*) and of the material before the Committee related to the author's situation, requested, pursuant to Rule 92 of its Rules of Procedure, that the State party take necessary measures to ensure that the author was not exposed to a foreseeable risk of substantial personal harm as a result of any act of the State party in respect of the author.

#### Factual background

3.1 The author, a chemistry and physics teacher, received his education at Cairo University. During his studies he was active in an organization involved in Islamist opposition inter *alia* distributing flyers, participating in meetings and lectures and read the Koran for the children in his village. The author acknowledges opposition to the government but disputes any contention he supported violence. In 1991, he completed his studies and decided the same year to leave the country, having been harassed and repeatedly arrested by the Egyptian Security Services because of his activities in the organization. At one point, he contends he was seized and tortured (hung up-side-down by the ankles, beaten and "dipped" head first in water). Before being released, he states he was forced to sign an agreement forswearing future involvement in the organization, failing which the next arrest would be "forever".

3.2 The author states that he left Egypt in order to avoid being arrested and tortured. Using his own passport but a false visa, he entered Saudi Arabia where he lived until 1994 when he in turn departed for Syria. In 1999, he felt forced to leave Syria since a number of Egyptian nationals had been extradited back to Egypt. He obtained a false Danish passport and departed for Sweden where he arrived in 4 August 1999. He immediately sought asylum in his own name and

admitted to having used a false passport in order to be able to enter the country. The author submitted in support of his claim for asylum that he had been physically assaulted and tortured in Egypt; that he had felt that he was being watched and his home had been searched; that after his departure from Egypt (to Saudi Arabia and then Syria) he had been sought at his parents' home; that he feared being brought before a military court if returned to Egypt on charges of being member of an illegal organisation; and that he was afraid that he would be arrested and tortured. He was detained from 4 to 18 August 1999 due to uncertainty as to his identity. Deciding not to prolong detention, the then Immigration Board decided that although there was uncertainty as to the author's identity and he had utilised a false passport which created a risk of absconding, his placement under surveillance would suffice in lieu of detention.

3.3 In order to establish his identity, the author states that he indirectly contacted an Egyptian lawyer who procured a high school report, which was faxed to the authorities in Sweden. In the same facsimile message, the lawyer provided an affidavit to the effect that the author was one of the accused in 1996 proceedings concerning membership in a forbidden organization likely to be handled by a military tribunal. An article in the newspaper al-Sharq al-Awsat described the case and named the author, stating that he had been charged in his absence. The article stated that the organization in question supported a continued armed struggle against the Egyptian government and that members would be tried before a military court, depriving them the right to a fair trial, inter alia as a conviction in a military court could not be appealed. The author denied any ties to the organization, but states that he feared arrest on false accusations if returned to Egypt. He also states that the Swedish Embassy in Cairo could not confirm that there was such a case as the newspaper had alleged or that Mr. Alzery was one of the suspects.

3.4 The Swedish Migration Board considered the author's application for asylum and permanent residence on first instance. On 31 January 2001, a statement was requested from the Swedish Security Police, whose functions include assessment of whether asylum cases are of a nature that consideration must be given to national security before a residence permit is granted. In April 2001, the Security Police commenced an investigation, and interviewed the author in June 2001. During the interview, he stated that he had never been involved with the movement he was accused of being involved in, and that he strongly rejected any violence as a mean to reach any political goal. He however believed that he would be arrested and tortured if returned to Egypt because of these wrongful accusations. The author was allowed to read the transcript of the hearing in September 2001, but was not informed of the conclusions drawn from this interview.

3.5 On 30 October 2001, the Security Police submitted its report, recommending that the application for permanent residence permit be rejected "for security reasons". On 12 November 2001, the Migration Board, while of the view that the author could be considered in need of protection, referred the matter to the Government for a decision pursuant to the Aliens Act, given the security issues involved. Having received the Migration Board's case file, the Aliens Appeals Board, while sharing the Migration Board's view of the merits, also considered that the Government should decide the case.

3.6 On 12 December 2001, a senior official of the Swedish Ministry for Foreign Affairs met with a representative of the Egyptian government. The purpose was to determine whether it would be possible, without violating Sweden's international obligations, including under the

Covenant, to order the author's return to Egypt. Having considered the option of obtaining assurances from the Egyptian authorities in respect of his future treatment, the Government had made the assessment that it was both possible and meaningful to inquire whether guarantees could be obtained that the author would be treated in accordance with international law upon his return to Egypt. Without such guarantees, his expulsion to Egypt would not have been an alternative. The state secretary of the Swedish Ministry for Foreign Affairs presented an Aide-Mémoire to the official which read:

“It is the understanding of the Government of the Kingdom of Sweden that [the author and another individual] will be awarded a fair trial in the Arab Republic of Egypt. It is further the understanding of the Government of the Kingdom of Sweden that these persons will not be subjected to inhuman treatment or punishment of any kind by any authority of the Arab Republic of Egypt and further that they will not be sentenced to death or if such a sentence has been imposed that it will not be executed by any competent authority of the Arab Republic of Egypt. Finally, it is the understanding of the Government of the Kingdom of Sweden that the wife and children of [another individual] will not in anyway be persecuted or harassed by any authority of the Arab Republic of Egypt.”

3.7 The Egyptian Government responded in writing: “We herewith assert our full understanding to all items of this memoire, concerning the way of treatment upon repatriate from your government, with full respect to their personal and human rights. This will be done according to what the Egyptian constitution and law stipulates.” In oral discussions with representatives from the Egyptian government, the Swedish Government also requested that the Embassy would be allowed to attend the trial. The author states that it remains unclear what other kind of follow-up mechanisms were discussed and decided upon prior to the expulsion. While the Swedish Government had since indicated that there had been discussions about the right to visit the author in prison, this remained unconfirmed. .

3.8 On 18 December 2001, the Government decided that the author should not be granted a residence permit in Sweden on security grounds. The Government noted the content of the guarantees that had been issued by a senior representative of the Egyptian government. Although in the light of the circumstances and the author's contentions as to his past conduct, his fear of persecution was considered to be well founded, entitling him protection in Sweden, the Government considered that he could be excluded from refugee status. In its decision, the Government concluded on the basis of intelligence services information that the author was involved, in a leading position and role, in the activities of an organization implicated in terrorist activities, and that he should be refused protection.

3.9 The Government separately assessed whether there was a risk that the author would be persecuted, sentenced to death, tortured or severely ill treated if returned, such circumstances constituting an absolute statutory bar to removal. The Government was of the view in this respect that the assurances procured were sufficient to comply with Sweden's obligations of *non-refoulement*. The Government ordered the author's immediate expulsion.

3.10 In the afternoon of 18 December 2001, a few hours after the decision to expel was taken, Swedish Security Police detained the author. According to the State party, no force was used in

the arrest. He was informed that his application for asylum had been rejected and was then brought to a Stockholm remand prison. At the time of his arrest, the author was on the phone with (then) legal counsel, but the call was cut short. In the detention centre, he allegedly asked permission to call his lawyer but this request was rejected. After a few hours in detention, he was transferred by vehicle to Bromma airport. He was then escorted to the police station at the airport, where he was handed over to some ten foreign agents in civilian clothes and hoods. Later investigations by the Swedish Parliamentary Ombudsman, disclosed that the hooded individuals were United States' and Egyptian security agents.

3.11 The author states that the hooded agents forced him into a small locker room where they exposed him to what was termed a "security search", although Swedish police had already carried out a less intrusive search. The hooded agents slit the author's clothes with a pair of scissors and examined each piece of cloth before placing it in a plastic bag. Another agent checked his hair, mouths and lips, while a third agent took photographs, according to Swedish officers who witnessed the searches. When his clothes were cut off his body, he was handcuffed and chained to his feet. He was then drugged per rectum with some form of tranquilliser and placed in diapers. He was then dressed in overalls and escorted to the plane blindfolded, hooded and barefooted. Two representatives from the Embassy of the United States of America were also present during the apprehension and treatment of the applicant. In an aircraft registered abroad, he was placed on the floor in an awkward and painful position, with chains restricting further movement. The blindfold and hood stayed on throughout the transfer including when he was handed over to Egyptian military security at Cairo airport some five hours later. According to his (then) Swedish counsel, the blindfold remained on until 20 February 2002, and was only removed for a few days in connection with visits by the Swedish Ambassador on 23 January 2002 and an interview with a Swedish journalist in February 2002.

3.12 When the author's (then) counsel met State Secretary Gun-Britt Andersson in January 2002, after the visit by the Ambassador, she assured him that the men had not complained of any ill treatment. In a hearing before the Swedish Standing Committee on the Constitution in April 2002, the (then) Foreign Minister stated that: "I still believe that we can trust the Egyptian authorities. If (it turns out that) they cannot be trusted, we will have to get back to this issue. But everything we have seen so far indicates that we can trust them." In its follow-up report of 6 May 2003 to the Human Rights Committee, the Swedish Government also stated that it: "[i]s the opinion of the Swedish Government that the assurances obtained from the receiving State are satisfactory and irrevocable and that they are and will be respected in their full content. The Government has not received any information which would cast doubt at this conclusion."<sup>1</sup>

3.13 The visit of the Ambassador to the author at the Tora prison was not in private, neither were any of the subsequent visits undertaken during the author's time in that prison. The author advanced complaints about the treatment in the presence of not only the Ambassador but also of the warden and five other Egyptian men. Egyptian personnel took notes, in the Ambassador's view in order to assess the interpretation from Arabic to English. It was regularly the case, and accepted by the visitors from the Embassy, that prison security personnel or the warden were present and even participated in the discussions with the author. On many occasions, the

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<sup>1</sup> CCPR/CO/74/SWE/Add.1.

Swedish representatives asked direct questions of the Egyptian prison personnel present, or they spontaneously commented on the author's statements.

3.14 Shortly after the first meeting, the Ambassador asked for a meeting with the Egyptian Security Services to discuss the allegations of ill-treatment made. The interlocutor rejected the accusations as something to be expected from "terrorists". Swedish authorities accepted this explanation and did not act on it any further. The next visit occurred after the passage of five weeks. In a diplomatic report of 2 February 2002 from the Swedish Ambassador to his Ministry for Foreign Affairs, he informed: "We agreed about the following routines for the visits by the Embassy: Visits shall take place once a month at a time to our own choice. We shall inform [redacted] a few days in advance that we want to conduct the visit so that his office can arrange the technical details. [Redacted] stated in this regard that if the rumours about torture etc. continue we will have to jointly discuss different ways to have such rumours refuted." The letter also disclosed that the UN Special Rapporteur on torture had approached the Swedish Government in a letter asking for information about the monitoring system put in place in order to secure the rights of the author and another individual.

3.15 After the January meeting, the author was transferred to another section of the Tora prison controlled by the Egyptian Security Services (rather than General Intelligence). He states that for a further five weeks he was interrogated and this time harshly ill-treated, including electric shocks applied to genitals, nipples and ears. The torture was monitored by doctors who also put ointment on the skin after torture in order not to leave any scars. He was forced to confess to crimes he had not committed, and was questioned about activities such as arranging meetings for the forbidden organization he was active for and opposing "the system". Despite the reprisals, the author continued to attempt to convey information as to the treatment suffered, as detailed in the Ambassador's report following a second visit on 7 March 2002:

"At the next meeting none of the men spoke out about the torture. They did however give signals and indications that something was not right: I therefore wanted to ask: Had they been tortured or maltreated since my last visit? [Another individual] replied evasively that it would be good if I could come as often as possible. I then asked him to take off his shirt and undershirt and turn around. No signs of maltreatment were visible. [The other individual] then explained that there were no marks on his body. One of the Egyptian officials observed afterwards that [the other individual] was clearly trying to hint by means of his evasive formulations that he had in fact been maltreated, without coming out and saying so directly .... The following can be noted from the other information the two men provided during the conversation: .... They both avoided answering my question concerning their daily routine. In conclusion I asked whether there was anything else they wished to say to me. The answer was a hope that I would come back soon, along with the comment that "it's hard being in prison. In summary, nothing emerged to change my judgment from my first visit that [the author and the other individual] are doing reasonably well under the circumstances. There was nothing to suggest torture or ill treatment."

3.16 The author states that, for an extended period, he and the other individual were not allowed to meet other prisoners and were kept in isolation in cells continually deprived of light. On 20 February 2002, he was moved to another correction centre where he was kept in small isolation



cell measuring 1.5 by 1.5 metres until the second week of December 2002. On three or four occasions in 2002, he was called to hearings before a prosecutor for decision on his continued detention. At the first hearing in March 2002, the author complained of the torture and ill-treatment that he had suffered. He was not provided with hearing records. Although represented by a lawyer at the time, the latter did not react to his statement, which left the author to speak on his own behalf at subsequent hearings. According to Embassy records, between October 2002 and May/June 2003, the author met the prosecutor every fourteen days and thereafter every 45 days. The decision to keep him in detention was always upheld, the prosecutor relying on emergency laws but without formally charging the author.

3.17 On 16 June 2002, the author's (then) Swedish counsel communicated to the European Court of Human Rights that he intended to file a complete application on the author's behalf within a reasonable time. On 9 September 2002, the Swedish Ambassador, during a visit to the author, requested the prison authorities to allow the author to sign a power of attorney sent to the Embassy by the author's then Swedish counsel, for purposes of an application to the European Court of Human Rights. On 26 September 2002, the Ambassador informed counsel by fax that as the author was detained, he did not have a right to sign the power of attorney. The Egyptian Embassy, for its part, did however not answer a request by counsel for assistance. In late 2002, the author was partially informed of the reason for his detention. He was alleged to be one of some 250 members of a forbidden organisation, with respect to which criminal proceedings had been instituted in 1993. According to the author, many co-accused had been in detention for years without trial, a number of them had been sentenced to death and executed and others had not been freed even after an acquittal in court. He feared he would suffer similar fate. From December 2002 until October 2003, the Ministry of Interior ordered his detention.

3.18 On 27 October 2003, he was released from detention without charge. According to the Swedish Embassy, an Egyptian court directed release, but the author was not present and cannot corroborate the matter. Since his release, the author's physical health has improved, he has completed complementary university studies in pedagogy that he commenced in prison and he has married. Deciding to go into business, he built a small breeding farm.

3.19 In early 2004, the author's (then) Swedish counsel provided the Swedish Foreign Ministry with allegations that the author had provided him concerning his subjection to, *inter alia*, torture in Egypt both before and after the Embassy's first visit on 23 January 2002. There had however been no incidents of torture or other cruel treatment after 20 February 2002. Moreover, during a visit by Embassy staff in early 2004, the author made similar allegations. According to the Embassy's report from that visit, the incidents of torture had occurred after the Embassy's first visit to him in detention. He had not provided any information regarding the treatment prior to the Embassy's first prison visit. On 19 March 2004, the author's (then) Swedish counsel lodged an application with the European Court of Human Rights, arguing that the author's expulsion had resulted in his being tortured and ill-treated and faced the risk of being sentenced to death or killed during the torture. He further argued that he had not had access to court or an effective remedy with respect to the allegations of terrorist activities against him, and that his expulsion order had not been examined by a court. On 26 October 2004, a Chamber of the European Court, by a majority, declared the case inadmissible on the basis that it had been introduced out

of time.<sup>2</sup> In the absence of a satisfactory explanation by counsel for the delay in filing, the Court took 19 March 2004 as the date of introduction of the complaint and declared it inadmissible accordingly.

3.20 With respect to post-expulsion proceedings in Sweden, the Ministry of Justice, on 12 April 2002, conducted a judicial appraisal of the way in which the Security Police had dealt with the enforcement and accepted, in principle, the Security Police's procedures. In a complaint on 25 May 2004, an investigation was filed with the Stockholm district prosecutor as to whether representatives of the Swedish Government had committed a criminal offence in connection with the Government's decision on 18 December 2001 to expel *inter alia* Mr. Alzery, and whether any offence had been committed when the decision was enforced. As far as the complaint concerned Ministerial representatives of the Government, it was handed over to the Parliament's Standing Committee on the Constitution, which has jurisdiction to lodge criminal charges, such as serious neglect of Ministerial duties, before the Supreme Court. On 17 February 2005, the Committee decided that the portion of the complaint that had been referred to it by the Stockholm district prosecutor required no action.

3.21 As to the remaining issues, the Stockholm district prosecutor decided on 18 June 2004 not to initiate a preliminary investigation regarding whether a criminal offence had been committed in connection with the enforcement of the expulsion decision. The reasons adduced for the decision were that there was no ground for assuming that a criminal offence under public prosecution had been committed by a member of the Swedish police in connection with the enforcement. The district prosecutor referred the case to the Prosecutor-Director at the Stockholm Public Prosecution Authority for a decision on whether to initiate a preliminary investigation regarding events taking place on an aircraft registered abroad.

3.22 On 3 November 2004, the Prosecutor-Director's declined to take further action. He noted that the Security Police had been tasked with the enforcement of the expulsion decision and carried the responsibility for it. It was therefore up to the Security Police to ensure that the security measures that were taken, either by the Security Police or those who assisted it, were compatible with the applicable Swedish legal provisions. The question was therefore whether representatives of the Security Police had failed in their exercise of public authority, which effectively amounted to a review of the district prosecutor's decision. The Prosecutor-Director's referred to the anti-terrorism mandate of the Security Police, considering that to be able to perform its task, other methods than those used in regular police service were sometimes required. The expulsion had been decided upon by the Government and the persons concerned had been deemed by it to present a risk to the security of the realm. Considering that, particularly at the time in question, there were strict requirements in respect of security and protective measures, what had occurred could not be considered to be in breach of the general principles applying to police interventions. The Prosecutor-Director therefore shared the opinion of the district prosecutor that there were no grounds for assuming that a criminal offence under public prosecution had been committed by Swedish police personnel. The decision was deemed to include measures taken by foreign personnel in view of the fact that such personnel had not been engaged in any independent activities.

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<sup>2</sup> Alzery v. Sweden, Application No. 10786/04.

3.23 With respect to acts occurring on a foreign registered aircraft, the Prosecutor-Director considered that, according to the Act on Air Traffic, a pilot on an aircraft registered abroad was obliged to supervise the capacity of the aircraft to operate also in Swedish territory. The supervision entailed a right to take measures motivated by security concerns. There was no reason to assume that a criminal offence under public prosecution had been committed by the pilot of the foreign aircraft.

3.24 In an effort to clarify the facts transpiring after the author's return, the State party advises that on 18 May 2004, it raised allegations of ill-treatment with the Egyptian authorities at the highest level. An envoy voiced Swedish concerns as to the alleged ill-treatment suffered in the early weeks following return and requesting an inquiry including international medical expertise. The Egyptian Government dismissed the allegations but agreed to undertake an investigation. In June 2004, the then Swedish Minister for Foreign Affairs wrote to the Egyptian authorities, suggesting that the investigation be carried out with or by an independent authority, involving the judiciary and medical expertise and preferably international expertise in the area of torture investigations. She also offered the assistance of Swedish expertise. In July 2004, the Egyptian authorities rejected the allegations of ill-treatment and referred to Egyptian investigations. In December 2004, the issue was discussed of a possible international inquiry under the auspices of the United Nations High Commissioner for Human Rights. On 11 May 2005 the Swedish Foreign Minister addressed a letter to the High Commissioner, describing *inter alia* unsuccessful efforts that had been undertaken on the Swedish part to bring about an investigation in Egypt for the purpose of independently establishing the facts in view of the allegations of torture and ill-treatment that followed on the expulsion of the two Egyptian nationals to that country. A request was directed to the High Commissioner that her Office carry out an investigation into the matter as a basis for an assessment of the effectiveness and implementation of the diplomatic assurances provided by Egypt. The Minister declared that the Government was prepared to lend its full support to the investigation and to provide financial resources, if need be. The High Commissioner responded by letter of 26 May 2005. Referring to the decision of the Committee against Torture in the case of Agiza v Sweden,<sup>3</sup> the High Commissioner stated *inter alia* that she found no grounds on which her Office could possibly supplement that Committee's assessment and findings in any meaningful way. In conclusion, the High Commissioner stated that she was not prepared to undertake the proposed investigation. The State party details a number of further Ministerial and senior official contacts with Egyptian counterparts in ongoing attempts to procure independent, impartial investigation of the facts.

3.25 On 21 March 2005, the Parliamentary Ombudsman reported on his *proprio motu* investigation into pre-expulsion aspects of the author's case, revealing serious shortcomings in the way the case was handled by the Security Police, in respect of whom the Ombudsman expressed extremely grave criticism.<sup>4</sup> The author himself was not a party to this investigation, but his former Swedish counsel was interviewed by the Ombudsman. The mandate of the Ombudsman was to investigate if the Swedish Security Police had committed any crime or in any other way acted unlawfully during the execution of the expulsion order. Early in the proceedings the Ombudsman elected not to conduct a criminal investigation. The Ombudsman does not give reasons for this decision but the State party suggests that the reasons seem related

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<sup>3</sup> Committee against Torture, communication No. 233/2003, Views adopted on 20 May 2005.

<sup>4</sup> Report No. 2169-2004.

to the fact that there was no senior official of the Security Police who had been assigned command of the Bromma operation, that the officials present had relatively subordinate ranks and that none of them felt that they bore the ultimate responsibility for the operation and that they might have felt under pressure given the urgency accorded by the Cabinet to prompt execution the day the decision had been taken. Counsel disagrees, citing media comments by the Ombudsman that the earlier prosecutorial decision not to initiate criminal proceedings had been an important factor in his own decision. Whatever the reason, due to the election not to conduct a criminal investigation, the Ombudsman was able to procure compulsory testimony for informational purposes from police officers, whose testimony could otherwise have been withheld on grounds of the right to be free from criminal self—incrimination.

3.26 In his conclusions, the Ombudsman criticized the failure of the Security Police to maintain control over the situation at Bromma airport, allowing foreign agents free hand in the exercise of public authority on Swedish soil. Such relinquishment of public authority was unlawful. The expulsion was carried out in an inhuman and unacceptable manner. The treatment was in some respects unlawful and overall had to be characterized as degrading. It was questionable whether there was also a breach of article 3 of the European Convention. In any event, the Security Police should have intervened to prevent the inhuman treatment. In the Ombudsman's view, the way in which the Security Police had dealt with the case was characterised throughout by passivity - from the acceptance of the offer of the use of an American aircraft until completion of the enforcement. One example cited was the failure of the Security Police to ask for information about what the security check demanded by the Americans would involve. The Ombudsman also criticised inadequate organisation, finding that none of the officers present at Bromma airport had been assigned command of the operation. The officers from the Security Police who were there had relatively subordinate ranks. They acted with remarkable deference to the American officials. Regarding the foreign agents, the Ombudsman considered that he lacked legal competence for initiating prosecution.

3.27 On 4 April 2005, the Swedish Prosecutor-General decided not to resume the preliminary investigation, following a complaint from the Helsinki Committee for Human Rights (Swedish Section). With reference *inter alia* to the powers of the Parliamentary Ombudsmen to prosecute, the obligation of courts, administrative authorities and state/municipal officials to provide the Ombudsmen with any requested information and the powers of the Prosecutor-General to *inter alia* review the decisions of a subordinate prosecutor, the conclusion was reached that it was not possible to review the Parliamentary Ombudsman's decision to refrain from using his powers to prosecute. It could also be seriously questioned whether the Prosecutor-General could make a new assessment of the issue of whether to start or resume a preliminary criminal investigation when the matter had already been determined by the Parliamentary Ombudsman. This was the situation, particularly if no new circumstances were at hand. The Prosecutor-General went on to state that, in any event, several of the persons that would have to give statements within the framework of a resumed preliminary criminal investigation had already been interviewed by the Parliamentary Ombudsman and submitted information under the obligation to state the truth provided by Swedish law for such proceedings. Therefore, the option to conduct a preliminary investigation under the Code of Judicial Procedure was no longer available.

3.28 On 21 September 2005, Parliament's Standing Committee on the Constitution reported on an investigation that had been initiated in May 2004 at the request of five members of Parliament

that the Committee examine the Government's handling of the matter that led to, *inter alia*, Mr. Alzery's expulsion to Egypt. With respect to the assurances procured, the Committee was of the view that a more detailed plan for a monitoring mechanism had not been agreed with the Egyptian authorities and appears not to have existed at all prior to the decision to expel. This shortcoming was reflected in the actual monitoring of the guarantee, which was not consistent with the recommendations issued later on by the UN Special Rapporteur on issues relating to torture or the practice established by the Red Cross. A major flaw was naturally that the first visit to the men was not carried out earlier. However, the shortcomings in the actual monitoring were, in the Committee's opinion, mainly a consequence of the lack of planning in advance. The prerequisites for meaningful monitoring would have been better in place, if appropriate monitoring had been planned and agreed upon with the Egyptian authorities before the men were expelled. The difficulties that the monitoring would entail should reasonably have been anticipated prior to the decision to rely on the guarantee and, as a consequence, to expel the men to their home country. The Committee noted that an essential element for the assessment that the guarantee should be relied on, the Government had stressed its confidence in Egypt's intention to demonstrate that it is a serious participant in the international community by living up to the obligations it had assumed, including under Security Council Resolution 1373 adopted weeks prior to the expulsion. The Committee further noted that it lacked the opportunity to assess whether the men were subjected to torture or other treatment in breach of the conventions. However, a great deal implied that such treatment took place. It concluded that in any event the assurances should not have been accepted.

3.29 With respect to the immediate execution of the expulsion order, the Committee noted that while such a process had been provided by law, it had questioned whether fears that the men would request interim measures before an international body before there was time to enforce the expulsion decisions influenced the decision-making. Such concerns could naturally not be allowed to come into play. The Committee noted that the decisions had been notified to the expellees through the enforcement authority, while counsels had been notified by registered letters. This procedure was considered satisfactory provided that decisions were provided to counsel in a more rapid manner.

3.30 With respect to events at Bromma airport, the competence of the Committee did not extend to investigation of the actions of the Security Police; rather, the Committee focused on whether the (then) Foreign Minister, Anna Lindh, exerted undue influence on the Security Police at the time of the expulsion by indicating a preference for a certain course of action. The Committee noted that the Foreign Minister, at the presentation of the matter at the Foreign Ministry on 17 December 2001, was informed of the alternative that entailed that an American aircraft was used in the enforcement, and the Security Police, when deciding on the choice of transport, also took into account what they had come to believe was the Foreign Minister's position in that regard. It had not been possible to establish with complete clarity whether the Foreign Minister was provided with the said information during the presentation, or whether the information was available at that time in other parts of the Government Offices. The Security Police had kept a journal of its meetings with the Ministries. No corresponding documentation existed within the Government Offices.

3.31 According to the Committee, it was not satisfactory that the procedures for preparing government matters left room for considerable uncertainty as to what happened. Since this was

the case, subsequent scrutiny was made considerably more difficult. However, it did not seem in dispute that an opportunity of foreign assistance, if with nothing other than so-called slot-times, had been mentioned during the presentation to the Foreign Minister, which raised an issue of the administrative authorities' independence. Under Swedish law, no authority (including Parliament) may determine how an administrative body shall decide in a particular case in a matter concerning the exercise of public authority against an individual. At the same time, Swedish law requires that the head of the Foreign Ministry shall be kept informed when a question of importance for the relations to another state or to an intergovernmental organisation is raised at another state authority.

3.32 Concerning the Government's decision that expulsions be enforced immediately, the Committee noted that it had been questioned if the Foreign Minister, by voicing during the presentation prior to the Cabinet meeting her preference for enforcement on the same day that the decisions were issued, encroached on the rule of independence of administrative bodies. In the Committee's view, this was essentially a question of what the Foreign Minister heard and said, what she meant and how that should be perceived. Given that due to her death, her opinion could no longer be obtained, the Committee therefore lacked the opportunity to determine the issue. It emphasised that the Security Police bore responsibility for how the enforcement came to be conducted.

3.33 As to exhaustion of domestic remedies, the author notes that there was no possibility in law of appealing or reviewing the expulsion decision of 18 December 2001. As to the claim submitted to the European Court, the author argues, not least given the general importance of the case, that the procedural delays by his lawyer and the inadmissibility decision by the European Court should not be a reason for the Human Rights Committee to reject the case. The result would be that no review of the case by an international human rights body would be possible. In any event, it is submitted that there are strong reasons justifying the delay in submission of the claim. Upon return to Egypt, the author was at once imprisoned, interrogated and tortured, first by Egyptian general intelligence and later by state security services. When the European Court claim was first filed in 2002, then counsel was not only of the view that he required a written power of attorney due to the language on the application form, but also he wanted to be certain that the author approved of such a course. There were serious security issues to consider, as an international complaint implicating Egypt could expose Mr. Alzery to further ill treatment and torture. Counsel had neither access to the author nor wished to enmesh the latter's family, of simple background, in a vulnerable and potentially dangerous situation. After meeting with the author subsequent to his release, then counsel sought to procure permission of the author to return to Sweden, given that no charges were filed, as there would be little possibility for him of an ordinary life in Egypt. Unsuccessful negotiations to this end prolonged the delay in filings to the European Court.

### **The complaint**

4.1 The author claims to be victims of violations of articles 2, 7, 13 and 14 of the Covenant, and of article 1 of the Optional Protocol.

4.2 The author's principal claims, under article 7 of the Covenant, are two-fold. Firstly, his expulsion breached article 7 on the basis that Sweden was or should have been aware that he

faced a real risk of torture in the circumstances, notwithstanding the assurances procured. Second, he argues that the treatment he was subjected to within Swedish jurisdiction violated this article and that the ineffectiveness of the subsequent investigations failed to comply with the procedural obligations imposed by that article.

*- Breach of the prohibition of refoulement (article 7 of the Covenant)*

4.3 The author argues that, in the circumstances of the case, Sweden was in breach of its obligation under article 7 not to expose an individual to a real risk of torture at the hands of third parties. He observes that the existence of such a real risk is made out at the time of expulsion, and does not require proof of actual torture having subsequently occurred although information as to subsequent events is relevant to the assessment of initial risk. In his case, he argues that the evidence as to subsequent treatment was strongly probative of the initial existence of a real risk of torture. He argues that the assurances procured, coupled with monitoring mechanisms insufficient to protect him against, or even detect, ill treatment, were insufficient protection against the risk of harm. He contends that the prohibition on refoulement is absolute, and not subject to balancing against countervailing considerations of national security or the kind of conduct an individual is suspected of. For these conclusions, the author refers to the judgment of the European Court of Human Rights in Chahal v United Kingdom<sup>5</sup> and the Decision of the United Nations Committee against Torture in Agiza v Sweden.<sup>6</sup>

4.4 As to the actual or constructive knowledge of Sweden at the time of removal, the author argues that Sweden was well aware of the human rights situation in Egypt. In its annual reports thereon, the Swedish Government expresses concerns as to torture of suspected terrorists in particular by the security police. It also criticizes the use of military tribunals for civilians. Other sources credibly contend that the police and security service practice torture of detainees with virtually complete immunity and that suspected terrorists run a particularly high risk of being subjected to torture or cruel or inhuman treatment or punishment. The author refers to the concluding observations on related matters in Egypt by the Human Rights Committee and the Committee against Torture covering an extended period of years,<sup>7</sup> as well as critical reports from national human rights organisations and international sources. The Government was also aware that the Egyptian President had declared, and continually renewed, a state of emergency dating from 1981, and that numerous laws protecting human rights were set aside, *inter alia* permitting trial of civilians by military tribunal. The Government was also aware that Egypt had not accepted the individual complaint jurisdiction of any treaty body, or the invitation of any international monitoring bodies, including the United Nations Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment.

4.5 In his January 2001 report to the Commission on Human Rights,<sup>8</sup> the Special Rapporteur cited thirty-two cases of death in custody, apparently as a result of torture, occurring between 1997 and 1999. Confessions extracted under torture were commonly used as evidence in political trials and form the basis for convictions. Victims of torture had no effective remedy and little

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<sup>5</sup> Application No. 70/1995/576/662, Grand Chamber judgment of 15 November 1996.

<sup>6</sup> *Op.cit.*

<sup>7</sup> CCPR/CO/76/EGY (2002), A/54/44 (1999) and CAT/C/CR/29/4 (2002).

<sup>8</sup> E/CN.4/2001/66.

opportunity for redress: most applied for and received financial compensation from civil courts, in effect an admission on the part of the authorities that torture has taken place. But very few victims could convince the authorities to institute criminal proceedings against their torturers: in the handful of such cases reaching the courts in recent years almost all resulted in acquittals or derisory punishments. Finally, according to the Special Rapporteur, while reports of torture of political detainees had decreased recently, torture of ordinary criminal offenders in police stations remained rife.

4.6 The author argues that Sweden was aware not only of a general risk of torture, ill treatment and unfair trial, but of a personal risk in the author's case. The case material is clear that the Swedish Government was aware that it would be in breach of its *non-refoulement* obligation if it expelled the author without more – it was on precisely this basis that the Swedish Government decided to engage in negotiations with representatives from the Egyptian government, and, after having received the assurances in question from Egypt, decided to reject the request for asylum and to execute the expulsion order immediately. According to the author, the assurances procured were not sufficiently effective, even to theoretically protect him from torture or ill treatment. In addition to the Government's knowledge of the human rights situation in Egypt, the author was being expelled for being a security risk and under accusation of being responsible for terrorist acts in Egypt, exposing him to clear risk of torture and incommunicado detention. He argues that Sweden was also aware of Egypt's rejection to other States' attempts to procure analogous assurances and establish effective follow-up mechanisms in expulsion cases according to the principles laid out in the Chahal decision.<sup>9</sup>

4.7 In addition, the decision to expel the author was taken not only after negotiations with the Egyptian authorities on the content of the assurances, but also after having sought the opinion of the British, United States and German Embassies in Cairo. Nor did Sweden seek to propose any amendments to the draft assurances proposed by the Egyptian side after the December meeting. Sweden ought also to have been aware of the fact that a number of other persons of Egyptian origin had been returned to and held in Egypt. In October 2001, for example, two inhabitants in Bosnia with dual Bosnian and Egyptian citizenship were deprived of their citizenship and deported from Bosnia to Egypt where they were sentenced to long imprisonments and allegedly subjected to torture. The author argues that it is thus unclear what real value the Government could in fact afford the assurances since they did not afford him any special, positive, treatment, as compared with other suspected terrorists. Rather, he was to be treated like any one else suspected of being threat to national security. All laws in force, including state security laws, were thus fully applicable to Mr. Alzery.

4.8 The author contends that the assurances were deficient in a number of specific respects. They did not provide for legal counsel to be appointed immediately upon return, for counsel to be present during interrogations, for sufficiently frequent private and unmonitored independent meetings or for access to independent medical examinations. By contrast, upon return to Egypt, the author was handed over to the Egyptian General Intelligence with five weeks elapsing prior to the first visit. The Ambassadorial visit was then agreed with the prison commandant in advance when the visits should take place. Visits were less frequent during the summer vacation months and Christmas when there were intervals of two months. None of the visits in prison took

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<sup>9</sup> Hani El Sayed Sabaei Youssef v Home Office [2004] EWHC 1884 (Queens Bench, Field J.)



place in private. Rather, the author was taken to the commandant's office, with up to ten officials present. On numerous occasions, officials were invited to participate in the conversation with the men, on other occasions they spontaneously commented on what had been said. The Embassy did not insist that the author be examined by a physician, much less one with specific experience of torture victims. Nor did it ask for permission to bring a doctor to the prison to perform any medical examination. The author was forced to speak with the Embassy staff through an interpreter, despite speaking Swedish almost fluently. Nor were Embassy staff allowed to visit him in the cell where he was being held. The author also claims that it was also clear from the Embassy reports that Embassy officials lacked experience and knowledge of how a torture victim behaves and speaks, what questions should be asked, overall of how to get as true a picture as possible. The author contends that it was careless of the Swedish authorities to approach the Egyptian authorities for an assessment of the veracity of the statements claiming ill-treatment. The Embassy visits aside, the author was only visited once by an attorney – in relation to his first appearance before a prosecutor.

4.9 After the first Ambassadorial visit when the author and the second detainee had complained of the treatment to the Swedish ambassador, the author contends that they were subjected to cruel and inhuman treatment as soon as the ambassador had left the prison. In consequence, they did not further raise the issue of ill-treatment until March 2003. During the winter of 2002-2003, the Swedish Ministry for Foreign Affairs appointed a special envoy, with responsibility for follow-up concerning the cases. When visiting the author and the second detainee in March 2003, ill-treatment allegations were renewed by the second detainee. Speaking thereafter, separately, to the author, the latter did not make any statement about the treatment but according to the Embassy report only asked if he had to answer the questions posed to him and that he already had said all the wanted to say.

4.10 The author thus argues that there were no real follow-up procedures in place at the time of the expulsion, and no adequate mechanisms were established afterwards that could protect him from ill-treatment. In the author's view, Sweden in fact did not even seek the opportunity to effectively monitor the agreement. The only thing that was agreed upon between Sweden and Egypt was the right for Swedish representatives to be present in any new trials that might take place. There is nothing in the agreements describing the right to visits in prison, or the regularity of such visits, nor how these visits were to take place or what would happen, what mechanisms would be put in place, if there were any signs of a violation of the agreement. In the author's view, the State party lacked both the competence and desire to appropriately monitor the author's situation, despite the concerns expressed from a variety of national and international quarters. Instead of remedying the situation, the Swedish Government contended that the monitoring was functioning and that there was nothing to suggest that Egypt had breached the agreement.

4.11 The author suggests that the reason for the lack of follow-up mechanism was that Sweden believed it could rely merely on the good faith of the Egyptian government to avoid being criticised for violating its international obligations. In the hearing before the Committee on the Constitution, the Swedish State Secretary expressly stated that Sweden, after the expulsion, could not interfere in what Sweden believed was the internal concern of a state as the author was an Egyptian national, detained in Egypt. The Ambassador had earlier explained that the reason he did not ask to visit the men until five weeks after they returned to Egypt was that if he did, it

would be seen as a sign of lack of confidence in Egypt respecting the agreement. The author argues that since Sweden had entered an agreement with Egypt, it not only felt obliged to trust that it would be respected, but also acted in a manner so that the weaknesses in agreement would not be exposed. The behaviour shows the inherent deficiencies in diplomatic agreements regarding the protection of the human rights of the individual. Diplomacy cannot effectively protect against illegal ill treatment of an individual. And as mentioned above, since both states risk being accused of having violated the absolute prohibition against torture, there is no incitement to reveal indications or information about ill-treatment. In May 2004, when Sweden unsuccessfully sought an investigation, the Egyptian authorities were unsympathetic to the suggestion that the claims of mistreatment be investigated by any foreign independent person or body. The Swedish authorities, while expressing their disappointment, were unable to further act. The author notes in this regard that the assurance is of no legal value in Egypt and cannot be enforced or utilised as a legal document by him.

4.12 The author questions whether the Swedish Government acted in good faith in expelling him. In addition to the immediate execution of the expulsion order, which denied recourse to international remedies, shortly after the terrorist attacks of 11 September 2001, the author notes that the Swedish Government had little hesitation in permitting a covert Central Intelligence Agency (CIA) operation to occur on Swedish soil. The Swedish security police was informed that there would be a security check of the men, but they did not ask what this would entail. They were also informed, and accepted, that the CIA agents would be masked and hooded. There were no senior Swedish officers present at Bromma airport, and those who were assigned to carry out the expulsion, relinquished authority and control to the foreign agents involved. The author adopts the view of the Parliamentary Ombudsman that the treatment already suffered on Swedish soil could have been anticipated because of the then global situation. He also emphasises that the operation he was subjected to was a joint Egyptian and United States' operation, with United States' and Egyptian agents both at Bromma airport and on the aircraft. The author suggests that the risk of ill treatment was thus already wholly clear and realized on Swedish territory, and accordingly the need for prompt and effective follow-up upon arrival was vital.

*- Treatment suffered at Bromma airport (article 7 of the Covenant)*

4.13 The author alleges that the treatment he suffered at Bromma airport, as described in paragraph 3.11, *supra*, was imputable to Sweden by the latter's failure to prevent it though within its power, and further violated his rights under article 7 of the Covenant. Moreover, the deficient and ineffective investigation of the treatment constituted a procedural violation of the same article. As to whether the treatment was imputable to Sweden, he notes that Swedish authorities allowed the treatment to take place, without seeking to prevent or stop it.

*- Inadequate investigation of alleged violations of torture or other cruel, inhuman or degrading treatment or punishment (article 7 of the Covenant)*

4.14 As to the investigation, the author argues that the treatment was not investigated promptly and independently, and allocated no individual responsibility, even at the level of a reprimand, upon conclusion. The unlawful acts by the foreign agents had not been subjected to any criminal investigation, despite complaints to the appropriate authorities. For his part, the Ombudsman's mandate did not extend to investigation or prosecution of foreigners' illegal acts on Swedish

territory. The author notes that the criminal complaint lodged in 2004 covered all possible criminal acts taking place at Bromma airport, including by foreign agents and, by way of command, the Swedish government. The prosecutor however promptly terminated the investigation. The previous investigation by the Ministry of Justice in April 2002 had also drawn the conclusion that nothing criminal had taken place at Bromma airport. Despite the investigation and findings presented by the Ombudsman in March 2005, the prosecuting authorities stood by their previous legal assessment and refused to re-open the investigation, arguing that it could not overrule the decision by the Ombudsman not to press charges against any Swedish law enforcement personnel. The main reason however for the Ombudsman not prosecuting was that because the prosecutor previously had decided not to press charges, he had conducted the investigations as an open investigation and not a criminal investigation, and had thus not informed the police officers who gave statements that what they said could be used against them in a court of law. Further, as the Ombudsman stated, he considered the Security police to have learned from the experience and thus in the course of the investigation not to change his investigation from a purely informative one to a criminal proceeding.

4.15 The author observes that the Ombudsman's investigation did not examine the issue of the command responsibilities of senior officials. Nor did the Ombudsman hear any foreign agents, as this was not his mandate. In the author's view, the Ombudsman's criticisms of illegality – specifically of foreign agents acting on Swedish soil without the proper consent and the treatment amounting at least to degrading treatment under international law - should have been sufficient for the Prosecutor-General to reopen the criminal investigation.

*- Exposure to risk of a manifestly unfair trial (article 14 of the Covenant)*

4.16 The author argues that his expulsion further violated article 14 of the Covenant, on the basis that in the circumstances of the case he was exposed to a risk of an unfair trial. The author recalls that he had left Egypt in 1991 on account of the persecution of individuals involved with organizations involved in Islamist opposition and the treatment he had already been subjected to. He feared that he would be detained under the emergency laws in place and interrogated under torture as many others in such situation had been. The author argues that the Swedish Government sought to exclude him from refugee protection on the grounds of his alleged association with Islamist groups in Egypt, although the Government could not prove such a connection.

4.17 The author contends that, at the time of his expulsion, the Swedish Government was unaware of his legal status in Egypt, believing for reasons unknown to the author that he had been convicted and sentenced to seven years in prison. Only in March 2003 did the Embassy report to the Government that it believed to have received information as to the author's correct status, specifically, that dating from 1993 he was suspected along with 250 others of being a member in a forbidden organization that engages in terrorist activities. He recalls that he was himself not informed about the case until late 2002, and was never prosecuted or tried for any criminal or security threatening activities.

4.18 The author argues that despite these facts, the Swedish Government has both publicly and in closed hearings consistently maintained that the author did in fact have terrorist links and responsibility for serious crimes, also raising issues under the presumption of innocence. Before

the Parliamentary Committee on the Constitution, it was suggested that the author held a leading position in a terrorist organisation in Egypt and was involved in serious crimes. He suggests that he was caught up in a general anti-terror hysteria, noting that he has never seen the full security police evaluation of his case. The author argues that his release without charge, despite interrogation and torture upon his return to Egypt, confirms his innocence of the terrorist association claimed.

4.19 The author notes that in its negotiations with Egypt, the Swedish Government never demanded that the author should be tried in a civilian court, only that he would be given a fair trial. He suggests this resulted from previous experiences where Egypt had resisted attempts of other States seeking to procure assurances of a civilian court trial.<sup>10</sup> The mechanics of how a fair trial could be secured were not discussed, with Sweden simply requesting to attend any new trial. The author notes that the person expelled at the same time as he had been and covered by the same assurance subsequently received a trial in a military court in patently unfair circumstances, which Sweden was not permitted to monitor. Nor was any Swedish representative present at the hearings before the prosecutor regarding the author. In the author's view, Sweden was well aware that there was no other legal avenue for him to have his case heard than before a military tribunal or an emergency court, with an attendant real risk of unfair trial. Such trials, routinely utilised since 1992 in terrorism-related cases, are sometimes held en masse and routinely fail to meet international fair trial standards even where the death penalty resulted. Evidence, including confessions, procured under duress, threats and torture is permitted, while individuals detained under emergency laws who do not receive a trial are only released after having confessed or given the requested information, often of names of other individuals, who are in turn arrested and interrogated. The author argues that a 2005 statement by the Swedish Minister for Foreign Affairs to the effect that the person expelled with Mr. Alzery should be given a trial in a civilian court as the military proceedings had not been fair shows that Sweden had originally accepted that military tribunals in Egypt could be fair and that the author would be tried before such a court.

4.20 The author acknowledges that the Committee's jurisprudence to date has not extended protection against refoulement to circumstances of unfair trial, but invites the Committee to follow the approach of the European Court of Human Rights which has done so.<sup>11</sup> He emphasises that there is a close link between the right to a fair trial and the right not to be tortured as prolonged detention, often incommunicado, prior to trial carries an acknowledged heightened risk of torture. This is particularly so where, as in this case, evidence extracted under torture is routinely utilised in subsequent proceedings. He recalls that although he received visits by Swedish representatives while in custody, this did not eliminate the risk and actual torture he was subjected to during the first two months.

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<sup>10</sup> See, for example, Bilasi-Ashri v Austria, European Court of Human Rights, 26 November 2002.

<sup>11</sup> See Colozza v Italy, judgement of 12 February 1985, Series A no. 89, p 16, § 32; Soering v United Kingdom, Application No. 1/1989/161/217, judgment of 7 July 1989, at 113; and Mamatkulov et al. v Turkey, Applications nos. 46827/99 and 46951/99, Grand Chamber judgment of 4 February 2005.

4.21 In light of the foregoing, the author argues that Sweden, by expelling him on the basis of unfounded allegations of terrorist activities not provided to him for a response and failing to secure that he would in fact be provided a fair, non-military trial violated his rights under article 14 of the Covenant. In conclusion, he notes that his case could readily have been handled as an extradition, which would have provided review in the Swedish courts. He also contends that due to the seriousness of the alleged crimes, he could also have been prosecuted in Sweden under its personal and universal jurisdiction for such crimes.

*- Inadequate process of expulsion of an alien and insufficient, ineffective remedy (articles 2 and 13 of the Covenant)*

4.22 The author argues that the procedure followed in his expulsion violated articles 13 and 2 of the Covenant. The author notes that under the Aliens Act, as it then stood, an asylum matter may be referred to the Government if it is judged to be a matter of public or national security or if the matter may be of importance for the nation's relationship with a foreign power or an intergovernmental organization. Such reference provides the Government complete discretion to weighing considerations of national security and the individual's right to protection. The national security issue is not adjudged by any court of law or other independent body before the Government's decision. The Government is the first and last instance – its decision cannot be appealed. Since matters dealt with under this procedure are classified, the information on which the decision is based (the evaluation by the Security Police) is normally withheld from the asylum seeker, counsel and the general public. While selected information can be revealed to the asylum seeker and his attorney, under strict non-disclosure orders, the grounds for the assessment are often only described in generalities and are not revealed to such an extent that they can be met or challenged by the individual. In the author's case, the only portion of the assessment by the Security Police provided, under non-disclosure order, was information he had given himself when being interviewed by the Security police. Nor, as a rule, does the affected individual have any right to present his case to the ministers or those government officials who take the decision, further curtailing his opportunities to submit any reasons against expulsion. The author specifically asked for a private meeting in order to present his case to the Government, but this request was rejected.

4.23 With reference to the Committee's previous criticism of such a denial of hearing in the context of the examination of the State party's fourth periodic report,<sup>12</sup> the author argues that this process fails to satisfy the requirements of article 13 of the Covenant. While acknowledging that article 13 permits States parties to expel an asylum seeker without an opportunity to submit the reasons against expulsion and without having an opportunity to have the case reviewed if there are "compelling reasons of national security", the author argues that such an exception should be construed narrowly in order to respect the purpose and spirit of the Covenant. It should also be read in conjunction with the established principles regarding procedural right for the individual asylum-seeker deriving from the Convention on the Status of Refugees 1951 and its Protocols. In its Handbook and in recently developed guidelines concerning the expulsion rules in the convention, the Office of the UN High Commissioner for Refugees (UNHCR) sets out minimum procedural safeguards to which asylum seekers should be entitled to, even if suspected of the most serious crimes. These guidelines set out that given the severe consequences of exclusion for

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<sup>12</sup> U.N. Doc. CCPR/C/79/Add.58 (1995), at para 16

an individual and its exceptional nature, it is essential that rigorous procedural safeguards in relation to this issue are built into the refugee status determination procedure. Reference should be made to the procedural safeguards considered necessary in refugee status determination in general, which include the consideration of each case; opportunity for the applicant to consider and comment on the evidence on the basis of which exclusion may be made; provision of legal assistance; availability of a competent interpreter, where necessary; reasons for exclusion to be given in writing; right to appeal an exclusion decision to an independent body; and no removal of the individual concerned until exhaustion of all legal remedies against decision to exclude.

4.24 The author argues that these standards were not met in his case, and that the information on which the Government based its security assessment must have been false. Nor is membership of a criminal organisation – which the author denies – in itself a sufficient ground to impute acts of the organisation, without more substantiation, to an individual and oust refugee protection. The author notes that prior to arrest and expulsion on 18 December 2001 he had not been detained, subjected to particular security controls or otherwise treated as a real security risk : he had been legally in Sweden and allowed to work and could in principle live a free and normal life in that country. The Migration Board referred his asylum claim to the Government after the Security Police made the assessment that he was considered to constitute a security risk. However, the dominant portion of the information concerning his alleged dangerousness was withheld from him and counsel. Without access to the full assessment by the Security Police, the author suggests that the only reason he was expelled was because he was on a form of “wanted” list in Egypt, and presumably also in the United States of America. Since the nature of the accusations was never revealed and it was not known what information the Swedish Security Police in Sweden believed to be credible, it was very difficult for the author to refute the accusations, including raising concerns about the risk of information being compromised for example by being procured through torture. Emphasising that even after lengthy detention in Egypt he was never charged, the author suggests that the Swedish Government relied too readily on information from its security services, which had itself relied on foreign intelligence, without exercising due diligence in its use. At the time of expulsion and to this day, the author remains unaware as to why he was considered to constitute a security risk in Sweden.

4.25 The author describes as “one-sided” the Government’s general competence in matters of national security in connection with an application for asylum, even if the individual faces a risk of torture or other cruel or inhuman punishment, the death penalty or other persecution. In the drafting history of the current Aliens Act, as well as in the Government commission report presented in 1999 proposing a change in the jurisdiction and rules of procedure in asylum matters, reviewers warned that: “If ... a person can present an arguable claim of a violation of Covenant rights, and if the Government has then made the decision as the first and only instance, the individual has been deprived of the right to an effective remedy prescribed in Article 13 (of the European Convention).”<sup>13</sup>

4.26 Inviting the Committee to take an analogous approach, the author further refers to Recommendation 98(13) of the Committee of Ministers of the Council of Europe, which

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<sup>13</sup> SOU 1999:16 Ökad rättssäkerhet i asylärenden (“Protection of individual rights in asylum matters”). Final report of committee on new jurisdiction and rules of procedure in alien matters (NIPU), pages 330-331.

described Article 13 (right to an effective remedy) in relation to Article 3 (prohibition against torture) as follows:

“1. An effective remedy before a national authority should be provided for any asylum seeker, whose request for refugee status is rejected and who is subject to expulsion to a country about which that person presents an arguable claim that he or she would be subjected to torture or inhuman or degrading treatment or punishment.

2. In applying paragraph 1 of this recommendation, a remedy before a national authority is considered effective when:

2.1. that authority is judicial; or, if it is a quasi-judicial or administrative authority, it is clearly identified and composed of members who are impartial and who enjoy safeguards of independence;

2.2. that authority has competence both to decide on the existence of the conditions provided for by Article 3 of the Convention and to grant appropriate relief;

2.3. the remedy is accessible for the rejected asylum seeker; and

2.4. the execution of the expulsion order is suspended until a decision under 2.2 is taken.”

4.27 The author commends to the Committee the approach on this issue taken by the Committee against Torture in the companion case of Agiza v Sweden, where the Committee stated (at 13.8):

“The Committee observes that, in the normal course of events, the State party provides, through the operation of the Migration Board and the Aliens Appeals Board, for review of a decision to expel satisfying the requirements of article 3 of an effective, independent and impartial review of a decision to expel. In the present case, however, due to the presence of national security concerns, these tribunals relinquished the complainant’s case to the Government, which took the first and at once final decision to expel him. The Committee emphasizes that there was no possibility for review of any kind of this decision. The Committee recalls that the Convention’s protections are absolute, even in the context of national security concerns, and that such considerations emphasize the importance of appropriate review mechanisms. While national security concerns might justify some adjustments to be made to the particular process of review, the mechanism chosen must continue to satisfy article 3’s requirements of effective, independent and impartial review. In the present case, therefore, on the strength of the information before it, the Committee concludes that the absence of any avenue of judicial or independent administrative review of the Government’s decision to expel the complainant does not meet the procedural obligation to provide for effective, independent and impartial review required by article 3 of the Convention [against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment].”

4.28 In addition to failing to meet the requirements of article 13, the author argues that the Government’s competence as the first and last decision making body in his case, including where

issues of torture are in play, breaches article 2 of the Covenant, as interpreted in General Comments 20 and 31, which requires an effective remedy. The exclusion of review possibility falls short of the requirement for accessible, effective and enforceable remedy for breach of a Covenant right.

*- Violation of the right to effective individual complaint (First Optional Protocol, article 1)*

4.29 The author argues that the execution of the Government's decision within a matter of hours, and without advice to either the author or counsel, both denied him the effective exercise of the right of complaint, including seeking interim measures of protection, guaranteed by article 1 of the Optional Protocol. In consequence, irreparable harm resulted. The author points out that on 14 December 2001 his (then) Swedish counsel had advised the Government of his intention to pursue international remedies in the event of an adverse decision. He argues that the precipitate haste of the expulsion was intended to avoid such an eventuality. He adds that in the days prior to expulsion, counsel was not provided with full security reports, any detail as to the negotiations with Egypt or the timetabling of the Government's decision; indeed, officials specifically declined to acquiesce to counsel's requests for relevant records. When counsel's call with the author was cut off on 18 December 2001, the former was advised upon contacting the Ministry of Foreign Affairs that no decision had been taken. Advice by certified letter of the decision only reached counsel after the expulsion.

4.30 The Security Police, for its part, had also planned the swiftest possible execution of the expulsion order. Although the Security Police had informed the Ministry of Foreign Affairs that it had an aircraft ready to transport the author to Egypt on 19 December 2001, this was rejected by Government as not prompt enough. The Security Police then presented the Government with a proposal it had received from the United States, namely that the Central Intelligence Agency had an aircraft that had airspace clearance to Cairo on 18 December, which could be utilised by Sweden. The author argues that it was thus clear that the Security Police both knew that the decision to expel was going to be taken that day and were ready to act as soon as it was taken. Taking these facts together, and relying on the decision in Agiza v Sweden that equivalent events constituted a breach of the right to exercise effective complaint under article 22 of the Convention against Torture or Other Cruel, Inhuman or Degrading Treatment or Punishment ("the Convention against Torture"), the author argues that a parallel violation of article 1 of the Optional Protocol is disclosed.

### **State party's submissions on admissibility**

5.1 By Note verbale of 10 October 2005, the State party disputed the admissibility of the communication on three bases. Firstly, it questioned whether the communication was in fact submitted on behalf of the alleged victim, suggesting that Mr. Alzery might only have recently become aware that a communication had been filed in his name. It remained unclear whether current counsel for the author had been properly authorised by her client to bring his case before the Committee. (*infra*, para. 7)

5.2 Secondly, the State party argued that the communication was inadmissible by virtue of its reservation in respect of communications where the same matter was being or had been examined under another procedure of international investigation or settlement. The State party noted that the author submitted claims of torture, ill-treatment and death, as well as absence of



access to court and to effective remedies to the European Court of Human Rights, which declared the case inadmissible for introduction out of time. The State party argued that both complaints concerned the same matter, based on the same facts and the same legal arguments. The reservation was further intended to avoid “appeal” from the European Court to the Committee. In the State party’s view, it might be questioned whether a decision by the Committee not to consider the present communication inadmissible on this basis might not undermine respect for the Court and its decision. In contrast to the situation in O.F. v Norway,<sup>14</sup> where the Committee had found that a procedural reservation did not preclude a communication where the European Commission’s Secretariat had advised of likely admissibility problems, the European Court here had explained at length its decision to declare the case inadmissible.

5.3 Thirdly, the State party raised the issue of delay in submission of the communication amounting to an abuse of process. It noted that while delay per se did not amount to abuse, in certain circumstances, the Committee expected reasonable justification for delay.<sup>15</sup> The State party drew the Committee’s attention to the fact that the author appeared to have waited until the decision of the Committee against Torture in the parallel case of Agiza v Sweden on 20 May 2005 before submitting the case. In the State party’s view, the delay between the expulsion on 18 December 2001 and submission of the communication on 29 July 2005 was excessive and without acceptable justification. This was particularly so with regard to the time period between the author’s release in October 2003 and July 2005, and even more so for the period between the European Court’s decision in October 2004 and July 2005. The State party saw no apparent reason why the Committee was not approached as soon as possible after the European Court’s decision – the facts of his case had already been presented to the Court and the legal arguments made before the Court could also have been used before the Committee.

5.4 The State party also recalled the detailed reasoning of the European Court analysing the delay before it, and suggested that this reasoning had bearing in the present context. Against this background and considering that the Committee’s jurisprudence had accepted that a communication can be time-barred, the State party contended that there was a risk of undermining respect for the European Court and its decisions if the communication is proceeded with. In the interests of legal certainty and avoiding a state of uncertainty, therefore, the State party argued that an abuse of submissions is disclosed.

5.5 In addition, as to the claims concerning alleged failure to take necessary measures in respect of events at Bromma airport (article 7) and concerning the treatment of torture in domestic legislation (article 7), the State party argued that these claims are insufficiently substantiated, for purposes of admissibility. As to the claim under article 14, the State party failed to understand the lack of fair trial given that no trial took place, in Egypt or in Sweden. The claim was thus hypothetical and the author had insufficient status as a victim. Moreover, as no charge was laid which could attract the application of article 14, the claim was inadmissible *ratione materiae*.

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<sup>14</sup> Communication No. 158/1983, decision of 26 October 1984.

<sup>15</sup> See Gobin v Mauritius, communication No. 787/1997, inadmissibility decision of 16 July 2001.

**Counsel's comments on State party's submissions on admissibility**

6.1 By letter of 10 January 2006, counsel for the author responded, disputing the State party's submissions. As to the question of ongoing authority to act, counsel argued that she retains plenary power to advance the communication on Mr. Alzery's behalf. She argued that the power of attorney of January 2004 to Mr. Alzery's former Swedish counsel granted him the right to act in all cases and instances on behalf of Mr. Alzery and to appoint any person whom he wished to represent Mr. Alzery. Any objection to the existing counsel's power of attorney therefore had to invalidate the original January 2004 authority. Counsel argued however that it is a general principle of law that a power of attorney was valid until it had been withdrawn, as demonstrated by sufficient, objective evidence, which had not been shown in the present case. Counsel further argued that the onus of proof should be on the State party to demonstrate such a change in circumstances. In any event, she supplied a written declaration from Mr. Alzery's original counsel confirming current counsel's continuing authority to act.

6.2 Counsel went on to question the propriety of the State party contacting an opposing applicant in an ongoing legal matter in order to ask sensitive questions about the complaint, rather than to turn to that person's legal representative. Counsel argued that such conduct put Mr. Alzery "at great risk", and argued that the State party thus sought to put pressure on Mr. Alzery and to determine whether and, if so, how he remained in contact with his lawyer. The circumstances of Mr. Alzery's release militated against the possibility of accurately demonstrating Mr. Alzery's intent without risk to him, particularly with reference to events transpiring when Swedish counsel visited (see para 3.19, *supra*). In light of circumstances, counsel's willingness and ability to contact him was also substantially restricted. Counsel disputed, moreover, that the Swedish Embassy had been in regular contact with Mr. Alzery.

6.3 Counsel argued that once Mr. Alzery's former counsel was informed by the Ministry of Foreign Affairs of its contact with Mr. Alzery concerning the communication (see para 4.1, *supra*), a senior Ministry official confirmed that he believed that it was probable that Mr. Alzery's phone was tapped but that the Embassy had made the assertion that discussing these matters over the phone was without risk for Mr. Alzery. In October 2005, in what counsel believed to be a safe communication with Mr. Alzery, Mr. Alzery's former counsel asked about the telephone call from the Embassy and whether it was true that Mr. Alzery had stated that he did not know of and did not want any examination by the Committee. After having been assured that Mr. Alzery wanted to pursue his complaint to the Human Rights Committee, Mr. Alzery advised that the person who called him was the interpreter employed by the Embassy. The men thus spoke Arabic but, according to Mr. Alzery, the interpreter was not translating their conversation into Swedish, which Mr. Alzery spoke well. He could not hear anyone asking questions or talking in the background. According to Mr. Alzery, the interpreter brought up the Agiza decision of the Committee against Torture, suggesting that decision could be a "good opportunity" also for him. The interpreter then pursued the subject by asking if Mr. Alzery had any plans on using the decision by the Committee against Torture, to which Mr. Alzery responded that his lawyer in Sweden took care of all his legal matters.

6.4 As to the argument that the Committee's competence to consider the communication was precluded by the State party's reservation, counsel referred to the Committee's jurisprudence that dismissal of a case on purely procedural grounds, such as the six month rule applied by the

European Court in this case, did not amount to an “examination” of the case within the meaning of such a reservation. In any event, the current communication raised claims with respect to articles 13 and 7 of the Covenant (in relation to treatment at Bromma airport and the State party’s alleged failure to promptly and independently investigate the violations) that had not been raised by the European Court. The complaint also elaborated much further on articles 2, 14 and 7 of the Covenant (concerning the *non-refoulement* principle) than had been possible before the European Court. Counsel rejected that Mr. Alzery had ever sought or intended to use the international complaints mechanisms in a fashion inconsistent with the object and purposes of the treaties, or that a decision by the Committee would in any way undermine respect for the European Court.

6.5 With respect to the argument of an unjustified delay in submission of the communication, counsel argued that in the circumstances of the case, it had been submitted in timely fashion. Counsel noted at the outset that Mr. Alzery was expelled unexpectedly and without the possibility to turn to any national or international body to challenge or stay execution of the expulsion. Mr. Alzery had, through his then lawyer, made clear to the Swedish Government that if a decision to expel were to be taken he would turn to an international body such as the European Court. The possibility that the Government would decide to execute an expulsion decision immediately, without informing counsel, was at the time so unorthodox that it was entirely unforeseeable. Equally atypical was the decision to use and rely on diplomatic assurances. Counsel contends that had Mr. Alzery or his lawyer been informed of the use of diplomatic assurances before the expulsion, he would immediately have sought interim measures at the international level.

6.6 Counsel argued that ever since the decision of 18 December 2001, the circumstances of the Mr. Alzery’s case had been exceptional and surrounded by secrecy and clandestine behavior, with none of a number of international and national investigations undertaken since then having been able to investigate in full all dimensions of the case. Neither had Mr. Alzery been accepted as a complainant or party to any investigation. Some of these examinations were also flawed because of misinformation or unwillingness on the Swedish government’s part to submit information, creating an uncertain legal situation for Mr. Alzery. Counsel emphasizes that Mr. Alzery was only released in October 2003, with the strict limits on communication making contact by counsel risky, difficult and infrequent. In addition, counsel sought to exhaust alternatives to a national or international complaint that would not be as intrusive or dangerous for Mr. Alzery, including the effort to procure an investigation of the High Commissioner for Human Rights and to reach an agreement for his return to Sweden. The decision to turn to the Committee thus had to be considered with due diligence for Mr. Alzery’s well being, in the light of the investigations concluding after the European Court’s decision of October 2004.

### **Supplementary submissions of the parties on the admissibility of the communication**

7. By Note verbale of 10 February 2006, the State party advised that in light of counsel’s comments upon its submission on the admissibility of the communications, it saw no reason to maintain the doubt expressed as to whether counsel had been actually authorized by her client to advance the communication. It accordingly withdrew its objection in this regard.

### Decision on admissibility

8.1 At its eighty-sixth session, on 8 March 2006, the Committee considered the admissibility of the communication. Firstly, with respect to the State party's argument that the Committee's jurisdiction to consider the case was excluded by the terms of the State party's reservation, the Committee recalled its constant jurisprudence that where a complaint to another international instance, such as the European Court of Human Rights, was dismissed on procedural grounds without examination of the merits, it could not be said to have been "examined", so as to exclude the Committee's competence.<sup>16</sup> In the present case, the European Court having dismissed the application on the procedural ground of failure to comply with the six-month rule for submission of the application, the Committee was likewise not precluded from further consideration of the communication. The Committee further observed that, contrary to the State party's suggestion, such a conclusion involves no disrespect for the European Court, on the basis that the Committee's admissibility criteria did not include the basis upon which the European Court based its decision. It follows that the communication was not inadmissible on this ground.

8.2 Secondly, with respect to the State party's argument that the communication should be dismissed as an abuse of process on the grounds of being time-barred, the Committee noted that the author's (then) counsel had initiated correspondence with the European Court of Human Rights, a choice of forum appropriately and properly open to him, less than six months after the expulsion. In view of the complexities of the case, including the scarcity of detail known about his treatment, general condition and willingness to proceed with a complaint, that period could not be viewed as undue. From the decision of inadmissibility rendered by the European Court of Human Rights in October 2004 to the submission of the communication to the Committee in July 2005, a further eight months had elapsed. In the circumstances and in light of the Committee's previous practice with respect to passage of time, the Committee was not persuaded that the lapse of time was sufficiently egregious or otherwise defined by extraordinary circumstances (such as the intervening election in Gobin v Mauritius<sup>17</sup>) to amount to an abuse of process. The complaint was thus not inadmissible on this ground.

8.3 Thirdly, the State party raised the issue as to whether the communication was properly submitted on behalf of Mr. Alzery. The Committee noted that the State party subsequently withdrew its objection to this aspect of the admissibility of the communication. The Committee observed, moreover, with respect to the terms of the authorization, that its practice was not to construe powers of authority in strict or formalistic terms. Rather, it sought to give effect to the *de facto* authority which the complainant sought to confer on counsel. Applying such an approach, there can be little doubt that Mr. Alzery had conveyed an authority to act sufficiently wide at the time it was given to encompass a communication to the Committee. At the same time, a power of authority could be revoked either explicitly or implicitly by subsequent events which were inconsistent with the original conferral of authority.

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<sup>16</sup> See, for example, Weiss v Austria, communication No. 1086/2002, Views adopted on 3 April 2003, and Linderholm v Croatia, communication No. 744/1997, decision adopted on 23 July 1999.

<sup>17</sup> Op.cit.

8.4 As to whether such a revocation had occurred in the present case, the Committee noted that the State party's original argument rested on what Mr. Alzery was said to have confided to an Arabic-speaking member of the Swedish Embassy's staff speaking to him by telephone for the first occasion in a considerable period of time. In view of the strictness of the conditions of his release and, in particular, events following apparent monitoring of Mr. Alzery's previous telephone contact with a national human rights organization (see para 3.19, *supra*), Mr. Alzery's statement as a reflection of his true intent had to be treated with considerable caution. Taking into account both the gravity of the alleged violations, as well as the importance for international review of the merits of such a case should the national investigations undertaken be shown, on the merits, to have been inadequate or ineffective, the Committee considered that the State party had not discharged its burden of demonstrating that the power of attorney originally conferred no longer continued to subsist. It followed that, even if the State party had not withdrawn this objection to admissibility, the Committee would not have considered the communication inadmissible on the basis of counsel not having been properly authorized by Mr. Alzery.

8.5 The Committee further considered that the author had substantiated, for purposes of admissibility, his arguments related to breach of the prohibition of refoulement, his treatment suffered at Bromma airport and inadequate investigation of alleged violations of torture or other cruel, inhuman or degrading treatment or punishment (all article 7 of the Covenant); exposure to risk of a manifestly unfair trial (article 14 of the Covenant); inadequate process of expulsion of an alien and insufficient, ineffective remedy (articles 2 and 13 of the Covenant); and violation of the right to effective individual complaint (First Optional Protocol, article 1). On 8 March 2006, it therefore declared the communication admissible.

### **State party's submissions on the merits**

9.1 By submissions of 10 October 2005 and 5 May 2006, the State party addressed the merits of the communication. As to the claim of a breach of article 7 on account of the author's refoulement to Egypt and exposure to a real risk of torture and other ill-treatment, the State party refers to the decision of the Committee against Torture in the companion case of Agiza v Sweden, where that Committee found a breach of article 3 of the Convention against Torture. The State party accepts that finding and sees no reason to contest the corresponding claim under the Covenant, without however conceding that the author was in fact tortured or ill-treated. If such treatment occurred, primary responsibility lay with the Egyptian authorities and represented a breach of their bilateral undertakings. The State party, referring to its desire to ascertain what actually took place, however invokes the fruitless efforts at the highest levels to achieve an impartial, independent investigation with international expertise into the course of factual events in Egypt subject to the expulsion (*supra*, at para 3.24). The State party observes that it is not content with the responses of the Egyptian Government, but that, in the process of carefully considering what possible further action to take, it is of the utmost importance that some confirmation is received that such action is in line with the author's own wishes. To date, the State party has received contradictory information about these wishes. Naturally, further measures must not risk affecting or jeopardizing the author's safety or welfare in any way, and it is necessary, in the circumstances, that the Egyptian Government cooperates and concurs in any further investigative efforts. In addition, the State party refers to the findings of its Parliamentary Committee on the Constitution and its efforts to develop an instrument within the Council of Europe on appropriate use of diplomatic assurances. After the relevant body of the

Council of Europe decided not to pursue work in this area, the State party has no intention of further pursuing this issue of a formal instrument on assurances internationally. In the light of these efforts, the State party leaves to the Committee the question of whether there has been a violation of article 7 in this respect.

9.2 Concerning the claims under article 7 concerning the alleged ill-treatment at Bromma airport, the State party refers to the findings of the Parliamentary Ombudsman (*supra*, para 3.23 *et seq*) expressing extremely grave criticism of the Security Police and serious shortcomings in the way the case was handled. It notes however that the Parliamentary Ombudsman found that degrading treatment had taken place and not torture, though his criticism nonetheless remained valid. The State party also rejects that what transpired amounted to torture as defined by article 1 of the Convention against Torture.<sup>18</sup> The State party notes that after the release of the Parliamentary Ombudsman's findings, an independent "Enforcement Committee" concluded that there was a need for clear guidelines for enforcement of expulsion orders of aliens. This was followed in October 2004 circular memorandum of the National Police Board, which in February 2005 was incorporated into the Board's regulations with immediate effect. These regulations require, inter alia, a police officer in charge of enforcement to intervene immediately if an alien is treated by foreign authorities in breach of Swedish notions of justice. Swedish police are explicitly held responsible for enforcement when assisted by a foreign authority, while security checks carried out on Swedish territory must be carried out by Swedish police. Further, the State party details training and reorganisation of the Security Police, strengthening of specialist resources for such situations and clarifying lines of responsibility. While unable to report or comment on reasons for foreign officials' actions in this case, the State party accepts that certain steps taken at Bromma airport were too far-reaching in relation to the actual risks involved. On this basis, the State party leaves to the Committee the assessment of this article 7 issue.

9.3 As to the alleged failure, also in breach of article 7, properly and independently to investigate the treatment at Bromma airport, to hold any individual responsible or to investigate acts of foreign agents, the State party observes that these events were considered by the ordinary apparatus of criminal prosecution, referring to the three sets of reasoned decisions by the Stockholm district prosecutor, the Prosecutor-Director and the Prosecutor-General. Special measures of investigation by bodies with competence to engage criminal proceedings were also taken by the Parliamentary Ombudsman, who decided not to initiate a preliminary criminal investigation, and the Parliamentary Standing Committee on the Prosecution, which decided not to take further action on criminal complaints against relevant Ministers. In accordance with Swedish law, these proceedings were undertaken promptly and independently after complaints were filed, and thus there is no violation of article 7 in this respect.

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<sup>18</sup> Article 1 of the Convention provides as follows:

1. For the purposes of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

9.4 Concerning the claim that torture and other ill-treatment are insufficiently proscribed in Swedish law, the State party recalls that the Covenant does not require specific definitions of these notions to be incorporated. After careful assessment of Swedish criminal law, the State party concluded that the Convention against Torture did not require amendments to domestic criminal legislation. All acts of (as well as attempts of and complicity in) torture and cruel, inhuman or degrading treatment or punishment are offences under domestic law, punished appropriately grave penalties, consistent with article 7 of the Covenant. On the alleged lack of fair trial, the State party notes that no criminal charges were brought against the author after his return, nor did he stand trial there. There was thus no violation of his rights under article 14.

9.5 As to the lack of an effective remedy against the Cabinet-level decision on the author's asylum application, the State party accepts the finding of the Committee against Torture in Agiza that this amounted to a breach of the procedural obligation in article 3 of the Convention against Torture and thus does not contest the corresponding claim under the Covenant. The State party notes, however, that as from 31 March 2006, a new system for judicial examination of asylum claims has been established in the form of Migration Courts and a Supreme Migration Court. Under this system, the Supreme Migration Court, on oral hearing, may determine the existence of an impediment to enforcement of the expulsion decision, such as a risk of torture, which would be binding on the Government. The new legislation also provides for automatic issuance of a residence permit, absent extraordinary circumstances, to an alien where an international body deciding on an individual complaint concludes the individual cannot be removed. On the claim that the author's expulsion was inconsistent with article 13 as he was not permitted to present his case to the Ministers and/or officials who took the decision, the State party notes that the expulsion decision was reached according to law, and that article 13 affords an exception for national security circumstances, which existed in the present case. There was thus no violation of article 13 of the Covenant.

9.6 On the alleged lack of opportunity to seize the Committee of the case, in breach of article 1 of the Optional Protocol, the State party accepts the finding of the Committee against Torture in the Agiza case that immediate execution of the expulsion order frustrated the effective right of communication and thus it sees no reason to contest the corresponding claim before the Committee. It notes the Standing Committee's conclusions in its report of 21 September 2005 on this matter that concerns an individual might seek interim measures before an international body could not be allowed to come into play and that expulsion decisions being notified to expellees by the enforcement authority, while counsel was notified by letter, was acceptable provided that counsel was notified more quickly.

### **Counsel's comments on the State party's submissions on the merits**

10.1 On 16 June 2006, counsel responded to the State party's submissions on the merits. As to the sufficiency of the investigations undertaken with respect to the treatment at Bromma airport, counsel notes that the Swedish Government was aware from an early stage as to what had transpired at the airport, indeed the Ministry of Justice had compiled a report on the matter. The State party however kept these issues confidential and out of public and parliamentary domain for several years. It was only until the 2004 transmission of a television programme providing details on these matters that a criminal complaint was first lodged and formal criminal investigations began. It is thus misleading to speak of prompt investigations. Furthermore,

counsel argues that even accepting the State party's reasons for the Ombudsman's decision not to initiate a criminal investigation (see *supra*, para 3.27), this represents a systemic lack of control for which the Security Police is organisationally responsible. The Ombudsman's decision to undertake an investigation of informational nature, with officials required to give testimony, also meant that not only the Ombudsman but also other prosecuting authorities were unable to prosecute the officials responsible, on account of self-incrimination.

10.2 Concerning the State party's suggestions of wariness as to further action vis-à-vis the Egyptian authorities (see *supra*, para 9.1), counsel states the author already informed the Swedish Government of his willingness to participate in a full and comprehensive investigation if performed independently and capable of guaranteeing his safety. This remains the position, although the author has always declined, on grounds of personal safety, an investigation being carried out by Egyptian police, particularly if it had as its object of punishment of individual officers. He is concerned that bilateral negotiations between Sweden and Egypt, anyway initiated late, are not in his interest and that a bilateral investigation could expose him to great risk, with the State retaining the legal power to arbitrarily detain him on security grounds.

10.3 As to the argument under article 14, counsel argues that the fact that the author did not in fact receive a trial is no answer to his claims. He suffered interrogation and abuse in detention, meeting only repeatedly a prosecutor who ordered further imprisonment. There was no presence or monitoring by the Embassy of these sittings, nor did the Embassy establish contact with a national human rights group engaged in monitoring the proceedings, despite being made aware of this fact. He was provided a lawyer for the first such hearing, but was not allowed to meet him before. A privately-retained lawyer was not able to visit him in prison. Egyptian law only allows public counsel after formal charges are laid. He was never presented with any evidence he could examine or informed in detail about the accusations against him. Counsel argues that the State party was aware of the serious risk that his legal rights as an accused would not be respected and that there were no follow-up mechanisms in place to exercise already minimal control over proceedings after the author was returned.

10.4 As to the argument under article 13 and the State party's invocation of the national security exception, counsel argues this provision was inapplicable in this case. Referring to the Swedish Government's recent grant of visas to Hamas politicians, its belief at the time (*supra*, para 4.17), that Mr. Alzery was subject to a relatively low possible sentence of seven years imprisonment under Egyptian law for the offence that the author was suspected of and that there was never sufficient evidence for him to be charged, let alone convicted, of an offence, counsel argues that no case for the national security exception in article 13 could be made out. In any event, the lack of due diligence in investigating the case and reliance on international intelligence for justification of the expulsion failed to meet even the basic level of due process afforded by article 13.

10.5 Finally, counsel submits that torture rather than any lesser form of ill-treatment was suffered at each stage of the author's forcible return (treatment at Bromma airport, silently consented to by the Swedish police, treatment in flight and treatment in Egypt upon return). In any event, counsel observes that the assessment of qualification of severity lies independently with the Committee rather than any domestic authorities, and that the Committee has consistently been reluctant to distinguish strictly between categories of ill-treatment.



### Consideration of the merits

11.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as provided in article 5, paragraph 1 of the Optional Protocol.

11.2 The Committee notes at the outset that, with respect to a number of claims, the State party concedes violations of the Covenant or the Optional Protocol, on the basis of parallel findings of the Committee against Torture in the case of Agiza v Sweden made with respect to substantially similar provisions of the Convention against Torture. While such a concession is relevant to the Committee's determination, it must nevertheless independently ascertain that in the circumstances of the case violations of the relevant provisions of the Covenant or the Optional Protocol occurred.

11.3 The first substantive issue before the Committee is whether the author's expulsion from Sweden to Egypt exposed him to a real risk of torture or other ill-treatment in the receiving State, in breach of the prohibition on refoulement contained in article 7 of the Covenant. In determining the risk of such treatment in the present case, the Committee must consider all relevant elements, including the general situation of human rights in a State. The existence of diplomatic assurances, their content and the existence and implementation of enforcement mechanisms are all factual elements relevant to the overall determination of whether, in fact, a real risk of proscribed ill-treatment exists.

11.4 The Committee notes that, in the present case, the State party itself has conceded that there was a risk of ill-treatment that – without more – would have prevented the expulsion of the author consistent with its international human rights obligations (see *supra*, at para 3.6). The State party in fact relied on the diplomatic assurances alone for its belief that the risk of proscribed ill-treatment was sufficiently reduced to avoid breaching the prohibition on refoulement.

11.5 The Committee notes that the assurances procured contained no mechanism for monitoring of their enforcement. Nor were any arrangements made outside the text of the assurances themselves which would have provided for effective implementation. The visits by the State party's ambassador and staff commenced five weeks after the return, neglecting altogether a period of maximum exposure to risk of harm. The mechanics of the visits that did take place, moreover, failed to conform to key aspects of international good practice by not insisting on private access to the detainee and inclusion of appropriate medical and forensic expertise, even after substantial allegations of ill-treatment emerged. In light of these factors, the State party has not shown that the diplomatic assurances procured were in fact sufficient in the present case to eliminate the risk of ill-treatment to a level consistent with the requirements of article 7 of the Covenant. The author's expulsion thus amounted to a violation of article 7 of the Covenant.

11.6 On the issue of the treatment by the author at Bromma airport, the Committee must first assess whether the treatment suffered by the author at the hands of foreign agents is properly imputable to the State party under the terms of the Covenant and under applicable rules of State responsibility. The Committee notes that, at a minimum, a State party is responsible for acts of foreign officials exercising acts of sovereign authority on its territory, if such acts are performed with the consent or acquiescence of the State party (see also article 1 of the Convention against

Torture). It follows that the acts complained of, which occurred in the course of performance of official functions in the presence of the State party's officials and within the State party's jurisdiction, are properly imputable to the State party itself, in addition to the State on whose behalf the officials were engaged. Insofar as the State party accepts the finding of its Parliamentary Ombudsman that the treatment suffered was disproportionate to any legitimate law enforcement purpose, it is evident that the use of force was excessive and amounted to a breach of article 7 of the Covenant. It follows that the State party violated article 7 of the Covenant as a result of the treatment suffered by the author at Bromma airport.

11.7 As to the claim under article 7 relating to the effectiveness of the State party's investigation into the treatment suffered at Bromma airport, the Committee notes that the State party's authorities were aware of the mistreatment suffered by the author from the time of its occurrence; indeed its officials witnessed the conduct in question. Rather than submit conduct whose criminal character was plainly well arguable to the appropriate authorities, the State party waited over two years for a private criminal complaint before engaging its criminal process. In the Committee's view, that delay alone was insufficient to satisfy the State party's obligation to conduct a prompt, independent and impartial investigation into the events that took place. The Committee further notes that as a result of the combined investigations of the Parliamentary Ombudsman and the prosecutorial authorities, neither Swedish officials nor foreign agents were the subject of a full criminal investigation, much less the initiation of formal charges under Swedish law whose scope was more than capable of addressing the substance of the offences. In particular, the Committee notes that the decision of the Parliamentary Ombudsman to effect an informational investigation including substantial compelled testimony. While the thoroughness of the investigation for that purpose is not in doubt, the systemic effect was to seriously prejudice the likelihood of undertaking effective criminal investigations at both command and operational levels of the Security Police. In the Committee's view, the State party is under an obligation to ensure that its investigative apparatus is organised in a manner which preserves the capacity to investigate, as far as possible, the criminal responsibility of all relevant officials, domestic and foreign, for conduct in breach of article 7 committed within its jurisdiction and to bring the appropriate charges in consequence. The State party's failure to so ensure in this case amounts to a violation of the State party's obligations under article 7, read in conjunction with article 2 of the Covenant.

11.8 As to the claim concerning the absence of independent review of the Cabinet's decision to expel, given the presence of an arguable risk of torture, the Committee notes that article 2 of the Covenant, read in conjunction with article 7, requires an effective remedy for violations of the latter provision. By the nature of refoulement, effective review of a decision to expel to an arguable risk of torture must have an opportunity to take place prior to expulsion, in order to avoid irreparable harm to the individual and rendering the review otiose and devoid of meaning. The absence of any opportunity for effective, independent review of the decision to expel in the author's case accordingly amounted to a breach of article 7, read in conjunction with article 2 of the Covenant.

11.9 Regarding the claim under article 14 concerning exposure to a risk of a manifestly unfair trial, the Committee notes that the State party sought to rely simply on the receiving State's incorporation, in the diplomatic assurances, of an undertaking to afford the author a fair trial. Given both that no trial in fact occurred and in view of the Committee's findings set out above

that State party exposed the author at the point of expulsion to grave violations of the Covenant, the Committee does not consider it necessary to make a separate finding on this issue.

11.10 Concerning the claim under article 13, the Committee accepts that the decision to expel the author was reached in accordance with the State party's law as it then stood and was thus "in pursuance of a decision reached in accordance with law", within the meaning of article 13 of the Covenant. The Committee notes that in the assessment of whether a case presents national security considerations bringing the exception contained in article 13 into play allows the State party very wide discretion.<sup>19</sup> In the present case, the Committee is satisfied that the State party had at least plausible grounds for considering, at the time, the case in question to present national security concerns. In consequence, the Committee does not find a violation of article 13 of the Covenant for the author's failure to be allowed to submit reasons against his expulsion and have the case reviewed by a competent authority.

11.11 Inasmuch as the claim of a breach by the State party of its obligations under the Optional Protocol is concerned, the Committee refers to its established jurisprudence that a State party is obliged, upon adhering to the Optional Protocol, to permit the exercise in good faith of the right of complaint to the Committee conferred by the Optional Protocol, and to refrain from steps which would render decision on the communication nugatory and futile.<sup>20</sup> In the present case, the Committee notes that the author's (then) counsel had expressly advised the State party in advance of the Government's decision of his intention to pursue international remedies in the event of an adverse decision (see supra, paragraph 4.29). Counsel was incorrectly advised after the decision had been taken that none had been reached, and the State party executed the expulsion in the full knowledge that advice of its decision would reach counsel after the event. In the Committee's view, these circumstances disclose a manifest breach by the State party, of its obligations under article 1 of the Optional Protocol.

12. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts as found by the Committee reveal violations by Sweden of article 7, read alone and in conjunction with article 2 of the Covenant. The Committee reiterates its conclusion that the State party also breached its obligations under article 1 of the Optional Protocol.

13. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy, including compensation. The State party is also under an obligation to avoid similar violations in the future. In this respect, the Committee welcomes the institution of specialized independent migration courts with power to review decisions of expulsion such as occurred in the present case.

14. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of

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<sup>19</sup> See, for example, Borzov v Estonia, communication No. 1136/2002, Views adopted on 26 July 2004.

<sup>20</sup> Piandiong et al. v. The Philippines, communication No. 869/1999, Views adopted on 19 October 2000, and Weiss v Austria, communication No. 1086/2001, Views adopted on 3 April 2003.

the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant, and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the Committee's Views.

[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.]

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