



COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

FOURTH SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 38885/02
by N.
against Finland

The European Court of Human Rights (Fourth Section), sitting on
23 September 2003 as a Chamber composed of

Sir Nicolas BRATZA, *President*,

Mr M. PELLONPÄÄ,

Mr M. FISCHBACH,

Mr J. CASADEVALL,

Mr S. PAVLOVSKI,

Mr J. BORRERO BORRERO,

Mrs E. FURA-SANDSTRÖM, *judges*,

and Mr M. O'BOYLE, *Section Registrar*,

Having regard to the above application introduced on 31 October 2002,

Having regard to the interim measure indicated to the respondent
Government under Rule 39 of the Rules of Court,

Having regard to the observations submitted by the respondent
Government and the observations in reply submitted by the applicant,

Having deliberated, decides as follows:

THE FACTS

The applicant, Mr. N., born in 1972 and resident in Helsinki, is a citizen of the Democratic Republic of Kongo. He is currently detained in police custody in Finland in order to be returned as a rejected asylum seeker to the Democratic Republic of Congo (the DRC). He is represented before the Court by Mr Thomas Bergman, a lawyer for the Refugee Advice Centre in Helsinki.

The respondent Government are represented by Mr Arto Kosonen, Director, Ministry for Foreign Affairs.

A. The circumstances of the case

The facts of the case, as submitted by the applicant and as they appear from the documents, may be summarised as follows.

The applicant left the DRC on 17 May 1997. Travelling from Brazzaville, through Pointe Noire, Angola, Luanda, Viana, Bengila, Namibia, Johannesburg and Amsterdam, he finally arrived in Finland on 20 July 1998, requesting asylum. He claimed to be persecuted because of his political opinions in his country of origin for the following reasons:

The applicant was a member of the DSP (Division Spéciale Présidentielle) in his home country before Laurent-Désiré Kabila became President in May 1997 and, thus, a supporter of late President Mobutu. His father was a soldier in Mobutu's army. He is of the Ngbandi ethnic group (as President Mobutu was), and was born in Gbadolite in the Equateur region (which was the home region of Mobutu as well). He was a good friend of the son of Mobutu named Kongulu and nicknamed Saddam, who also was a member of the DSP. The applicant got vocational training as a guard (Certificat de garde civil) obtaining GT2 as grade. He lived on the compound of the president's palace.

The main task of the DSP was to protect president Mobutu, his family and property in the mentioned order. The head of the DSP was General Nzimbi Kongo Wabasa, who is the applicant's uncle. Twelve men formed a "belt" around the president. The orders of the president were distributed through a chain of officers. As a soldier the applicant was never directly in contact with the president. He was expecting to become a lieutenant, but this never happened because Mobutu was overthrown before the applicant could be promoted.

Amongst the applicant's tasks within the DSP was to infiltrate the University and monitor students for actions and opinions hostile towards the government. His tasks were often connected to Kongulu's operations, securing the safety of the son of Mobutu and his operations.

During his stay in the Netherlands in 1993-1997, as an asylum seeker, the applicant continued to work as an infiltrator amongst the Zairean

asylum seekers, as he had done in the university. He also worked on helping Kongulu when Mobutu's son was doing business in Europe. Back in Zaire the applicant was sent with the DSP to monitor the influx of Ruandan refugees into the eastern parts of Zaire.

The applicant left his country the day on which Kabila's troops took Kinshasa. Before that president Mobutu had left for Gbadolite. According to the applicant, the President did not want to leave Kinshasa but he was told he should do so by the headquarters of the army. The applicant considers this a plot. General Mayeli was later killed in the headquarters. As Kabila's troops reached Kinshasa the applicant fled across the river to Brazzaville together with the son of Mobutu and other members of the president's family.

President Mobutu sent an aeroplane to get the members of his family and DSP to Gbadolite. At the airport of Maya-Maya the pilot refused to fly them there even if he was offered extra money to do it. After the news reached them that President Mobutu had left Gbadolite for Morocco the group dispersed.

After the incident at Maya-Maya the applicant left by train for Pointe Noire, from where he took a boat to Cabinda in Angola. From there he flew to Luanda, the capital of Angola. There he was arrested since he did not speak Portuguese even though he carried an Angolan identity card, which he had bought. He was held in the prisons of Viana and Bengila before he was released. In Viana he was physically abused and because of this abuse he still had problems with his shoulder when he came to Finland. After his release he travelled to Santa Clare on the border of Angola and Namibia. From Namibia he travelled on board a lorry to South Africa. He flew from Johannesburg via Amsterdam to Helsinki.

In Finland the applicant has tried to avoid contact with his countrymen because of his connection with the Mobutu regime. He has also refused to use interpreters that have been his countrymen.

The applicant and his common-law wife, E., met each other in 1999 in Helsinki while they were both asylum seekers. They lived together in the reception centre in Helsinki for nine months until the deportation of E. on 22 February 2000.

After her prohibition on re-entry had expired E. visited the applicant in Helsinki for five days in April 2002. As a result of this visit E. became pregnant. After this they kept up the contact by phone and mail.

On 6 March 2001 the Directorate of Immigration ordered the applicant's deportation to the DRC. He was also forbidden to enter Finland, Sweden, Norway, Denmark and Iceland for two years. The Directorate found the applicant's submissions inconsistent. It also noted that the applicant had failed to prove his identity. Furthermore, the applicant was not found to face any real risk of treatment contrary to Article 3 if deported to the DRC.

The decision was served on the applicant on 30 March 2001. On 26 April 2001 he appealed to the Administrative Court of Helsinki. At an oral hearing before the Administrative Court the applicant recounted in detail his work for DSP and his connections with Mobutu's immediate circles. He was able to draw a detailed map of the area of the presidential palace and was able to answer questions about Mobutu's relatives. The Administrative Court rejected the applicant's appeal on 20 June 2002 after a vote (2-1), having doubts as to the veracity of the allegations that the applicant would be facing treatment contrary to Article 3 if returned to the DRC, as the applicant had not submitted any evidence that he had been a member of the DSP, in particular as his identity has not been certified. Judge Aer and *referendaire* Lilja dissented, referring to the UNHCR Instructions from January 1998, according to which soldiers of the Division Speciale Presidentielle were assessed by the UNHCR as being at risk. On 27 June 2002 the applicant applied to the Supreme Administrative Court for leave to appeal.

On 28 October 2002 E. arrived in Finland and requested asylum the same day. She moved in with the applicant in the reception centre in Helsinki. The Directorate of Immigration refused the application on 31 October 2002, as being manifestly ill-founded.

On 30 October 2002 the applicant was detained by the police and informed that he would be deported on 5 November 2002. Upon telephone contact with the Supreme Administrative Court the applicant's legal adviser, Mr Bergman, was informed that the Supreme Administrative Court would not react on the request to suspend the deportation order. On 1 November 2002 the applicant and his legal adviser were informed by the police that the day of deportation had been changed to 6 November 2002.

On 5 November 2002 the Government of Finland decided not to deport the applicant to the DRC until the Court had examined the applicant's application, following the Court's interim measure under Rule 39 of the Rules of Court.

The applicant's son was born in Helsinki on 23 January 2003 and the applicant's paternity was confirmed by the decision of the District Court of Helsinki on 24 February 2003.

On 4 March 2003 the Supreme Administrative Court decided to grant the applicant leave to appeal against the decision of 20 June 2002 of the Administrative Court of Helsinki, and refused the applicant's appeal without an oral hearing, upholding the Administrative Court's decision. The Supreme Administrative Court found, *inter alia*, as follows:

"Taking into account the recent developments in the DRC which have taken place since the applicant has allegedly left the country, the period of time which has passed since his departure, the significant lack of credibility in respect of his allegations concerning the risks he will be facing on his return to the DRC, the fact that he has not even claimed that he has had any contact with the local authorities who have been in office since the change of the regime on 17 May 1997 or that he would have come to

their knowledge, the Supreme Administrative Court cannot consider that the applicant is facing a real risk of becoming a subject of interest to the present rulers. Therefore, [the applicant] does not have a well-founded fear of persecution for reasons of his ethnic origin, membership of a particular social group or political opinion within the meaning of Section 30, subsection 1, of the Aliens' Act. Thus, he cannot be granted asylum. Even though the general security situation in Kinshasa, the capital of the DRC, is still very delicate, there is no well-founded reason to assume that [the applicant] would face a risk of being subjected to serious human rights' violations or to inhuman or degrading treatment in his country of origin. Thus, he cannot be issued a residence permit on the basis of his need of protection either."

B. Relevant domestic law

Subsections 1 and 2 of Section 18 b (537/1999) of the Aliens Act (*ulkomaalaislaki, utlänningslagen*; 378/1991) provide that the following must be regarded as family members of a person residing in Finland: his spouse as well as an unmarried child of under 18 years of age whose guardian the person residing in Finland is. If the person residing in Finland is a minor child, his guardian must be deemed a family member. People who continuously share a household and cohabit in a relationship resembling marriage must be deemed to be comparable to spouses. A requirement for this comparison is that they have cohabited for a minimum of two years, except if they have a common child.

According to subsection 1 of Section 18 B (537/1999) a family member of an alien residing in Finland with a residence permit issued on the basis that he is a refugee or in need of protection or is a family member of a Finnish citizen or a citizen of another Nordic country residing in Finland must be issued a residence permit unless there are reasons relating to public order or safety or other weighty reasons against issuing the permit. The decision on whether to issue a residence permit must be made taking into account all the relevant circumstances as a whole relating to the matter. The overall consideration must also take into account the possibilities of a person already residing in Finland with a permit to move back to his home country or to a third country to lead a family life if the family ties as a whole may be deemed to be strongest there.

According to Section 20, subsection 1 (537/1999) an alien who enters Finland without a residence permit may be issued a fixed-term residence permit in Finland if:

- 1) he has held Finnish citizenship or has at least one parent who is or has been a Finnish citizen,
- 2) prior to entering Finland, he has lived with a spouse currently residing in Finland or continuously shared a household and cohabited without marriage with a person currently residing in Finland; or if
- 3) refusing a residence permit would be clearly unreasonable.

According to Section 30 (537/1999), an alien must be granted asylum and issued a residence permit if, owing to well-founded fear of persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion, he resides outside his country of origin or habitual residence and if, owing to such fear, he is unwilling to avail himself of the protection of the said country. The following constitute special grounds for not granting asylum:

1) in view of Finland's national security, there exist particular reasons for not doing so;

2) the alien concerned has committed a crime against peace, a war crime or a crime against humanity according to the terms of international agreements or has committed another serious crime other than a political offence;

3) the alien concerned previously stayed in a country which has acceded to the Convention Relating to the Status of Refugees or stayed in another safe country and applied for asylum there or had the opportunity to do so; or

4) according to the Convention between Denmark, Finland, Iceland, Norway and Sweden concerning the Waiver of Passport Control at the Intra-Nordic Frontiers (Finnish Treaty Series 10/1958), another signatory to the Convention is obliged to readmit the alien in question;

5) in compliance with the Convention Determining the State Responsible for Examining Applications for Asylum Lodged in one of the Member States of the European Communities that was concluded in Dublin on 15 June 1990 (later the Dublin Convention), another contracting State is obliged to take responsibility for an asylum seeker (1183/1997).

According to Section 31, an alien residing in Finland may be issued a residence permit on the basis of his need of protection if he, in his country of origin or habitual residence, is threatened by capital punishment, torture or other inhuman or degrading treatment or if he cannot return there because of an armed conflict or environmental catastrophe.

According to Section 37, subsection 2 (537/1999), an alien whose continued residence in Finland would require a residence permit, but to whom it has not been issued, may also be refused entry.

According to subsections 1 and 2 of Section 38 (537/1999), an alien must be refused entry as soon as it has been possible to ascertain that his entry into or residence in Finland cannot be permitted. All the relevant matters and circumstances must have to be taken into account in their entirety when considering the refusal of entry. These include at least the duration of his stay in Finland, the relationship between a child and a parent, family ties and other ties to Finland. No one may be returned to an area where he may be subjected to the treatment referred to in Section 30 or 31 or to an area from which he could be further sent to such an area.

According to Section 43 (154/1995), an alien may be prohibited from entry to Finland for a maximum of five years or until further notice in a

decision concerning deportation or in a decision concerning refusal of entry made by Directorate of Immigration. The entry prohibition order may be revoked entirely or for a limited period owing to changed circumstances or for an important personal reason. Revocation is decided by the Directorate of Immigration.

According to subsection 4 of Section 57 (537/1999), a decision of the County Administrative Court to in paragraphs 1 and 2 (a decision concerning an appeal against a decision of the Directorate of Immigration) may be appealed only if the Supreme Administrative Court grants leave to appeal. The leave may be granted only if it is important to have the issue decided by the Supreme Administrative Court for the application of the law in other similar cases or for reasons of uniform judicial practice or if there are other weighty grounds for granting the leave to appeal.

According to the Government Bill for the Amendment of the Aliens Act (HE 50/1998), in cases of doubt, the case must be decided in the asylum seeker's favour, provided that all the information available has been verified and the authorities are generally convinced of the reliability of the information provided by the asylum seeker.

COMPLAINTS

1. The applicant complains that he would face inhuman treatment contrary to Article 3 of the Convention if deported to the DRC as he is outside his country of origin and has a well founded fear of persecution from the current government in the DRC based on his political opinion, nationality and belonging to a particular social group, because of his work in DSP and for Mobutu, because of his Ngbandi ethnicity and because of his close connections with the family of Mobutu.

2. Secondly, the applicant complains that his deportation would violate his right to respect for his private and family life as he has a common-law wife, whose asylum procedure is pending, and a new-born son in Finland. He invokes Article 8 of the Convention in this respect.

THE LAW

1. The applicant complains about his planned deportation. First, he claims that he would face inhuman treatment contrary to Article 3 of the Convention if deported to the DRC. Article 3 reads as follows:

“No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”

The applicant submits that he is outside his country of origin and has a well-founded fear of persecution from the current government in the DRC based on his political opinion, nationality and belonging to a particular social group because of his work in DSP and for Mobutu, because of being of Ngbandi ethnicity and because of his close connections with the family of Mobutu. He notes that the Administrative Court of Helsinki was divided. One judge stated that despite some unclear points it could not be excluded that the applicant had been a member of the DSP and that this has to be seen in his favour. He further said that UNHCR has stated that former soldiers of DSP were in a particularly great danger of infringements or inhuman or degrading treatment. He would have granted the applicant a residence permit based on the need of protection - so called secondary protection.

The applicant emphasises that his interests at stake are of a serious and fundamental nature. The seriousness of his application is supported by the fact that the Finnish Supreme Administrative Court granted leave to appeal which happens only in a small minority of appeals and the decision was, furthermore, published in the Supreme Administrative Court's Yearbook.

The applicant notes that in an asylum case the applicant often has several difficulties in presenting a full account of his grounds from the very beginning of the procedure. This may be caused by previous experiences of the behaviour of police officers and authorities in the applicant's country of origin. The applicant comes from a country of a dictatorship where, according to credible and objective human rights reports, corruption and abuse of power are rampant. Having served in the special forces of the former President Mobutu and, thus, having witnessed human rights violations, it is conceivable and natural that he would not trust the Finnish authorities. Further, the information he has given on his past is of a sensitive nature and places him in a difficult, if not intolerable, position amongst his countrymen in Finland. Even if the applicant's name is not mentioned in the published version of the Supreme Administrative Court's decision, he is easily recognised since he is the only Congolese asylum seeker in Finland, who has previously requested asylum in the Netherlands and who has a Russian common-law wife. Following the publication of the Supreme Administrative Court's decision, the applicant is afraid to show himself outside his room in the reception centre, since his work for DSP is now known to the other Congolese asylum seekers. The applicant has, however, come into contact with another Congolese asylum seeker whom he recognised as being a former member of the DSP. Her case is now pending in the Administrative Court of Helsinki. The applicant is convinced that she could testify on the question of his being a member of the DSP.

The applicant has consistently and precisely related the circumstances and his own role in the events which took place when the rule of President Mobutu was overthrown and the applicant was forced to flee his country.

He has also related in detail about his activities for the DSP before the take-over of power.

Since the submission of the present application, new reports have been published on the human rights situation in the DRC. According to the most recent UNHCR report (Country of Origin Report on the DRC in the final Report of the 8th European Country of Origin Information Seminar in Vienna 28-29 June 2002) , many of the former Mobutu soldiers have been persecuted since President Kabila came into power in May 1997. Many are feared to have lost their lives at the Kitona Military Base, where they were taken, or have been accused of being in alliance with Rwanda or with the armed opposition, and indeed many of them have been targeted. According to the report, the ethnic origin of a former Mobutu soldier is sometimes more important than his military rank.

The Government contest the applicant's allegations, recalling that the Contracting States have the right, as a matter of well-established international law and subject to their treaty obligations including the Convention, to control entry, residence and expulsion of aliens.

The Government note that both the Directorate of Immigration and the Administrative Court as well as the Supreme Administrative Court considered the information given by the applicant unreliable as a whole. The Directorate of Immigration and the Administrative Court also pointed out that the applicant had been convicted for criminal offences in Finland, albeit minor ones. Furthermore, the relevant authorities noted that the applicant has used several identities and they have not been able to verify his real identity.

The Government observe that, according to available reports presented on the human rights situation in the DRS, the fact that a person belongs to a certain ethnic group or that he had possibly previously worked for President Mobutu or his close family members does not as such give reason to believe that the person has a well-founded fear of persecution in his country of origin. In the light of information available on the situation in the DRC, only such office holders as had been in high positions in President Mobutu's regime, and who had abused their power, faced a risk of being subject to persecution after the seizure of power by Kabila, and not members of DSP of a lower rank.

In its decision of 4 March 2003 the Supreme Administrative Court observed that the applicant left his country more than six years ago. That court noted that the risk of persecution should be assessed according to the present-day conditions, and that the conditions had improved since President Joseph Kabila took over in January 2001 after his father Laurent Kabila.

The Government accept that, in the asylum interview and in the oral hearing held by the Administrative Court, the applicant was able to provide general information on the events in the DRC in May 1997. Most facts, as

recounted by the applicant are, however, generally known and public. The Government also submit that the information provided by the applicant, concerning the applicant's role in the events and his escape to Finland, is inconsistent and imprecise. He has not presented any details concerning his own activities that would show that he was engaged in political activities in his country of origin. Moreover, the information the applicant gave in the Netherlands in relation to his application for asylum there differs significantly from the information he gave in Finland.

The Government also note that the applicant has not contended that he was arrested or convicted or that any search warrant was issued against him in his country of origin. Nor was he subjected to torture or threats. On these grounds, and for the reason that the applicant has used several identities, his statements were not considered reliable as a whole by the relevant authorities.

The Court considers, in the light of the parties' submissions, that the complaint raises serious issues of fact and law under the Convention, the determination of which requires an examination of the merits. The Court concludes therefore that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. No other ground for declaring it inadmissible has been established.

2. Secondly, the applicant complains that his deportation would violate his right to have respect for his private and family life as he has a common-law wife, whose asylum procedure is pending, and a new-born son in Finland. He invokes Article 8 of the Convention which reads as follows:

“1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

The applicant notes that his common-law wife has given birth to the applicant's son since the submission of the application. The applicant has acknowledged his paternity and the acknowledgement was sanctioned by the District Court of Helsinki on 24 February 2003. The applicant, E. and their son live together in the reception centre of Helsinki. Therefore they are deemed to be comparable to spouses in accordance with Section 18 b of the Aliens Act. Accordingly, their family can be considered as a family within the meaning of Article 8 of the Convention.

The applicant emphasises that his right to have respect for his family life can only be exercised effectively if the family is allowed to live together. The applicant and E. also share a child whose paternity has been legally acknowledged. Their only realistic opportunity to continue their family life is in Finland. Return as a family to the DRC is impossible due to the applicant's fear of torture or degrading treatment. As to living in Russia, he would have to obtain a residence permit for which he has no absolute right. Furthermore, living in Russia would cause him undue hardship due to the general attitude towards Africans. His partner left Russia because of the racist attacks against her and her Russian-African children, which facts are the grounds for her own asylum application.

The Government contest the applicant's allegation, recalling that no right of an alien to enter or to reside in a particular country is as such guaranteed by the Convention.

The Government note that only in his additional observations of 30 October 2002 to the Supreme Administrative Court has the applicant stated that deportation would interfere with his right to family life, since his common law wife returned to Finland as an asylum seeker on 28 October 2002 and because she was then expecting the applicant's child.

The Government further note that neither the applicant nor E. has a residence permit. The applicant's alleged common-law wife, E., only stayed in Finland for a relatively short time between April 1999 and 22 February 2000 when she was deported to Russia. She returned to Finland in April 2002, to stay for less than a week, after the prohibition on entry had expired on. On 28 October 2002 E. returned to Finland and lodged a new application for asylum. In January 2003 E. gave birth to a child. E.'s appeal concerning the request for asylum is still pending in the Administrative Court. In its decision of 4 March 2003 the Supreme Administrative Court explicitly found that there was no family life between the applicant and E. within the meaning of Article 8 of the Convention. That court noted that applicant and E. had only lived together for a short time, and then moved in together again as asylum seekers at the reception centre more than two years later. Neither the Aliens Act nor the Convention gives aliens without residence permits the right to choose a certain country (Finland) as residence for themselves or their family.

In this connection the Government note that the applicant and E. may have a possibility to settle in the DRC considering that there is no violation of Article 3 in the present case, or in E.'s country of origin, or in another country that grants them a residence permit. The Government conclude that the decision to deport the applicant was not disproportionate to the legitimate aim pursued and that, consequently, there has been no violation of Article 8 of the Convention in this respect.

The Court considers, in the light of the parties' submissions, that the complaint raises serious issues of fact and law under the Convention, the

determination of which requires an examination of the merits. The Court concludes therefore that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. No other ground for declaring it inadmissible has been established.

For these reasons, the Court unanimously

Declares the application admissible, without prejudicing the merits of the case.

Michael O'BOYLE
Registrar

Nicolas BRATZA
President