COMMITTEE AGAINST TORTURE

K.N. v. France

Communication No 93/1997

18 November 1999

CAT/C/23/D/93/1997

ADMISSIBILITY

Submitted by: K.N. (name deleted) [represented by counsel]

Alleged victim: The author

State party: France

Date of communication: 15 August 1997

The Committee against Torture, established under article 17 of the Convention against Torture and Other Cruel, Inhuman or DegradingTreatment or Punishment,

Meeting on 18 November 1999,

Adopts the following decision:

Decision on admissibility

1.1 The author of the communication is K.N., born in 1963, a national of the Democratic Republic of the Congo (former Zaire) currently living in France, where he has asked for asylum and faces deportation. He asserts that to return him to the Democratic Republic of the Congo would constitute a violation by France of article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. He is represented by counsel.

1.2 In accordance with article 22, paragraph 3, of the Convention, the Committee brought the communication to the attention of the State party on 17 December 1998.

Facts as submitted by the author

2.1 The author says that he was a student leader in Zaire, and organized student demonstrations

against President Mobutu's regime. He gives no description of his activities in Zaire, but submits copies of a wanted notice for him issued on 4 May 1992, an arrest and detention warrant for incitement to rebellion drawn up by the Ndjili Prosecutor's Office on 22 April 1992, and a pre-trial release on bail order for his brother dated 24 July 1992.

2.2 On arrival in France on 6 June 1992, the author applied to the French Office for the Protection of Refugees and Stateless Persons (OFPRA) for refugee status; his application was denied on 11 August 1992, and the denial was upheld by the Refugee Appeal Board (CRR) on 17 December 1992.

2.3 The author then requested a review of his file, stating that there had been some new factors, viz that certain members of his family had allegedly suffered severe ill-treatment, [1] and provided copies of documents showing that he was still a wanted man. Meanwhile, by an order dated 15 April 1993, the Paris Prefect of Police decided that he should be deported.

2.4 By decision dated 23 April 1993, OFPRA rejected K.N.'s fresh application on the grounds that the alleged new developments did not establish that his alleged fears were justified since his statements were not backed up by any convincing evidence. That decision was confirmed by CRR on 28 September 1993 on the same grounds, at a time when the current case law did not accept that considerations that could have been attached to the initial application were admissible as new factors. The author maintains, however, that the new factors were relevant enough for the Paris Administrative Tribunal to annul the first deportation order, in a ruling dated 5 May 1993 following the rejection of his initial application.

2.5 The communication reveals that a second deportation order was issued, but the author states that he never knew of its existence, probably because it was sent to him at his previous address. He affirms that, since he was not notified of that second order, an appeal against it had become inadmissible.

2.6 On 12 March 1994, the author was arrested after an identity check and transferred to the detention area of the Paris Law Courts. A hearing was arranged immediately and, in a judgement dated 14 March 1994, the Paris Correctional Court sentenced him to a three-year ban from French territory for theft and for being in France illegally. The charge of theft was for carrying an identity card which, according to the author, his brother-in-law had lent him. On 20 March 1994, K.N. was put aboard an aircraft bound for Brussels and Kinshasa.

2.7 The author states that, upon his arrival in Zaire, he was detained after passing through immigration control at the airport. There he was allegedly subjected to a stern interrogation carried out by an army officer who withheld the papers relating to his application for asylum, in particular the OFPRA and CRR decisions.

2.8 K.N. says he was imprisoned without trial in Makala prison until January 1995. Held in an overcrowded cell, deprived of food, clothing and hygiene, he was constrained to drink water mixed with urine and excrement from the cell, and was often beaten with truncheons once or twice a day, also being subjected to various kinds of ill-treatment and torture. He was also made to perform forced labour. Some months later, a prison guard to whom his uncle had given money moved him

to a different cell and secured for him a transfer docket to the central hospital in Kinshasa where he was to obtain medical attention. [2] Arriving at the hospital on 19 January 1995, the author met his uncle who first took him by car to a friend's house and then helped him to cross the frontier into the Congo by boat. He allegedly arrived back in France in March 1995.

2.9 Being still banned from the country, the author had no alternative, if he wished to regularize his situation, but to lodge a plea with the Ministry of Justice to set aside the judgement of the Paris Correctional Court dated 14 March 1994. His plea was rejected on 16 October 1996.

2.10 Pursuant to the provisions of the ministerial circular dated 24 June 1997 on the review of the situation of certain categories of aliens illegally present in the country, the author lodged a request for exceptional authorization to reside in France. The request was rejected by the Prefect of Haute-Vienne on 3 July 1998 on the grounds that the author did not satisfy the conditions for benefiting under any of the provisions of the circular. More particularly, he had not furnished sufficient evidence of his personal situation to demonstrate that returning him to his home country would put him at serious risk of inhuman or degrading treatment. He was therefore given one month in which to leave French territory. The Minister of the Interior rejected the author's appeal against the Prefect's ruling on 16 December 1998.

2.11 K.N's counsel asserts that the author is utterly without rights; he has no legal means of regularizing his situation, no resources and no entitlement to housing, social security, employment, etc. He is living in hiding, receiving occasional help from people who feed and shelter him, and may be discovered and expelled at any moment.

The complaint

3.1 The author considers himself to be at risk of being arrested and tortured if he is returned to the Democratic Republic of the Congo, even though the present regime is not the same as the one that was in power when he left the country: he is known to the security service, where some old hands still have influence. His forcible return would thus be in breach of article 3 of the Convention.

3.2 The author has submitted to the Committee a copy of a letter posted in Kinshasa on 16 June 1995 telling him that his wife's dead body had been found, headless, while he was still in prison in Zaire. [3] According to the letter, his family does not know whether the discovery and the author's arrest are connected. The author also asserts that his daughter was abducted in November 1997 and held for several days at a secret location, but he provides no details of the persons responsible or the circumstances in which the abduction allegedly took place.

State party's observations on admissibility

4.1 By letter dated 20 April 1999, the State party challenges the admissibility of the communication. It argues non-exhaustion of the domestic remedies available to the applicant, both during the proceedings leading up to his expulsion to Kinshasa in March 1994 and since his return to France in 1995. It also disputes the author's claim to be a victim.

A. Proceedings leading up to author's deportation in 1994

4.2 By judgement dated 14 March 1994, the Paris Correctional Court banned the author from French territory for three years and ordered provisional execution of its sentence. The author, who was deported on 20 March 1994, entered no appeal against that judgement, although he had 10 days in which to do so by virtue of articles 496, 497 and 498 of the Code of Penal Procedure.

4.3 It is true that the judgement was for immediate enforcement and that the author was liable to be deported at any time, even before the 10 days had elapsed. There was, however, nothing to prevent K.N. from availing himself of this judicial remedy so as to have his case reviewed by the Court of Appeal.

B. Proceedings after author's return to France in 1995

4.4 Contrary to what is asserted in the communication before the Committee, the author did have the possibility, from the moment of his secret return to France in 1995, of explaining to the French administrative authorities the risks he ran in his country of origin and securing an administrative ruling protecting him from any action to expel him to the former Zaire. Indeed, he could validly have submitted a fresh application for refugee status to OFPRA.

4.5 It is true that the decree dated 14 March 1997, amending the decree of 2 May 1953, stipulates that a fresh application for recognition of refugee status must be preceded by a fresh application for provisional authorization to reside in France. It is nonetheless the case that the decree was adopted only in March 1997, and cannot therefore be invoked by the author as a reason for not applying to OFPRA between March 1995, when he returned to France, and March 1997, when the new decree was published.

4.6 Moreover, the obligation, deriving from article 2 of the Act of 25 July 1952 establishing OFPRA, to make oneself known to the authorities at the prefecture before applying to OFPRA for recognition of refugee status does not render registration of such a request by OFPRA contingent upon a prior decision by the prefecture to give permission to reside in France.

4.7 Even if an alien is not granted authorization to reside legally in France with a duly issued permit, he is always entitled to have his application for refugee status considered by OFPRA. Article 2 of the aforementioned Act of 25 July 1952 states that, when provisional authorization to reside in France is withheld, OFPRA shall accord priority to examination of the request for recognition of refugee status, and article 12 of the same Act says that an alien to whom permission to reside in France has not been granted on any of the grounds set forth in article 10 shall nonetheless be entitled to remain in France until the decision reached by OFPRA is notified.

4.8 Thus, though not indeed entitled to obtain a residence permit as long as the ban on his presence on French territory remained in effect, the author cannot seriously assert that this prevented him from submitting a fresh application for refugee status or emphasizing the risks he would run if returned to his home country. Furthermore, since his banishment from French territory ceased to be effective as from March 1997, the author could thereafter have submitted an application for recognition of refugee status subject to the usual conditions.

4.9 Given that the author could prove that he had been returned to his country of origin after the

rejection of his application by OFPRA and CRR in 1993, a fresh application for recognition of refugee status would have been regarded as a first application and not as an "abuse of process" or "deliberate fraud" which could, under the terms of article 10 of the Act of 25 July 1952, justify a refusal of provisional authorization to reside in France. The author could thus have been granted a provisional authorization to reside in France until OFPRA and, on appeal, CRR had ruled on his application.

4.10 Nor can the author maintain that the judicial authorities could not have been persuaded to lift the order banning him from France after his secret return in 1995. Article 28 bis of the ordinance of 2 November 1945 does indeed say that an application to lift a ban from French territory can be entertained only if the alien is living outside France, but the same article provides for an exception where the alien is subjected to a restricted residence order. Since such an order is issued by the administrative authorities when it is established that the individual concerned cannot return to his country of origin because, inter alia, of the risks he might be exposed to there, the author was at liberty to appear before the authorities in the appropriate prefecture to have his situation considered in that regard. He refrained from taking such a step.

4.11 It is thus clearly apparent that, since returning to France in 1995, the author has not made use of the legal channels which would have enabled him effectively to explain both to OFPRA and CRR and to the administrative authorities the risks to which he would be allegedly exposed in his country of origin, and to secure effective protection against any action to expel him.

4.12 On the other hand, the author of the communication under consideration has recently brought two appeals before the administrative courts: the first, dated 18 February 1999, seeks a stay of execution of the decision dated 3 July 1998 by the Prefect of Haute-Vienne rejecting his application for residence, and the second, dated 25 February 1999, seeks to have that same decision quashed. Since those two appeals are currently pending, the communication is premature.

C. Author's lack of victim status

4.13 The author is at present illegally within French territory, inasmuch as his latest application for a residence permit, submitted pursuant to the circular dated 24 June 1997 on the review of the situation of certain categories of illegal aliens, was definitively rejected by ministerial decision on 16 December 1998. Nevertheless, he does not at present face any administrative or judicial action to expel him. The decision banning him from French territory for three years taken by the Paris Correctional Court on 14 March 1994 has lapsed. Nor is there any order for his deportation for being in France illegally. So long as no such order has been issued by the Prefect, he is safe from any action to expel him to the former Zaire.

4.14 On the assumption that such an order were issued, its implementation would require a decision by the Prefect naming the country of destination. If, at that time, the individual concerned established that his life or liberty would be at risk or that he would be exposed to treatment in breach of article 3 of the European Convention on Human Rights in the event of being returned to his country of origin, expulsion to that country could not be carried out by virtue of article 27 bis of the aforesaid ordinance, and he would be made subject to a restricted residence order in accordance with article 28 of the ordinance.

4.15 If, nonetheless, having heard the author's explanations, the administrative authorities were to consider that the risks in the event of his return had not been established, the author would still however have the possibility of challenging, in the administrative courts, not only the deportation order itself but also the decision on the country of destination. Such an administrative law appeal would, under article 27 ter, have the effect of staying execution, and the deportation order could thus not be put into effect until the court had handed down its ruling. The administrative court has full control of the decision fixing the country of destination and could therefore annul it if it considered the risks proven. In that event, the individual concerned would also benefit from a restricted residence order pursuant to the aforementioned article 28.

4.16 At present the author, who is not subject to any enforceable decision to expel him to his country of origin, cannot plead that he is the victim of a breach of the Convention within the meaning of article 22, paragraph 1, thereof. In any event, if he were to be notified of a decision naming his country of origin as the country of destination, he would have open to him effective remedies which he would have to exhaust before making application to the Committee.

Comments by counsel

5.1 K.N.'s counsel submits objections to the State party's observations on admissibility. A. Failure to exhaust domestic remedies in respect of the ban from French territory ordered on 14 March 1994
5.2 Counsel points out that it is scarcely reasonable to maintain that the author, who was arrested on 13 March 1994, sentenced to banishment from French territory the day after, immediately detained with a view to the execution of the sentence, and then forcibly sent back to Zaire on 20 March, had had an opportunity to lodge an appeal. Appeals must be lodged in person with the clerk of the Court of Appeal, [4] the only exception being that prisoners, i.e. persons sentenced to a term of imprisonment, are given the possibility of entering an official appeal in the prison establishment. [5] K.N., who had not been sentenced to any term of imprisonment, was detained, first in premises not under the authority of the Prisons Administration, then in the aircraft and then in Zaire.

5.3 It is, moreover, generally acknowledged that, on the one hand, cases before the Paris Court of Appeal take about eight months to come up for a hearing, and on the other hand, that in cases of the present kind, heard by the Twelfth Division of the Court, the penalties are automatically upheld if not increased. In no circumstances could this be regarded as an effective and adequate judicial remedy since, even if it had been materially possible to lodge an appeal, the appeal entailed no stay of execution and would have done nothing to change the forcible execution of the author's banishment from French territory.

B. Failure to exhaust domestic remedies after the author's return to France in 1995

5.4 The State party maintains that the author could have submitted an application for asylum to OFPRA, could have requested assignment to a fixed place of residence, and has an appeal pending before the Administrative Court.

5.5 No lawyer or association would take the responsibility of advising the author to enter a fresh application for asylum, either in 1995 or nowadays. Doing so would almost automatically lead to the author's expulsion. Under French law, any application by an alien for permission to reside in

France (and hence for asylum, a request for asylum being possible and admissible only after residence for that purpose has been authorized by the administration) requires the applicant to go in person to the prefecture, pursuant to article 3 of the decree dated 30 June 1946 as amended and definitively interpreted by the Council of State. That, of course, has a strong deterrent effect since anyone who is not already in possession of residence papers or a residence permit is ipso facto liable to be issued with an immediate deportation order. Thus proceedings to regularize an alien's situation often result in the alien being arrested at the counter in the prefecture, served notice of a deportation order, and deported a few days later.

5.6 The State party wrongly maintains that, before the decree dated 14 March 1997 which prohibits any application for asylum before the prefect has granted permission to reside in France, nothing prevented the author from approaching OFPRA. Before the decree, any fresh application from an asylum-seeker who had been once refused was considered inadmissible because it conflicted with a previous final decision: the ipso facto result was the deportation of the applicant. Thus, when the author submitted a second application for asylum in March 1993 the only concrete result was the issue in the following few days of the customary deportation order and a decision to expel him to Zaire on 15 April 1993. Only following the rulings by the Council of State on 21 June 1996 (Prefect of Yvelines v. SARR, No. 168785 and Lakkis, No. 16053) was the right of a "reapplicant" for asylum to reside in France recognized in certain cases, and then only for a short while, since the decree of 14 March 1997 expressly banned any fresh application in the absence of permission from a prefect to reside in France. It is scarcely realistic, therefore, to suggest that the author ought to have submitted a third application, and no one with professional experience of the law on aliens would have considered doing so. What is more, until 14 March 1997, which was the date on which the decree took effect, the author was still legally banned from French territory for three years by the decision handed down by the Paris Correctional Court on 14 March 1994, and could not by definition be granted permission to reside in France - and thus to submit an application for asylum, which necessarily supposed previous authorization to reside in France.

5.7 The State party wrongly suggests that, after 14 March 1997, the author could have approached OFPRA even without being authorized to reside in France. Under French law, OFPRA cannot be approached directly; it only considers applications for asylum forwarded by a prefecture which has granted the asylum-seeker permission to reside in France.

5.8 As regards the assignment to a fixed place of residence (which confers no right to work, welfare coverage, etc.), counsel argues that this is a discretionary measure which the administration may take but which cannot be requested from an independent authority or court: it cannot therefore be regarded as a "judicial remedy" within the meaning of international law. As the State party indicates, the administration may take such a step if it considers it has been shown that the individual concerned cannot return to his country of origin in view, inter alia , of the risks to which he is exposed. It will be recalled that, for seven years, the administration has taken the view, when the question of asylum, residence or expulsion has arisen, that returning to his country of origin will not cause the author any problem. It is hard to see how things would be any different if the question of assignment to a fixed place of residence arose.

5.9 The appeal against the refusal of permission to reside in France currently pending before the Limoges Administrative Court does not entail a stay of execution and thus affords the author no

protection whatsoever against forcible return to his home country. In parallel with his request to have that refusal overturned, the author submitted, in February 1999, an application for suspension of the contested decision. That procedure, too, does not entail a stay of execution. While, theoretically, it should be pursued as a matter of extreme urgency, [6] one need only observe that the application has still not been heard and that delays in such cases can run into years. As for the appeal, counsel states that, in 1999, petitions submitted in 1994 were coming up before the Limoges Administrative Court for a hearing.

5.10 As for the substance, the appeals lodged, even if they entailed a stay of execution and even if they were heard within a reasonable period, would, in keeping with constant case law, be rejected. Applications for suspension are consistently held to be inadmissible unless the contested decision places the petitioner, already in an irregular situation, in a new de facto and de jure situation. With regard to the substance, moreover, there is first of all case law that is just as constant that fears in the country of origin are of no avail against a refusal of permission to reside in France. Secondly, the applicant always bears the burden of providing conclusively the truth of the facts he cites; yet by definition, no absolute proof such as the French administration and courts demand can be provided in the present case.

C. Author not a victim in the absence of expulsion proceedings

5.11 According to counsel, keeping the author in a situation where he has no right to any legal support, housing, or welfare coverage is in itself suffering intentionally inflicted and/or condoned with the objective of persuading him not to remain in French territory, and constitutes inhuman and degrading treatment and torture within the meaning of article 1 of the Convention.

5.12 One has only to read the decision by the Prefect of Haute-Vienne refusing the author permission to reside in France, notice of which was served on him on 27 July 1998, to see that he is given a month to leave the country, after which time an order for his deportation will be issued. French administrative practice is as follows. Either a deportation order is sent by recorded delivery to the individual's last known address; in this case it is final, and that the individual may not know of its existence is irrelevant; or else a deportation order is immediately produced, served on the individual and put into effect when he is arrested or subjected to an identity check. In the former case, the individual has seven days in which to appeal. K.N., does not know whether such a letter was sent to him. In the latter case, an appeal must be entered within 48 hours. It cannot seriously be maintained that, in such circumstances, the author would have the time and opportunity to establish what risks he is running, when he had been denied the option of doing so since 1992. Such an appeal did indeed entail a stay of execution, but the court is required to give its ruling within 48 hours. In the circumstances, this cannot be regarded as an effective and appropriate remedy.

5.13 According to counsel, arguments based on fears and on risks run in the country of destination are of no avail against the expulsion order itself and can at best serve to have the decision as to country of destination overturned where appropriate. Besides the additional procedural complication this creates for the alien, who must remember to state specifically that he also contests the possible decision as to country of destination and adduce separate factual and legal arguments for that purpose, there is nothing that obliges the administration to notify the decision as to country of destination at the same time as the expulsion order. On the contrary, it has now become common

practice, precisely in order to prevent any appeal entailing stay of execution from being lodged, not to notify an alien in detention of this decision until the 48 hours for appealing against the expulsion order have expired. That alien who is being expelled has the two months allowed under ordinary law to enter a traditional appeal against the decision as to country of destination. That appeal, which does not entail a stay of the expulsion, will be heard after the customary delay of some years.

The Committee's considerations

6.1 Before considering any claims contained in a communication, the Committee must decide whether or not it is admissible under article 22 of the Convention.

6.2 In accordance with article 22, paragraph 5 (b), of the Convention, the Committee does not consider any communication unless it has ascertained that the author has exhausted all available domestic remedies; this does not apply where it has been established that the application of the remedies has been or would be unreasonably prolonged or that it is unlikely to bring effective relief to the alleged victim.

6.3 In the present case, the Committee notes that, since arriving in France in 1995, the author has not submitted a fresh application for refugee status to OFPRA although there are new facts which he could adduce. The Committee notes, in that connection, the statement by the State party that, though not indeed entitled to obtain a residence permit so long as the ban on his presence in French territory remained in effect, the author could not seriously maintain that this state of affairs prevented him from submitting a fresh application for refugee status or emphasizing the risks he would run if returned to his own country. The State party also says that, his banishment from French territory having ceased to be effective as of March 1997, the author could thereafter have submitted an application for refugee status subject to the usual conditions. The Committee notes also that the author's appeal against the decision by the Prefect rejecting his application for residence and his application for suspension of the expulsion order, lodged before the administrative authorities in July 1998 and February 1999 respectively, are currently pending. In the circumstances, the Committee finds that the conditions laid down in article 22, paragraph 5 (b), of the Convention are not met.

7. The Committee consequently decides that:

(a) The communication is inadmissible as it stands;

(b) Under rule 109 of the Committee's rules of procedure, this decision may be reviewed if the Committee receives a written request by or on behalf of the author containing evidence to the effect that the reasons for inadmissibility no longer apply; and

(c) This decision shall be communicated to the author of the communication and, for information, to the State party.

1/ The author states that his wife was arrested and imporisoned after his departure, but the file

contains no evidence to support this statement.

2/ Copy of transfer docket attached.

3/ Photographs of the body are annexed to the communication.

4/ Code of Penal Procedure, article 502.

5/ Ibid., article 503.

6/ Administrative Courts and Administrative Appeals Courts Code, article R 120.

[Done in English, French, Russian and Spanish, the French text being the original version.]