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Gäfgen: opening the door to a reassessment of Article 3 violations?

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In 2002, the applicant in *Gäfgan v Germany* (No. 22978/05) 30/7/08 kidnapped and suffocated a boy. At the time of the applicant's arrest, the police believed the boy to still be alive. When the applicant did not disclose the boy's whereabouts, the local deputy chief of police instructed the interrogating officer to tell the applicant that he would suffer pain unless he disclosed the boy's location. The applicant then confessed to killing the boy and hiding the body. The German courts acknowledged that the threats uttered against him were contrary to Art. 3 (prohibition of torture) of the ECHR and that his testimony was not admissible in evidence during the trial. Evidence that had been obtained as a result of this testimony, however, such as the discovery of the boy's body, could be used at trial, and the applicant was sentenced to life imprisonment.

After failed appeals to German courts contesting the use of evidence obtained through torture, the applicant complained to the ECtHR. The ECtHR, while recognising that the applicant was subjected to inhuman treatment, refused, however, to recognise him as the victim of a violation of Art. 3 (on the grounds that the police officers who pressured the applicant were subjected to sanctions by the German courts), and did not find a violation of the right to a fair trial.

interrogation practices, interrogators have developed sophisticated psychologically-orientated interrogation techniques designed to convince suspects that it is in their own interest to cooperate.[2] However, in cases where the police are dealing with suspects who operate on the assumption that they will refuse any cooperation with the police, the police may want to apply more extreme interrogation tactics than those permitted in ordinary criminal cases.

It is noted that the ECtHR did not regard the threat of torture as torture and considered that: "*…the questioning […], took place in an atmosphere of heightened tension and emotions owing to the fact that the police officers, who were completely exhausted and under extreme pressure, believed that they had only a few hours to save J.'s life…*",[3] which was regarded as a mitigating factor by the ECtHR.

In addition to such mitigating circumstances, some commentators have argued that police brutality may also be defended on the grounds that without the infliction of pain and psychological pressure some serious crimes would not be solved.[4] However, these arguments question the capability of Art. 3 (which constitutes an absolute prohibition) to cover those violations where police are more likely to use extreme interrogation tactics relying on extensive psychological pressure, and even challenge the absolute nature of Art. 3 itself.

The preventive reach of Art. 3 was expanded in *Soering v UK* (No. 14038/88) 7/7/89, and, more specifically, in *Chahal v UK* (No. 22414/93) 15/11/96. In a decision that might be seen as somewhat contrary to the developments achieved in the expulsion and non-refoulement caselaw of the ECtHR, the UK Court of Appeal in the case of *A and Others v SSHD*[5] ruled on 11 August 2004 that evidence obtained by torture is admissible in the UK.[6] However, on appeal to the House of Lords this decision was reversed.[7]

As regards the notion of non-responsibility for the actions of third country agencies, the *Barcelona Traction*[8] dictum establishes obligations *erga omnes* in the protection of human rights beyond the reach of national jurisdiction. The ECtHR does not give a clear answer to the argument that the British Home Secretary put forward – that he could not enquire into the circumstances surrounding the interrogation in the third country.

Thus, the principle that had been established in *Soering* obliges states to enquire into possible ill-treatment in a third country, where a person is to be extradited. On the other hand, the suspects in *A and Others* had already been tortured in third countries before being handed over to the UK. In this regard the principle of *ex-post facto* consideration of a breach of Art. 3, pronounced in the *Greek case*,[9] could be invoked as

The argument put forward by Judge Kalaydjieva, in her dissenting opinion, that this decision is "*…opening the way for calculation of the appropriate extent of admissible coercion and its use in relation to particular accusations, contrary to the principle of a fair trial*"[1] may, in particular, breathe new life into the discussion on: (i) the interrogative value of coercion and the ECtHR's assessment of modern interrogation techniques; (ii) the value of evidence obtained under pressure, especially in the context of cases of non-refoulement.

As a result of the prohibition of abusive

The ECtHR's response to cases which involve modern psychologically orientated interrogative techniques, as 29 years ago in the case of *Ireland v UK* (No. 5310/71) 8/1/78, where British interrogators used a method consisting of five techniques to interrogate terrorist suspects, will involve an examination of the minimum level of severity needed to ground claims under Art. 3.

The violation of a suspect's right to due process, as a result of coercion during interrogation, is yet another issue raised by Judge Kalaydjieva, and frequently discussed in the context of refoulement.

an obligation on states to conduct an inquiry, as a result of which the court would decide on the admissibility of the evidence and confessions.

It can be expected, therefore, that the consideration of cases resulting from the use of modern interrogative tactics which target an applicant's psychological autonomy (and which involve lies, trickery, deception and threats), and of the admissibility of evidence obtained by the use of such methods, will involve, alongside the established principles

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of the ECtHR, an examination of the totality of circumstances surrounding the case, including scrutiny of modern interrogation techniques developed by police.

1 Gäfgen v Germany (No. 22978/05) 30/7/08, Dissenting Opinion by Judge Kalaydjieva.

2 Descriptions of modern interrogation techniques appear in police interrogation materials. In the US, for instance, the *Inbau Manual* has been the most widely used.

3 Gäfgen v Germany, paras 69-70.

4 See: Parry, J.T. and White, W. S., 2001-2002. Interrogating Suspected Terrorists, Should Torture be an Option? *University of Pittsburgh Law Review, 63*, p.751.

5 [2004] EWCA Civ 11323.

6 See: Hyland, J., 2004. Britain: Court of Appeals rules evidence obtained through torture is admissible (World Socialist Web Site) [online]. Available at: http://www.wsws.org/articles/2004/aug2004/brit-a13_prn.shtml.

7 [2005] UKHL 71, the House of Lords ruled that as a general rule evidence that has been obtained by torture is inadmissible.

8 The case concerning the Barcelona Traction, Light and Power Co., Ltd (ICJ Reports 1970, 32, paras 33-34).

9 The *Greek Case*, report of 5 November 1969, Yearbook of the Convention 12.