



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

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Committee against Torture

Decision adopted by the Committee under article 22 of the Convention, concerning communication No. 828/2017^{*}, ^{**}

<i>Communication submitted by:</i>	B.K. (represented by counsel, Ange Sankieme Lusanga)
<i>Alleged victim:</i>	The complainant
<i>State party:</i>	Switzerland
<i>Date of complaint:</i>	5 June 2017 (initial submission)
<i>References:</i>	Decision taken pursuant to rule 115 of the Committee's rules of procedure, transmitted to the State party on 22 June 2017 (not issued in document form)
<i>Date of present decision:</i>	24 July 2019
<i>Subject matter:</i>	Removal to the Democratic Republic of the Congo
<i>Procedural issue:</i>	Insufficient substantiation of claims
<i>Substantive issue:</i>	Risk of torture
<i>Article of the Convention:</i>	3

1.1 The complainant is B.K., a national of the Democratic Republic of the Congo, born on 28 September 1993. He applied for asylum in Switzerland, but his application was denied on 23 May 2017. At the time of submission of his complaint, he was under an expulsion order to the Democratic Republic of the Congo and considered that expulsion would constitute a violation by Switzerland of article 3 of the Convention. The complainant is represented by counsel, Ange Sankieme Lusanga.

1.2 On 22 June 2017, the Committee, acting through its Rapporteur on new complaints and interim measures, decided not to accede to the complainant's request for interim measures.

Facts as presented by the complainant

2.1 The complainant was a human rights defender in the Democratic Republic of the Congo. He visited prisons and then reported on the situation of the rights of prisoners. He

* Adopted by the Committee at its sixty-seventh session (22 July–9 August 2019).

** The following members of the Committee participated in the examination of the communication: Essadia Belmir, Felice Gaer, Abdelwahab Hani, Claude Heller Rouassant, Jens Modvig, Ana Racu, Diego Rodríguez-Pinzón and Sébastien Touzé.



also took part in conferences, including one in February 2017 during which he spoke out in defence of General Benoît Faustin Munene, who was an opponent of the regime of the then President, Joseph Kabila, and who had been accused of being involved in a coup d'état and charged with high treason. The complainant's father, a close friend of General Munene and a member of his movement, Armée de résistance populaire, was arrested in the Democratic Republic of the Congo on 10 May 2017.

2.2 On 24 April 2017, the complainant left the Democratic Republic of the Congo by air for Istanbul, Turkey, using his passport and a forged Portuguese visa. The following day, he arrived in Switzerland, where he was denied entry because his visa was forged. He then filed an application for asylum. The complainant was placed under house arrest in the international transit zone of Geneva Airport.

2.3 On 12 May 2017, after hearing the case, the State Secretariat for Migration rejected his application.¹ On 23 May 2017, the Federal Administrative Court upheld the decision of the State Secretariat and ordered the complainant's expulsion to the Democratic Republic of the Congo. The State Secretariat and the Court considered that his statements were not credible and that the documents produced had no probative value. The same was true of a letter from General Munene and an internal article written by a member of his political movement – Armée de résistance populaire – which had allegedly been drafted as a favour for the sake of the cause.

2.4 Finally, the complainant submitted a letter dated 25 May 2017 signed by General Munene. Addressed to the Swiss authorities and the European Court of Human Rights, it confirms that the complainant was a victim of an “attempted arbitrary arrest” by the authorities of his country of origin for having defended the General's cause at a conference on human rights in the Democratic Republic of the Congo. The letter also confirms that the complainant's father was arrested on 10 May 2017, accused of being one of the main agents recruiting young people in Bandundu province with the aim of overthrowing the regime in power. Furthermore, the letter confirms that the complainant, who was being sought by the Police Directorate of General Intelligence and Special Services, had fled the country and concludes that, if he were to be returned to the Democratic Republic of the Congo, he would be at risk of persecution and inhuman treatment by the regime.

The complaint

3.1 The complainant claims that his expulsion to the Democratic Republic of the Congo would violate article 3 of the Convention, as he might be subjected to inhuman or degrading treatment.

3.2 In the Democratic Republic of the Congo, human rights defenders are persecuted, arrested and even killed, and the political situation is currently tense owing to the collapse of political talks between the Government and the opposition. These assertions are supported by several reports and various sources addressing human rights, which have denounced serious mass violations of the rights of human rights defenders by the Congolese security forces.

3.3 Expulsion to the Democratic Republic of the Congo would therefore entail a real risk to the complainant's life. In this type of situation, the State party usually conducts additional enquiries, typically through the Swiss diplomatic mission in the complainant's country of origin. In the present case, however, nothing of the sort was undertaken, even though it would have been apposite to try to shed light on the situation and dispel any reasonable doubts in respect of the direct involvement of General Munene.

State party's observations on admissibility and the merits

4.1 On 29 November 2017, the State party submitted its observations on the admissibility and merits of the complaint. It notes that the asylum authorities have duly

¹ Summary hearing on personal information held on 28 April 2017 and hearing on grounds for asylum held on 5 May 2017.

considered the complainant's arguments and states that the complaint does not include any new information that might invalidate the asylum authorities' decisions.

4.2 On the facts and the procedure, the State party indicated that, on 24, 25 and 27 April 2017 and 3 May 2017, the complainant applied to the European Court of Human Rights for the implementation of interim measures. This request was rejected and the Court invited the complainant to indicate whether he wished to maintain his claims and, if so, to complete the application form.²

4.3 On 26 May 2017, on the basis of the letter of 25 May 2017 signed by General Munene, the complainant requested a review of his case. By an interlocutory decision of 31 May 2017, the State Secretariat for Migration set 15 June 2017 as the deadline for payment of an advance on costs of 600 Swiss francs. On 8 June 2017, the complainant lodged an appeal against that decision, which was declared inadmissible by the Federal Administrative Court on 12 June 2017 on the grounds that, with certain exceptions, interlocutory decisions delivered by the State Secretariat can only be challenged by means of an appeal against a final decision. The State party indicates that, on the same day, after meeting with a representative of the International Organization for Migration (IOM), the complainant stated that he was prepared to accept assisted voluntary return to the Democratic Republic of the Congo. On 16 June 2017, after being registered for the assisted voluntary return programme, the complainant returned to the Democratic Republic of the Congo.

4.4 Referring to an email of 19 June 2017 from the claimant's counsel sent to the Committee, which states that the complainant had not been heard from for three days and that both his relatives and General Munene feared that he was being subjected to torture in a cell, the State party maintains that the IOM representative who was following the case confirmed, by email of 19 June 2017, that the complainant had arrived in Kinshasa and had not encountered any problems during transit in Brussels, where he had been assisted by IOM. He specified that, on the complainant's arrival in Kinshasa, his passport had been retained by the immigration authorities because of the false Schengen visa in it, as was to be expected. The authorities had provided him with a copy of the pages of his passport indicating his identity so that he could apply for a new passport. The IOM representative added that the complainant had been transported by a driver in an official IOM vehicle. On his own request, the applicant had not been taken to his home, but had called his brother, who had met him in a commercial neighbourhood, from where they had left together. This email, which includes photographs of the complainant and the IOM driver, states that the complainant had given the driver a phone number and had told him that he would report to the IOM office in Kinshasa to access reintegration support in the coming days. In the email, the IOM representative confirms that there was no evidence of "sinister machinations, black cars or secret police coming to kidnap him". In respect of the passport, he said that the immigration authorities of the Democratic Republic of the Congo had exercised their right to withdraw a passport containing counterfeit documents – which had also been identified as such by the Swiss police.

4.5 On 20 June 2017, the State Secretariat for Migration had struck from the register the application for review of 26 May 2017, on the grounds that it had become moot following the complainant's voluntary return to his country. On 22 June 2017, the complainant lodged an appeal, arguing that he had been the victim of a defect of consent, in that the officials responsible for preparing his departure, in particular the IOM representative, had given him a choice between his departure from Switzerland – which was incorrectly termed "voluntary" – with 3,000 Swiss francs to assist with his return, or his administrative detention for the purposes of refolement.

4.6 On 4 July 2017, the Federal Administrative Court rejected the appeal. It found that the State Secretariat for Migration had based its decision on the grounds of both the implicit withdrawal of the application for review and the return to the country of origin. It appears from the case file that the complainant was neither detained for the purpose of his

² The complainant indicates that he had abandoned the proceedings before the Court in order to continue with the proceedings before the Committee.

refoulement, nor accompanied at the airport by police officers in order to be put on board an aircraft with the use of physical force. The Court considered whether the State Secretariat had been justified in closing the complainant's application for review, and if so, whether its closure had a legal effect on the complainant's situation. It was of the view that the complainant had lost any practical and present interest in a ruling being made on his application, as that application concerned the refusal of asylum. The Court found that the complainant's argument concerning a defect of consent that had led him to accept an assisted and, consequently, voluntary return, was irrelevant. The information concerning coercive measures to which asylum seekers required to leave Switzerland are exposed if they do not do so within the deadline is provided for in law and therefore cannot be equated, as the complainant asserts, with an unlawful threat intended to persuade him to consent to voluntary departure while he was unsettled by a decision that had entered into force. The complainant had, moreover, already been notified in the decision of the State Secretariat for Migration of 12 May 2017 that he could be detained for the purpose of enforced removal if he did not comply with the removal decision once it entered into force. Moreover, the Court emphasized that the fact that the authorities responsible for enforcing removal had encouraged the complainant to agree to voluntary return by providing assistance for the return complied with the law.

4.7 Accordingly, since the complainant left Switzerland voluntarily, the State party invites the Committee primarily to halt the consideration of the complaint and to strike it from the register.

4.8 On the merits, the State party points out that, under article 3 of the Convention, States parties are prohibited from expelling, returning or extraditing a person to another State where there are substantial grounds for believing that he or she would be in danger of being subjected to torture. For the purpose of determining whether there are such grounds, the competent authorities should take into account all relevant considerations, including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights. Based on the Committee's general comment No. 1 (1997) on the implementation of article 3 of the Convention in the context of article 22,³ the State party affirms that the complainant must establish the existence of a personal, present and substantial risk of being subjected to torture upon return to his or her country of origin. The existence of such a risk must be assessed on grounds that go beyond mere theory or suspicion. Other grounds must allow the risk of torture to be classed as "substantial".⁴ The following elements must be taken into account in this regard: (a) any evidence of a consistent pattern of gross, flagrant or mass violations of human rights in the country of origin; (b) any claims of torture or ill-treatment in the recent past and independent evidence to support those claims; (c) the political activity of the complainant within or outside the country of origin; (d) any evidence as to the credibility of the complainant; and (e) the absence of factual inconsistencies in the complainant's claims.⁵

4.9 The State party points out that the existence of a consistent pattern of gross, flagrant or mass violations of human rights does not, in itself, constitute sufficient grounds for believing that a particular person would be subjected to torture upon return to his or her country of origin. The Committee must establish whether the complainant is personally at risk of being subjected to torture in the country to which he or she would be returned.⁶ Additional grounds must be adduced in order for the risk of torture to qualify as foreseeable, real and personal for the purposes of article 3 of the Convention.⁷ The State party recalls that the risk of torture must be assessed on grounds that go beyond mere theory or suspicion.

4.10 Regarding the general human rights situation in the Democratic Republic of the Congo, the State Secretariat for Migration noted in its decision of 12 May 2017 that, except

³ The Committee's general comment No. 1 (1997) was replaced in September 2018 by general comment No. 4 (2017) on the implementation of article 3 of the Convention in the context of article 22.

⁴ General comment No. 1, paras. 6 and 7.

⁵ *Ibid.*, para. 8.

⁶ *K.N. v. Switzerland* (CAT/C/20/D/94/1997), para. 10.2.

⁷ *Ibid.*, para. 10.5, and *J.U.A. v. Switzerland* (CAT/C/21/D/100/1997), paras. 6.3 and 6.5.

in the conflict areas, predominantly in the east of the country, where various armed groups are active and the government armed forces conduct operations against opponents, the country is not at war, civil or otherwise, or plagued by generalized violence. It cannot therefore immediately be assumed – independently of the circumstances of the present case – that all complainants from this State face real danger. Moreover, the general human rights situation is not in itself sufficient to make the complainant's return incompatible with article 3 of the Convention. The complainant has failed to make a convincing argument for the claims that he would face treatment prohibited under that article if returned to the Democratic Republic of the Congo.

4.11 With regard to claims of torture or ill-treatment in the recent past and the existence of independent evidence to support those claims, the State party points out that States parties to the Convention have a duty to consider any such claims with a view to assessing the risk that the complainant concerned would be subjected to torture if he or she were to be sent back to his or her country of origin. The State party nonetheless recalls that the complainant has not actually claimed to have been subjected to torture or ill-treatment in his country of origin.

4.12 With regard to the complainant's political activities in his country of origin, he claimed that he was a human rights defender in the Democratic Republic of the Congo and that he was sought by the current regime for demanding the return of General Munene in the context of the national dialogue and for speaking out in his defence during a conference in February 2017. The Swiss authorities have, however, found that his statements were not credible. In his complaint to the Committee, the complainant did not adduce evidence to challenge the findings of the State Secretariat for Migration and the Federal Administrative Court.

4.13 With regard to the complainant's credibility and the consistency of the facts, the decisions of the national asylum authorities show that the complainant's statements do not in any way indicate that there are substantial grounds for believing that he would be exposed to torture if he were to be returned to the Democratic Republic of the Congo. The State Secretariat for Migration and the Federal Administrative Court considered that the complainant's statements that he undertook a training course in the field of human rights provided by the International Centre for Training in Human Rights and Development in Kinshasa in 2015 were plausible. However, they noted that such training alone could not give rise to a risk to the complainant in the event of him being returned to the country. A total of 940 people reportedly attended such training courses in 2015 alone.

4.14 Equally, neither the State Secretariat for Migration nor the Federal Administrative Court challenged the complainant's statements regarding his voluntary work visiting prisons and reporting on the detention conditions. They noted, however, that, without prejudging their credibility, the threats made against the complainant⁸ during his prison visits were not of sufficient intensity to constitute serious harm, the complainant himself having recognized that the threats were acceptable and were not the reason for which he had fled the country.

4.15 The Swiss authorities, however, did not find credible the complainant's claims that the immediate reason for him fleeing the country had been his participation in a conference denouncing human rights violations, during which he had spoken about General Munene's situation. He had provided only inconsistent information about the conference and the surveillance to which he had reportedly been subjected, offering no more than general statements. He had given an impersonal and stereotypical description of the events, with no significant details that would indicate that he had actually lived through the experience. When he had been asked to name the people who had spoken at the conference, he had been able to give only the name of the coordinator of the International Centre for Training in Human Rights and Development. He was unable to recall either the name of the person representing the Ministry of Justice or that of the person working for an international non-governmental organization, or even the name of the non-governmental organization. The asylum authorities rightly found that those statements called into question the credibility of

⁸ See the record of the hearing of 5 May 2017.

the complainant with regard to the problems he claimed to have encountered thereafter. If that event really was the source of his problems, the complainant should have been able to provide more information about the persons present.

4.16 In addition, the complainant's statements about being present during visits by National Intelligence Agency officers to his family home, the dates of these visits and the summonses and/or warrant(s) allegedly filed, were brief, disordered and even contradictory, and were not supported by any evidence. Furthermore, the claim – made only at the stage of the appeal before the Federal Administrative Court – that the complainant's father, a close friend of General Munene, had been arrested, is a mere assertion, not based on any objective, tangible or substantial evidence. That claim also contradicts statements made by the complainant during the hearings. The complainant had said that his father had also fled the country because he had allegedly received warrants for arrest "because of ill-intentioned traders".

4.17 Moreover, the complainant has not provided a body of tangible, specific and consistent evidence to establish that his links with General Munene are close enough for it to be believable that the authorities of their country of origin would consider him to be of interest. Contrary to the complainant's statements before the Federal Administrative Court, he neither said, nor, a fortiori, established, that he is a close relative or friend of General Munene, having simply indicated that he comes from near the same village in Bandundu province and is of the same ethnic group.

4.18 With regard to the evidence, some of which does not concern the complainant, the State party notes that such evidence confirms that the complainant took part in the training course organized by the International Centre for Training in Human Rights and Development, but does not show that the alleged harm mentioned in support of the asylum application actually occurred or attest to a well-founded fear of persecution. The letter from General Munene and the – unpublished – article written by a member of *Armée de résistance populaire* have no probative value, because, on the one hand, they do not mention the problems that the complainant claims to have had and, on the other, it is easy to obtain such documents, which appear to have been drafted as a favour for the sake of the cause.

4.19 In view of the inconsistency of the complainant's account and the lack of tangible evidence, there were no grounds for undertaking any additional investigations, such as a request to the Swiss mission in the Democratic Republic of the Congo.⁹ In his complaint, the complainant does not explain the inconsistencies and reiterates the facts as have already been considered by the Swiss authorities. He produces evidence that has already been presented to and examined by the national authorities. The State party also emphasizes that the complainant was returned to his country of origin following his registration for the assisted voluntary return programme, after the submission of the present complaint.

4.20 Finally, the complainant does not credibly establish that he has been subjected to treatment contrary to the Convention since his return to the Democratic Republic of the Congo. The most recent news available to the State party about the complainant's situation in his country of origin is that contained in the annex to an email dated 21 June 2017, in which the complainant's counsel stated that the complainant "had been in touch from the Democratic Republic of the Congo". He once again explained that the complainant had allegedly been forced to leave Switzerland under pressure from the IOM representative and the Geneva police and that, on his arrival in Kinshasa, his passport had been confiscated and he had allegedly been threatened at the airport. The complainant had then allegedly been taken away and placed in detention, where he had allegedly been tortured and questioned about his links to General Munene. He had been "crying in his native language" and someone had helped him to escape. He was allegedly now living in hiding with the family of General Munene. No other evidence has been produced to corroborate those statements.

⁹ The State party explains that such investigative action is not initiated ex officio, contrary to the claims made by the complainant.

4.21 Consequently, the complainant has not established a credible claim that he faces a real and serious risk of being subjected to treatment contrary to the Convention in his country of origin.

Complainant's comments on the State party's observations

5. The complainant's counsel submitted comments on the State party's observations on 12 June 2018. He contends that he has "learned from security sources" in the Democratic Republic of the Congo that the complainant and his father were held in incommunicado detention because of the complainant's human rights activities and the fact that his father is a person close to General Munene, who is still living in exile and is wanted in the Democratic Republic of the Congo. The State party therefore, by "returning the complainant in a covert manner", has subjected his whole family to torture and other cruel, inhuman or degrading treatment, in violation of article 3 of the Convention.

Issues and proceedings before the Committee

Consideration of admissibility

6.1 Before considering any claims contained in a complaint, the Committee must decide whether it is admissible under article 22 of the Convention. The Committee has ascertained, as it is required to do under article 22 (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.

6.2 The Committee has ascertained, in accordance with article 22 (5) (b) of the Convention, that the complainant has exhausted all available domestic remedies.

6.3 The Committee notes the complainant's argument that, in returning him to the Democratic Republic of the Congo, the State party has subjected him to torture and other cruel, inhuman or degrading treatment, in violation of article 3 of the Convention. The Committee also notes that the complainant claims to be a human rights defender and a person close to General Munene.

6.4 The Committee notes, however, that the Swiss authorities did not dispute the training received by the complainant in the field of human rights or his voluntary work visiting prisons and drafting reports on prison conditions. They argued, on the other hand, that the complainant's claim that his participation in a conference denouncing human rights violations, during which he allegedly spoke about General Munene's situation, was the immediate reason for him fleeing the country, was not credible. The Committee observes that the complainant has not produced any evidence in support of those claims. The Swiss authorities also concluded that the complainant had not demonstrated that he had close links to General Munene.

6.5 The Committee takes note of the information submitted by the State party on the complainant's registration for the assisted voluntary return programme, as well as the statements made by the IOM representative that the complainant has indeed returned to the Democratic Republic of the Congo. The Committee recalls that the existence of human rights violations in the complainant's country of origin is not, in itself, sufficient for it to conclude that a complainant runs a personal risk of being tortured.

6.6 Finally, the Committee notes the State party's argument that, in view of the fact that the complainant left Switzerland voluntarily, with 3,000 Swiss francs in return assistance, his complaint to the Committee should be struck from the register. The Committee also takes note of the complainant's allegations that, prior to his return, he was in danger of being subjected to torture and that, following his return, he had been subjected to torture and ill-treatment. However, it notes that the complainant constructed his allegations on the basis of general statements and did not provide any evidence in that regard. The Committee also notes that the complainant and his counsel have not produced any evidence concerning the complainant's alleged current situation, and have not explained why they are unable to do so. In this context, the Committee notes that the case file does not contain any information on the system for follow-up of voluntary returns put in place by the State party in accordance with its treaty obligations, the functions and duties of IOM in following up

on returns in which it assists, or confirmation from IOM of information provided by the complainant. The Committee notes, furthermore, that the complainant has not specified whether he tried to challenge the conditions of his alleged detention before the competent authorities or to inform himself of remedies available in that regard. The Committee refers to its general comment No. 4 (2017) on the implementation of article 3 of the Convention in the context of article 22, paragraph 38 of which states that it is the complainant who has to present an arguable case,¹⁰ that is, submit substantiated arguments showing that the danger of being subjected to torture is foreseeable, present, personal and real. In the Committee's opinion, the complainant has not discharged that burden of proof.

6.7 The Committee therefore concludes that the complainant has not sufficiently and clearly established a foreseeable, present, personal and real risk of torture in the event of his return to the Democratic Republic of the Congo, and that the complaint is inadmissible on grounds of insufficient substantiation, pursuant to article 22 (4) of the Convention and rule 113 (b) of its rules of procedure.

6.8 The Committee therefore decides:

- (a) That the complaint is inadmissible under article 22 of the Convention;
- (b) That the present decision shall be transmitted to the State party and to the complainant.

¹⁰ *Sivagnanaratnam v. Denmark* (CAT/C/51/D/429/2010), paras. 10.5 and 10.6; *A.R. v. Netherlands* (CAT/C/31/D/203/2002), para. 7.3; *Kalonzo v. Canada* (CAT/C/48/D/343/2008), para. 9.3; *X. v. Denmark* (CAT/C/53/D/458/2011), para. 9.3; *W.G.D. v. Canada* (CAT/C/53/D/520/2012), para. 8.4; and *T.Z. v. Switzerland* (CAT/C/62/D/688/2015), para. 8.4.