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Returning Uzbek Asylum-Seekers: The Principle of Non-Refoulement

Replies and Comments

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Focus

Article 33 Convention on the Status of Refugees

"No Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion"

Article 3(1) Convention against Torture

"No State Party shall expel, return ('refouler') or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture"

United Nations Special Rapporteur on Torture, UN Doc.

E/CN.4/2003/68/Add.2
3 February 2003

General Comment on the Implementation of Article 3 in the context of Article 22

A/53/44, annex IX
21 November 1997

Fleeing the 13 May suppressed protests in Andijan, about 450 Uzbeks took refuge in nearby Kyrgyzstan and have been living there in camps since then. The Uzbek government requested the Kyrgyz authorities to extradite about 130 asylum-seekers on the ground that they are considered criminals. On 9 June 2005 Kyrgyzstan returned four asylum-seekers to their country of nationality. 29 others are currently detained by the Kyrgyz authorities and are likely to be soon returned to Uzbekistan.

The main issue raised in this context by UNHCR as well as by NGOs such as Human Rights Watch and Amnesty International concerns the legality of the return of these asylum-seekers.

The 1951 Convention on the Status of Refugee, to which Kyrgyzstan is a party, declares that a State cannot return persons to a place where they would face persecution. Whether the persons have already obtained refugee status or are still in the process of determination does not matter as it has been accepted that article 33 applies to all persons, whether or not they fit the definition spelled out in article 1. In the instant case, UNHCR has already asserted that "the expulsion on June 9 of four asylum-seekers to Uzbekistan was a serious violation of [the principle of non-refoulement]."

Further, the principle of *non-refoulement* is explicitly contained in the 1984 Convention Against Torture, to which Kyrgyzstan is a State party. As stated by the Committee against Torture in the *Tapia Paez vs. Sweden* case the prohibition of non-refoulement is absolute. Consequently the main question revolves around whether returning those asylum-seekers to Uzbekistan would be a breach of Kyrgyzstan's obligations under CAT. From the „General Comment on the Implementation of Article 3 in the context of Article 22“ and the jurisprudence of the Committee against Torture it transpires that for an extradition or expulsion to breach article 3 CAT certain conditions must be fulfilled.

First, the treatment suffered by the person in the target country must constitute torture and not only ill treatment. Many NGOs have expressed their concerns as to the situation in Uzbek detention centres and prisons. Hence, the first condition may be met.

Second, there is a certain probability or risk that this situation occurs. According to the Committee, "the risk of torture must be assessed on grounds that go beyond mere theory or suspicion. However, the risk does not have to meet the test of being highly probable". Since in 2003 the UN Special Rapporteur on Torture found torture to be systematic in Uzbekistan, it may be argued that this criterion is fulfilled. Yet, one must prove that the person concerned would be personally at risk (CAT: *Mutombo vs. Switzerland*). The lack of information concerning the four persons returned to Uzbekistan in June 2005 conveys the impression that indeed those returned are facing a real risk of being linked to them being perceived as having been involved in the anti-governmental protests.

Third, the State must show that it applied certain standards of evidence when it assessed the risk or danger of torture: existence of a consistent pattern of human rights violations in the target State, the relevance of the personal political/ethnic history, the specific situation of victims of torture and the procedural obligation to undertake research. Again given the background of the cases, it may be contended that this element is met.

As a conclusion, one may safely state that should Kyrgyzstan return those asylum-seekers who fled the protest repression in Andijan, it would violate also its obligations under the Convention against Torture. Moreover, as mentioned earlier, the return of these persons to Uzbekistan is also in contravention of the principle of *non-refoulement* as stipulated in the 1951 Geneva Convention.

Responsibility

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