



**Convention against
Torture and Other Cruel,
Inhuman or Degrading
Treatment or
Punishment**

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Original: ENGLISH

COMMITTEE AGAINST TORTURE
Thirty-ninth session
(5 – 23 November 2007)

DECISION

Communication No. 299/2006

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| <u>Submitted by:</u> | Jean Patrick Iya (represented by counsel, Mr. Guido Ehrler) |
| <u>Alleged victim:</u> | The complainant |
| <u>State party:</u> | Switzerland |
| <u>Date of the complaint:</u> | 27 June 2006 (initial submission) |
| <u>Date of present decision:</u> | 16 November 2007 |

Subject matter: deportation of the complainant from Switzerland to the Democratic Republic of the Congo
Procedural issue: none

Substantive issue: deportation of a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.

Article of the Convention: 3

[ANNEX]

* Made public by decision of the Committee against Torture.

ANNEX

DECISION OF THE COMMITTEE AGAINST TORTURE UNDER ARTICLE 22 OF
THE CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR
DEGRADING TREATMENT OR PUNISHMENT

Thirty-ninth session

Concerning

Communication No. 299/2006

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| <i>Submitted by:</i> | Jean Patrick Iya (represented by counsel, Mr. Guido Ehrler) |
| <i>Alleged victim:</i> | The complainant |
| <i>State party:</i> | Switzerland |
| <i>Date of the complaint:</i> | 27 June 2006 (initial submission) |

The Committee against Torture, established under Article 17 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,

Meeting on 16 November 2007,

Having concluded its consideration of complaint No. 299/2006, submitted to the Committee against Torture on behalf of Mr. Jean Patrick Iya under article 22 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,

Having taken into account all information made available to it by the complainant, his counsel and the State party,

Adopts the following decision under article 22, paragraph 7, of the Convention against Torture.

1.1 The complainant is Jean Patrick Iya, a national of the Democratic Republic of the Congo born in 1968 and facing deportation from Switzerland to his country of origin. He claims that his deportation would constitute a violation by Switzerland of article 3 of the Convention. He is represented by counsel, Mr. Guido Ehrler.

1.2 In accordance with article 22, paragraph 3, of the Convention, the Committee brought the complaint to the State party's attention on 21 December 2006.¹ At the same time the Committee, pursuant to rule 108, paragraph 1, of its rules of procedure,

¹ On 14 July 2006, the complaint was mistakenly brought to the attention of the Permanent Mission of the Democratic Republic of the Congo in Geneva. The mistake was discovered in early December 2006 and immediately corrected.

requested the State party not to deport the complainant to the Democratic Republic of the Congo while his complaint was being considered. The State party acceded to such request.

1.3 On 20 February 2006, the State party provided its comments on the merits of the case and asked the Committee to lift its request for interim measures. On 22 May 2007, the Committee decided to maintain its request for interim measures.

The facts as presented by the complainant

2.1 From 1995 to 1997, the complainant worked as a journalist for the newspaper *Elima* in the Democratic Republic of the Congo, his main duty being to compile and publish information on human rights violations under the Mobutu regime. He notes that, during that period, he published articles on nearly 300 cases of human rights violations and “had problems” with the Mobutu regime as a result. After president Kabila took power in 1997, the complainant was detained on several occasions and, in late 1997, the publication of *Elima* was prohibited.

2.2 In January 1997, the complainant joined the Union for Democracy and Social Progress (UDPS) and was responsible for the recruitment of young militants. In January 1998, he was arrested and his press card was confiscated, which put an end of his career as a journalist. From 2000 to 2002, he worked for a non-governmental organization.

2.3 In June 2002 and May 2003, UDPS organized demonstrations against the Kabila regime. The complainant, who was among the organizers, was arrested on both occasions. On the first occasion, he was detained without charges at the military camp of Tshatshi and later transferred to the Gombé prison, where he was allegedly whipped and released two weeks later. On the second occasion, he was detained in Tshashti and then transferred to the Makala prison, a provisional arrest warrant having been issued against him on 22 May 2003.

2.4 On 1 May 2004, the complainant allegedly escaped from prison by bribing two prison guards. He left the country for Brazzaville, in the Republic of the Congo, where he stayed at a UDPS local representative's. Four days later, he travelled under a false identity to Lagos, Nigeria, where he stayed until 26 June 2004. From Lagos he flew to Italy holding a Nigerian citizen's passport and finally arrived in Switzerland, where he sought asylum on 29 June 2004. In Switzerland, he was asked to provide documents certifying his identity within 48 hours, which he was unable to do, as he was not able to contact his family in the Democratic Republic of the Congo.

2.5 On 3 May 2004, a search warrant was issued by security forces in the Democratic Republic of the Congo against the complainant, wanted for offenses against the public safety and against the Chief of state.

2.6 On 9 August 2004, the Swiss Federal Office for Refugees (ODR) refused to consider the merits of the complainant's asylum request and ordered his deportation. This decision was adopted on the basis of the complainant's failure to provide identification documents within 48 hours since the filing of his complaint with allegedly no valid justification for this delay. ODR considered that the complainant's statement

that his identity card had been confiscated during his detention in May 2003 was not credible and that his declaration on his alleged persecution was vague and did not rely on concrete facts.

2.7 On 19 August 2004, the complainant's appeal was rejected by the Asylum Appeals Board (CRA). Although the complainant submitted two documents to prove his identity, a certificate of celibacy and a degree certificate, the Board considered that these documents should have been submitted within the initial 48-hour deadline. It further considered that the complainant was not credible.

2.8 On 24 August 2005, the complainant requested a reopening of the proceedings and submitted further documents to prove his identity, including a UDPS membership card, a certificate confirming his engagement as a UDPS activist and the party's statutes, as well as other documents related to the party's activities. On 22 September 2005, the CRA rejected this request on the ground that a decision not to consider the merits of the case could not be quashed unless sufficient explanation was provided as to the delay in submitting the relevant documents.

2.9 The complainant's second request to reopen the proceedings was rejected by the CRA on 4 January 2006, on the basis of his failure to pay the judicial fees. The CRA also rejected his request to pay these fees on installments.

The complaint

3.1 The complainant claims that his deportation from Switzerland to the Democratic Republic of the Congo would violate article 3 of the Convention, as there are serious grounds to believe that he would be at risk of torture if returned. He notes that a search warrant has been issued against him and that torture is a common practice in the Democratic Republic of the Congo. He refers to Amnesty International 2005 Report to confirm this statement.

3.2 He further claims that the fact that his asylum application and the evidence provided were not considered in substance violates the principles of article 3.

State party's observations on the merits

4.1 On 20 February 2007, the State party does not contest the admissibility of the communication. On the merits, the State party contends that the complainant has not established a personal, real and foreseeable risk of torture upon his return to the Democratic Republic of the Congo. While noting the human rights situation in the Democratic Republic of the Congo, the State party recalls that this situation is not in itself a sufficient element to conclude that the complainant would be at risk of torture if returned. It further recalls that the complainant has not submitted any evidence to national authorities that proves the acts of ill treatment that he allegedly suffered while he was detained in Gombé prison.

4.2 The State party notes that, according to the law in force at the time where the proceedings against the complainant were held –the Asylum Act of 26 June 1998–, Swiss authorities could not consider an asylum request if the asylum seeker had failed

to submit identity documents within 48 hours since the asylum request had been filed. This Act was amended by Federal Act of 16 December 2005, which entered into force on 31 December 2005. The State party maintains that, from that date, both the ODR and the CRA thoroughly examined the issue of the complainant's alleged persecution and concluded that the complainant's statements were vague and not credible, in particular his description of his escape from prison.

4.3 The State party contends that the complainant has not submitted any evidence of his political engagement and alleged persecution. In the State party's view, the only evidence that would prove his political activities in the Democratic Republic of the Congo was a certificate by the UDPS local representative in Lagos. According to the ODR, this document could be easily "bought" in the Democratic Republic of the Congo. Additionally, the header of this "certificate" does not correspond to the text and the document is otherwise incomplete. The State party further questions the validity of the provisional arrest warrant and the search warrant allegedly issued by the Public Ministry in the Democratic Republic of the Congo and notes that the complainant has not explained how his family managed to obtain the original of these internal documents. It adds that DRC forms can be easily obtained and that the desired text could then be added.

4.4 The State party notes that, according to the interrogation records of 22 July 2004, the complainant's knowledge of the political situation in the Democratic Republic of the Congo did not reveal a political interest and, in particular, an interest in journalistic activities in the country. According to these records, the complainant had not been able to name any of the leaders of UDPS and did not show a detailed knowledge of the party's structure. The State party contends that the complainant's presentation of events is otherwise vague and poorly substantiated and that he is therefore not credible.

Complainant's comments on the State party's observations on the merits

5.1 On 7 September 2007, the complainant recalls the appalling situation of human rights in the Democratic Republic of the Congo. It notes that the Committee has denounced that security forces continue to practice arbitrary detentions without any judicial control and to inflict torture on detainees.² Detention conditions, including overcrowdings, malnutrition and lack of medical care, put in danger the lives of detainees and a number of them are reported dead. It further notes that UDPS is one of the oldest opposition parties in the Democratic Republic of the Congo. In summer 2005 this party organized demonstrations against the deferment of elections and 10 demonstrators resulted dead. In March 2006, UDPS members demonstrated in Kinshasa against the new electoral act and were repressed by security forces with truncheons and tear gas. In May and June 2006, UDPS members were arbitrarily arrested and ill-treated in Mbuji-Mayi. The complainant notes that journalists who are critical with the regime are constantly targeted by Congolese authorities. In this context, the complainant maintains that he would be subject to a risk of torture if returned, in light of his double condition of journalist and UDPS militant, as well as the fact that he is being searched by the authorities since his escape from prison.

² CAT/C/DRC/CO/1/CRP.1, para. 7.

5.2 The complainant notes that his asylum request was not rejected on the grounds of insufficient evidence on the alleged acts of ill-treatment suffered in the Democratic Republic of the Congo but because he failed to provide his travel documents within 48 hours since the request had been filed. He insists that his complaint was never examined in substance by national immigration authorities.

5.3 With regard to his alleged lack of credibility, the complainant notes that the interrogations at the Registry Centre serve the purpose of registering asylum seekers and informing them on the procedure to follow. Therefore, interrogation records have little evidentiary value in examining the asylum request. He adds that, even though he was interrogated in a “rudimentary manner” on his grounds for asylum, his declarations were sufficiently precise, detailed and coherent to prove that he was persecuted in the Democratic Republic of the Congo. As to his alleged lack of knowledge of the structure of UDPS, he claims that from the interrogation record it transpires that he understood that he was being asked about the current structure, to which he replied that he could not possibly know as he had been in prison for a year. He notes that the ODR staff should have dissipated this misunderstanding. He adds that, contrary to the State party’s submission, the interrogation records show that he had a sufficient knowledge of the political situation of his country.

5.4 The complainant notes that the State party does not indicate the information sources on which it relies to question the validity of the documents submitted to immigration authorities. He adds that the State party failed to comply with its obligation to thoroughly investigate the complainant’s political activities on the ground and that the argument according to which any of these documents can be “bought” in the Democratic Republic of the Congo is not substantiated.

5.5 The complainant notes that the State party does no longer question his identity or the fact that he obtained a degree in journalism and that he worked for the opposition journal Elima. He recalls that journalists in the Democratic Republic of the Congo are particularly exposed to human rights violations.

5.6 Finally, he explains that he has been presented in many articles by Amnesty International and other organizations as a political opponent that had been imprisoned in the Democratic Republic of the Congo and that this fact alone would be sufficient to put him at risk of torture if returned to this country.

Issues and proceedings before the Committee

6.1 Before considering any claims contained in a complaint, the Committee against Torture must decide whether or not it is admissible under article 22 of the Convention. The Committee has ascertained, as it is required to do under article 22, paragraph 5 (a), of the Convention, that the same matter has not been and is not being examined under another procedure of international investigation or settlement. The Committee further notes that domestic remedies have been exhausted and that the State party does not contest admissibility. Accordingly, the Committee finds the complaint admissible and proceeds to its consideration on the merits.

6.2 The issue before the Committee is whether the complainant's removal to the Democratic Republic of the Congo would constitute a violation of the State party's obligation, under article 3 of the Convention, not to expel or return a person to a State where there are substantial grounds for believing that he would be in danger of being subjected to torture.

6.3 In assessing whether there are substantial grounds for believing that the complainant would be in danger of being subjected to torture if returned to the Democratic Republic of the Congo, the Committee must take account of all relevant considerations, including the existence of a consistent pattern of gross, flagrant or mass violations of human rights. However, the aim of such an analysis is to determine whether the complainant runs a personal risk of being subjected to torture in the country to which he would be returned. It follows that the existence of a pattern of gross, flagrant or mass violations of human rights in a country does not as such constitute sufficient reason for determining that a particular person would be in danger of being subjected to torture on return to that country; additional grounds must be adduced to show that the individual concerned would be personally at risk. Conversely, the absence of a consistent pattern of flagrant violations of human rights does not mean that a person might not be subjected to torture in his or her specific circumstances.

6.4 The Committee recalls its general comment on the implementation of article 3, that "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" (A/53/44, annex IX, para. 6).

6.5 In the present case, the complainant contends that a personal and present risk of torture in the Democratic Republic of the Congo is justified by his past activities as a journalist and as a militant of an opposition party, as a result of which he claims to have been detained on several occasions and ill-treated, and by the fact that he is allegedly searched in this country since his escape from the Gombé prison in 2004. The Committee notes that the State party has questioned the complainant's credibility. At the same time, the Committee notes the complainant's argument that national authorities never examined his request in substance but rejected it on procedural grounds. The Committee takes note of the entry into force of the Swiss Federal Act on 31 December 2005 amending the 1998 Asylum Act, article 38 of which established the 48-day deadline requirement for immigration authorities to consider the merits of an asylum request. The State party contends that, since that date, national authorities have thoroughly examined the complainant's request in substance. However, the Committee observes that both the ODR and the CRA rejected the complainant's request on the basis of his failure to submit identity documents within the initial deadline and that his two requests to reopen the procedures were rejected by the CRA also on procedural grounds. All these decisions were adopted prior to the entry into force of the new Federal Act except for the last CRA decision of 4 January 2006, which rejected the complainant's application on the basis of his failure to pay judicial fees. Therefore, the Committee considers that his case was never examined on the merits by national authorities.

6.6 The State party has further questioned the authenticity of the evidence submitted by the complainant. At the same time, the complainant argues that national authorities did not thoroughly examine the evidence submitted by him or corroborate his

declarations on the ground. The Committee observes that the complainant has provided a coherent version of the facts and the relevant evidence to corroborate these facts. Therefore, the Committee concludes that the State party's arguments to challenge the validity of this evidence and the complainant's declarations have not been sufficiently substantiated.

6.7 Finally, the Committee recalls that torture and ill-treatment of detainees by security forces and services in the Democratic Republic is still common.³

6.8 The Committee considers that the complainant's political activities and his recent detention in the Democratic Republic of the Congo, together with the fact that he is being searched in this country, are sufficient arguments to conclude that he would face a personal risk of torture if forcibly returned to the Democratic Republic of the Congo.

7. The Committee against Torture, acting under article 22, paragraph 7, of the Convention, is of the view that the forcible return of the complainant to the Democratic Republic of the Congo would constitute a breach by Switzerland of his rights under article 3 of the Convention.

8. In pursuance of rule 112, paragraph 5, of its rules of procedure, the Committee invites the State party to inform it, within 90 days from the date of the transmittal of this decision, of the steps it has taken in accordance with the above observations.

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

³ See the Committee's Concluding Observations on the report submitted by the Democratic Republic of the Congo under the Convention against Torture and other forms of cruel, inhuman and degrading treatment (CAT/C/DRC/CO/1/CRP.1), paras. 6 and 7; and the Human Rights Committee's Concluding Observations on the report submitted by the State party under the International Covenant on Civil and Political Rights (CCPR/C/COD/CO/3), para. 16.