AS TO THE ADMISSIBILITY OF

Application No. 32884/96
by Ouma OUATTARA
against the United Kingdom

The European Commission of Human Rights sitting in private on 2 March 1998, the following members being present:

MM S. TRECHSEL, President
E. BUSUTTIL
A.S. GÖZÜBÜYÜK
A. WEITZEL
J.-C. SOYER
H. DANELIUS
Mrs G.H. THUNE
Mr F. MARTINEZ
Mrs J. LIDDY
MM L. LOUCAIDES
M.A. NOWICKI
I. CABRAL BARRETO
B. CONFORTI
N. BRATZA
I. BÉKÉS
J. MUCHA
D. SVÁBY
G. RESS
A. PERENIC
C. BÎRSAN
P. LORENZEN
K. HERNDL
E. BIELIUNAS
E.A. ALKEMA
M. VILA AMIGÓ
Mrs M. HION
MM R. NICOLINI
A. ARABADJIEV

Mr M. de SALVIA, Secretary to the Commission

Having regard to Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms;

Having regard to the application introduced on 5 June 1996 by Ouma OUATTARA against the United Kingdom and registered on 5 September 1996 under file No. 32884/96;

Having regard to:

- the reports provided for in Rule 47 of the Rules of Procedure of the Commission;

- the observations submitted by the respondent Government on 20 November 1996 and further observations submitted on 19 June 1997 and the observations in reply submitted by the applicant on 4 April 1997 and 17 September 1997;

Having deliberated;

Decides as follows:

THE FACTS

The applicant is a citizen of Côte d'Ivoire, born in 1969 and currently resident in the United Kingdom. He is represented before the Commission by Jane Coker and Partners, solicitors practising in London. The facts of the case, as submitted by the parties, may be summarised as follows.

The applicant arrived in the United Kingdom on 29 October 1993, travelling on a passport which he later declared to be the passport of his brother, El Hadj Darude Ouattara. The applicant, under the name of El Hadj Darude Ouattara was granted permission to enter and remain in the United Kingdom for six months as a visitor, with a condition prohibiting him from taking employment, paid or unpaid.

On 1 November 1993 the applicant claimed asylum by personally presenting himself at the Home Office. He submitted a self-completion asylum application dated 8 December 1993, which detailed the factual basis for his claim to asylum. He claimed that he had been elected as the public relations officer for the Abidjan branch of the "Front Populaire Ivoirien" ("FPI"), an opposition political party, and that he had been responsible for distributing newsletters and magazines and newspapers critical of the government, in particular the newspapers "La Voie" and "La Patrie". He stated that on 7 August 1993 he had been arrested by security agents of the government, known as Loubards. He described being detained for one week during which time he was assaulted and stated that he was released on 14 August 1993, after having been forced to sign a declaration that he would resign from the FPI and refrain from dissident activities against the authorities and the President. The applicant states that after his release he was kept under surveillance, frequently stopped and interrogated, and that his friends and relatives were also subject to surveillance. The applicant describes going into hiding in a village from where his mother obtained a passport for him from an agent, which the applicant subsequently used to travel to England, entering the country on 29 October 1993 via Belgium.

In order to obtain more detailed information about his claim, the applicant was interviewed by the Home Office (Asylum Division) on 31 March 1994. The applicant stated on this occasion that after his release in August 1993 he went into hiding in his mother's village, he then travelled to Togo by bus. He stated that he remained in Togo for what he thought was about one year. From Togo he went to Benin and from Benin to Belgium by cargo boat. In Belgium he was given a lift by a German motorist to England. When challenged with the discrepancy of dates the applicant was unable to give clarifying details. At this interview the applicant revealed his true name and admitted that the passport on which he had been travelling bore his brother's name and details.

The Secretary of State for the Home Department considered the applicant's asylum claim, but rejected it in a letter dated 30 June 1994. The letter set out the reasons for rejection as follows:

(1) Political activity by recognised opposition groups, for example the FPI was tolerated in the Ivory Coast. The FPI had participated in the 1990 parliamentary elections and won a number of seats. Indeed, the FPI leader had won a seat. The Secretary of State considered, therefore, that it would be unlikely that activity with such a group would lead to harassment or persecution.

(2) On 30 July 1992 an amnesty for political opponents was announced and still remained in force. The applicant would be able to benefit.

(3) According to the passport with which the applicant arrived in the United Kingdom, he entered Togo on 9 March 1993 by

air through Lomé airport (not by land in late August as claimed) and returned to the Ivory Coast on 15 March 1993. He had then left the Ivory Coast by air on 17 September 1993 (not in late August 1993 by land to Togo and then by boat from Benin as claimed) using proper immigration channels at Abidjan airport. These discrepancies led the Secretary of State to doubt the applicant's credibility.

(4) The applicant's credibility was also seriously damaged because he had failed to admit his true identity when claiming asylum, revealing it only at an interview almost five months later.

On 27 August 1994 the applicant was arrested for fare evasion and interviewed by an immigration officer. Due to the fact that the applicant had used a false passport to gain entry to the United Kingdom, he was declared an illegal entrant on the same date and directions were given under the Immigration Act 1971 ("the 1971 Act") for his removal from the United Kingdom. The applicant was released on bail.

On 21 October 1994 the applicant appealed against the decision refusing his asylum claim. His appeal on the merits was heard by a Special Adjudicator on 20 February 1996. The applicant himself gave oral evidence at this hearing and he was represented by the Refugee Legal Centre. At this appeal the applicant produced a report by Amnesty International, dated 13 July 1994 and a medical report dated 15 November 1995. The medical report details the findings of a medical examination of the applicant, carried out on 15 November 1995 by Dr Peel of the Medical Foundation for the Care of Victims of Torture. The summary of this medical report states as follows:

"[The applicant] is a 26 year old Ivorean, who gives a story of having been arrested with some friends while selling political newspapers. During his arrest his clavicle was fractured and he was stabbed in two places. Once arrested he was kept in insanitary conditions and developed skin infections. He received no medical treatment, and was fed poorly. He was interrogated daily, but not beaten and was released after a week. He then fled to his village, but was not safe there, so after a few days he left the country. Mr Ouattara describes some psychological symptoms that are typical of those who have suffered such treatment. He also has scars on his body, which are very unlikely to have been caused in any other way than that he describes."

On 13 March 1996 the Special Adjudicator dismissed the applicant's appeal. In his "Determination and Reasons" the Special Adjudicator stated:

"The appellant bases his claim for asylum on the fact that he is a member of the FPI and has been persecuted for his political opinions culminating in him being detained and tortured in August 1993. However, I have not found the appellant to be a credible witness in that there are substantial parts of his evidence which I do not accept.

His credibility is undermined by the confusion in his evidence as to the chronology of events and, in particular as to the obtaining of his passport.

...

It is clear that the appellant has been the victim of serious ill-treatment. I have to consider whether there is

> a reasonable degree of likelihood that these injuries were incurred as a result of persecution...
>
> ...
>
> I have not found the appellant's evidence to be credible and I do not believe the account he has given of the circumstances of his arrest. I do not believe that he has been a political activist on behalf of the FPI nor that he was arrested for the reason that he describes or at the time he describes. However it is clear that the appellant has been the victim of serious ill-treatment.
>
> ...
>
> Although I accept that the appellant has been the victim of ill-treatment in Ivory Coast, and in all likelihood for this reason has decided to leave the country, I do not find there is any serious possibility that he has been persecuted for a Convention [1951 UN Refugee Convention] reason or that he is at risk of such persecution were he to return.
>
> This appeal must be dismissed but doubtless the Secretary of State will take careful note of the contents of the report from the Medical Foundation before deciding what further action will be appropriate."

By an application for leave to appeal dated 29 March 1996, the applicant applied to the Immigration Appeal Tribunal for leave to appeal against the dismissal of his asylum appeal by the Special Adjudicator. By a determination dated 3 April 1996, the Immigration Appeal Tribunal refused to grant leave to appeal. The applicant had no further right of appeal. He was arrested and detained under the 1971 Act on 5 May 1996. Removal directions for the return of the applicant to Côte d'Ivoire were originally set for 6 May 1996. They were deferred, initially to give the applicant time to consider judicial review proceedings and subsequently pending the outcome of the present application.

On 8 May 1996 counsel advised in writing that there was no arguable basis for a challenge to the determination of 3 April 1996, because the Special Adjudicator had considered all the evidence and had lawfully and rationally concluded that there was no evidence to suggest there was any serious possibility that the applicant had been persecuted for a Convention reason or that he would be at risk of such persecution were he to be returned.

The applicant's representatives wrote to the Home Office on 8 May 1996, confirming that no application for judicial review would be made. This letter, however, requested that the applicant be granted exceptional leave to remain in the United Kingdom outside the Immigration Rules because of the Special Adjudicator's acceptance that the Applicant had sustained injuries amounting to serious ill-treatment in Côte d'Ivoire.

According to an Amnesty International Report dated 28 May 1996, subsequent to the one submitted by the applicant to the Special Adjudicator, dozens of people were arrested in October 1995 as FPI sympathisers. The report also details an increase in the number of convictions of journalists and cites examples of journalists working on "La Voie" being singled out for judicial harassment by the Ivorean authorities, and imprisonment of journalists working for "La Patrie".

By a letter dated 17 July 1996 the Home Office replied to the applicant's letter of 8 May that:

"Based on the totality of evidence he [the Secretary of State] does not ... consider that there is any evidence to suggest that [the applicant] would face persecution for a Convention [1951 UN Refugee Convention] reason, were he returned to the Côte d'Ivoire."

The Secretary of State added that when the applicant had been arrested for fare evasion on 27 August 1994, he had admitted to an Immigration Officer that he had not come to the United Kingdom specifically to claim asylum.

This decision was confirmed in a letter of 25 July 1996, sent in response to further letters from the applicant's representatives.

The applicant, who had been in custody awaiting removal, was released from detention on 17 September 1996.

COMPLAINTS

The applicant complains under Articles 2 and 3 of the Convention about his proposed removal from the United Kingdom. The applicant further complains under Article 13 of the Convention that he had no effective remedy as the English courts had no jurisdiction to establish the existence of a risk of torture in a receiving state.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 5 June 1996 and registered on 5 September 1996.

On 7 September 1996 the Commission decided to communicate the application to the respondent Government.

The Government's written observations were submitted on 28 November 1996 and further observations on 19 June 1997, after an extension of the time-limit fixed for that purpose. The applicant replied on 4 April 1997 and further on 17 September 1997, also after an extension of the time-limit.

On 7 March 1997 the Commission granted the applicant legal aid.

THE LAW

1. The applicant complains that his removal from the United Kingdom to Côte d'Ivoire would constitute a violation of Articles 2 and 3 (Art. 2, 3) of the Convention. The Commission finds that the applicant's complaints should be considered under Article 3 (Art. 3) of the Convention.

Article 3 (Art. 3) of the Convention provides as follows:

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

The Government argue that the applicant has failed to exhaust his domestic remedies. Judicial review proceedings were not pursued to challenge the decision of the Immigration Appeal Tribunal's refusal of leave to appeal, and no application was made for judicial review of the refusal of the Secretary of State to accede to a request for exceptional leave to remain in the United Kingdom. With regard to the failure to challenge the refusal of leave to appeal by the Immigration Appeal Tribunal, the Government accept that counsel had advised that there was no arguable basis for such a challenge, but state that such advice did not absolve the applicant from his duty to pursue such a remedy. With regard to the Home Secretary's refusal to grant exceptional leave to remain, the Government state that this decision could have been judicially reviewed and they cite an example of a case

(R v. Secretary of State for Home Department ex parte Danaei) where the Home Secretary's refusal to grant exceptional leave was challenged and subsequently quashed. The Government rely upon the case of M v. United Kingdom (No. 12268/86, Dec. 7.11.88, D.R. 57 p. 136).

The applicant submits that domestic remedies have been exhausted. In relation to the failure to apply for judicial review of the refusal of the Immigration Appeal Tribunal to grant leave to appeal, the applicant states that counsel's opinion that there were no grounds for judicial review was unequivocal and amounted to a settled legal opinion. The opinion stated that the Special Adjudicator had made a lawful decision based on views rationally open to him and that there were thus no grounds for judicial review. The applicant argues that judicial review was doomed to fail and thus there was no effective remedy open to him. With regard to the failure to apply for judicial review of the refusal of the Secretary of State to grant exceptional leave, the applicant contends that judicial review was not an effective remedy. The applicant states that there is no body of case law where such challenges have been effective and that the case quoted by the Government is an isolated case, which in any event differs from the applicant's case on the facts; in the cited case the Home Secretary's refusal of exceptional leave was quashed because, despite the absence of additional evidence, the Home Secretary had relied on facts in relation to the asylum seeker that differed from those found by the Special Adjudicator. The applicant distinguishes the case of M v. United Kingdom (No. 12268/86, Dec. 7.11.88, D.R. 57 p. 136), as in that case the applicant, an asylum seeker who was found not to have exhausted his domestic remedies, had not challenged three refusals of asylum and one of exceptional leave and had submitted no evidence to suggest that judicial review would be ineffective.

The Commission recalls that, in accordance with Article 26 (Art. 26) of the Convention, it may only deal with a matter after all domestic remedies have been exhausted. Article 26 (Art. 26) requires exhaustion of remedies which relate to the breach alleged and which are available and sufficient (see Eur. Court HR, Van Oosterwijck judgment of 6 November 1986, Series A no. 40, p. 13, para. 27). In addition the Commission has consistently held that the mere existence of doubts as to the prospects of success does not absolve an applicant from exhausting a given remedy (see Nos. 5577-5583/72, Dec. 15.12.75, D.R. 4 pp. 4, 72).

The Commission recalls that in the cases of Vilvarajah and Others v. United Kingdom (Eur. Court HR, judgment of 30 October 1991, Series A no. 215), the Court held that judicial review was an effective remedy which provides a control of decisions of the administrative authorities in asylum cases. However, it is recognised in the Vilvarajah case that there are limitations to the powers of the courts in judicial review proceedings. In the current case counsel was of the view that the Special Adjudicator's finding could not be considered either unlawful on technical or procedural grounds or irrational. As regards the failure to apply for judicial review of the Secretary of State's refusal to allow the applicant permission to stay in the country, the Commission notes that the applicant has not submitted any contemporaneous advice from counsel which concluded that such an application was bound to fail. On the other hand, the request for permission to remain was a request for an exercise of discretion on the part of the Secretary of State, and may therefore be assimilable to an extraordinary remedy which the applicant was in any event not required to exhaust.

In the circumstances of the present case, the Commission is not required to determine whether the applicant has complied with the requirements of Article 26 (Art. 26) of the Convention as the application is in any event inadmissible for the following reasons.

The Government argue that the applicant has failed to show

substantial grounds that there is real risk that he will be subjected to torture or inhuman or degrading treatment or punishment, were he to return to Côte d'Ivoire. They do not accept that the applicant has ever been a FPI supporter and contend that the reports published by Amnesty International, in particular the report dated 28 May 1996 concerning the situation in Côte d'Ivoire, give a misleading, inaccurate and outdated account of the true situation. The Government have placed before the Commission UNHCR Country Information dated 3 February 1997 which is based on information from the US Department of State Office of Asylum Affairs and Country Conditions 1995/96. This report details an improvement of the situation in Côte d'Ivoire, noting the Government's apparent acceptance of the presence of the opposition and commenting that:

> "In our view, affiliation with the FPI ... would not by itself expose a person to danger upon returning to Côte d'Ivoire."

The applicant states that the Special Adjudicator accepted that he had been the victim of serious ill-treatment and that such past treatment of itself raises substantial grounds for believing there to be a real risk of similar treatment upon return.

The Commission recalls that in the case of Soering v. United Kingdom (Eur. Court HR, judgment of 7 July 1989, Series A no. 161, p. 35, para. 91), the Court held that for there to be an issue under Article 3 (Art. 3) of the Convention, there must be substantial grounds for believing that the person concerned faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment. In deciding whether there are substantial grounds for such a belief, the Commission will consider all the material before it (see the above mentioned Vilvarajah judgment at p. 36, para. 107). In the present case the Commission has considered and accepted the report of Amnesty International dated 28 May 1996 as an accurate summary of the situation in Côte d'Ivoire at the date of that report, but considers that such report must now be read in the light of the more recent UNHCR report of 3 February 1997. The Commission notes the medical report concerning the applicant's injuries and the finding of the Special Adjudicator, following the view of the medical doctor, that the applicant had been the victim of serious ill-treatment.

However, the Commission considers that there is no sufficient evidence before it to substantiate the applicant's involvement with the FPI or to establish that any detention was due to his political activities. In the absence of such evidence the Commission does not consider that the applicant has shown there to be substantial grounds for believing that were he to return to Côte d'Ivoire he would face a real risk of being subjected to torture, inhuman or degrading treatment or punishment, whether on political or other grounds. The fact that the applicant's injuries indicate he had received ill-treatment in the past is insufficient to ground a finding of a potential breach under Article 3 (Art. 3) of the Convention, in the absence of evidence of a real risk to him if returned now.

In these circumstances the Commission finds that substantial grounds have not been established for believing that the applicant would be exposed to a real risk of being subjected to inhuman or degrading treatment, within the meaning of Article 3 (Art. 3) of the Convention, were he to return to Côte d'Ivoire.

It follows that this part of the application is manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

2. The applicant complains under Article 13 (Art. 13) of the Convention that he had no effective remedy.

The Commission recalls that the guarantees of Article 13

(Art. 13) apply only to a grievance which can be regarded as "arguable" (cf. Eur. Court HR, Powell and Rayner v. United Kingdom judgment of 21 February 1990, Series A no. 172, p. 14, para. 31). In the present case, the Commission has rejected the substantive claims as disclosing no appearance of a violation of the Convention. For similar reasons, they cannot be regarded as "arguable".

It follows that this part of the application is manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

For these reasons, the Commission, by a majority,

DECLARES THE APPLICATION INADMISSIBLE.

M. de SALVIA	S. TRECHSEL
Secretary	President
to the Commission	of the Commission