AS TO THE ADMISSIBILITY OF

Application No. 18715/91
by Kiasi BANGULA
against the United Kingdom

The European Commission of Human Rights sitting in private on 11 December 1991, the following members being present:

MM.J.A. FROWEIN, Acting President
S. TRECHSEL
F. ERMACORA
G. SPERDUTI
E. BUSUTTIL
G. JÖRUNDSSON
A.S. GÖZÜBÜYÜK
A. WEITZEL
H.G. SCHERMERS
Mrs.G. H. THUNE
SirBasil HALL
Mrs.J. LIDDY
MM.J.-C. GEUS
A.V. ALMEIDA RIBEIRO
M.P. PELLONPÄÄ
B. MARXER

Mr. J. RAYMOND, Deputy 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 21 August 1991 by Kiasi BANGULA against the United Kingdom and registered on 22 August 1991 under file No. 18715/91;

Having regard to:

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

- the written observations of the Government submitted on 13 September and 29 November 1991;

- the applicant's written observations in reply submitted on 1 October and 6 December 1991;

- the parties' oral submissions at the hearing on 11 December 1991;

Having deliberated;

Decides as follows:

THE FACTS

The applicant is a citizen of Zaire, born in 1970, who at the time of lodging his application was detained in HM Prison Pentonville, London, pending the outcome of asylum proceedings. He was represented before the Commission by Ms. Nuala Mole, Executive Director of Interights, London.

The facts of the present case, as submitted by the parties, may be summarised as follows:

A. The particular circumstances of the case

The applicant arrived in the United Kingdom (hereafter referred to as the UK) on 23 September 1990 and immediately asked for political asylum. He had a forged Niger passport. He was placed in detention pending the examination of his request.

The Government stated that the applicant was first interviewed on 8 October 1990. The applicant told the immigration officer that he was a student in Zaire and that on 19 September 1990, with other students and teachers, he demonstrated against the Government's failure to make a pay award to teachers. During the protest he burned the Zaire flag and wrote "RDC" (République Démocratique du Congo) on a wall. He was arrested by the civil guard and taken to a place called "Cachet" where he was detained for 4 days. He said that he was not beaten whilst in detention, although badly fed. He told the immigration officer that he escaped with the help of the prison guard.

The applicant said that he had been approached by a guard at the detention centre who might have thought that the applicant was a member of the same tribe as him and who was, like him, a sympathiser of the UDPS (Union Démocratique pour le Progrès Social). He told the applicant that the authorities used that detention centre for people that they intended to execute. The guard then advised the applicant not to tell the other inmates anything about the help that the guard was going to give him. The applicant presumed that the guard had arranged with the applicant's father, a banker able to pay agents experienced in such matters, for the applicant's escape from the prison and flight from the country.

The applicant recounted that in the early hours of 23 September 1990 the guard took the applicant from his cell and drove him to the airport where he was handed to a businessman/agent. The agent was not Zairean and spoke little French, the applicant's mother tongue. The agent and the applicant then boarded a cargo aeroplane with no passengers or seating which took them to Lagos, Nigeria. The agent left the applicant in the Lagos airport restaurant. He later returned with a uniformed person. This uniformed person gave the applicant a forged Niger passport which was stamped by the Nigerian authorities although the applicant had not approached them. The applicant did not open the passport until he had boarded an aeroplane for the UK. The applicant did not apply for asylum in Nigeria for fear of being returned to Zaire. He believed that everywhere in Africa was corrupt and that the Nigerian authorities might have sent him back to Zaire. He told the British asylum authorities that he would be killed if he returned to Zaire.

In a letter dated 20 November 1990 a senior executive officer in the Refugees and Special Cases Unit of the Immigration and Nationality Department indicated that the Secretary of State was minded to conclude that the applicant did not qualify for asylum under the terms of the United Nations Convention of 1951 Relating to the Status of Refugees, as amended by the Protocol of 1967. The applicant's case had been considered in detail but, in the absence of evidence to substantiate his claims, his statements were thought to lack credibility and that, accordingly, the applicant had failed to make out a case for asylum. The applicant's account of his escape from detention and his departure from Zaire were deemed implausible on the grounds that it was highly unlikely that any person could have made the elaborate transit arrangements described by the applicant in the very short period between his arrest and escape, even against a background of illegal transactions being possible in Africa if large enough bribes are offered. The immigration authorities considered it strange that a guard whom the applicant had never met should suppose that the

applicant's father would have the means to finance such a complex escape operation (and thus risk serious consequences by playing his part in it). Moreover, it was not clear how the arrangements to place the applicant on a Lagos bound flight were made; how he had been smuggled past the airport and airline authorities and who the agent was. The applicant's account of events on his arrival in Lagos was considered to be even more unlikely. The applicant's case was that within a very short space of time (about 4 days at most) arrangements were made for him to escape detention and board a cargo aeroplane at Kinshasa; that he was able within a few hours to catch an onward flight to London from Lagos and that an unidentified agent in a foreign country was able to organise a carefully forged Niger passport and arrange for the applicant to move from the cargo aeroplane to the international departures lounge at Lagos without being challenged by the Nigerian authorities. The applicant had not produced evidence to substantiate or corroborate his claims in this respect and had therefore not been able to satisfy the Secretary of State that his account was reliable.

On 29 November 1990 the applicant was given a second interview. He then said that, although he had not been beaten during his 4 day detention, he was tortured by being made to run naked round the prison compound and by being put in a bag and thrown from guard to guard. Although he was not a member of the UDPS, he did distribute their leaflets in the street. He also said that he had no evidence of his treatment in Zaire because of the speed of his departure from the country.

In a letter dated 12 December 1990 the Asylum Division of the Immigration and Nationality Department informed the applicant that the further comments had failed to satisfy them that the applicant qualified for refugee status under the 1951 Refugee Convention.

On 20 March 1991 the applicant unsuccessfully applied to the Divisional Court for leave to challenge the Secretary of State's decision in judicial review proceedings. A further application to the Court of Appeal was refused on 14 June 1991.

There had been a third interview with the applicant on 5 June 1991, following medical examinations by Dr. Vincent Tonge of the Medical Foundation for the Care of Victims of Torture on 11 April 1991 and by Dr. Iain West, a consultant forensic pathologist of the United Medical and Dental Schools of Guy's and St Thomas' Hospitals on 16 May 1991.

The applicant had given a detailed account of his alleged torture to Dr. Tonge. The applicant told Dr. Tonge that after his arrest by civil guards on 19 September 1990 and imprisonment he had been roughly handled and beaten with fists and batons. He had been handcuffed to one of the guards and led into a small dark airless prison cell which already held three men. The cell had no windows or furniture. There were no toilet facilities so the prisoners were forced to relieve themselves in a corner of the cell. There were no cleaning or washing facilities and the prisoners' only sustenance was a small piece of dry bread and a bit of soiled water with sugar that was handed out twice daily.

The applicant claimed that he was tortured each day he was held in the prison. The torture took a variety of different forms. On several occasions he was stripped naked and taken outside with his hands cuffed behind his back. Once outside he was made to crawl face down on the ground for fifteen to twenty minutes or so with his hands still handcuffed behind his back. Then he would be left to lie on his back for ten minutes under the intense midday sun. On other occasions he was taken outside with other prisoners by five guards. These guards would tie the prisoners up one by one and place them into a sack. Then

the guards would throw and kick the sack around. When they had done this with one prisoner, another prisoner would be put in the sack and the guards would repeat the process as the other prisoners looked on. At night the applicant would be released from his wrist manacles and his right ankle would be manacled to a bar in his cell. Thereafter, a small fire would be lit outside and in front of the cell which would make the air in the cell even more difficult to breath. The guards would take hot metal sticks from the fire and burn the prisoners. The applicant claimed to bear several scars from this treatment. When the fire faded the prisoners were forced to kneel on the roasting ground where the fire was dying. During his third day of captivity, the applicant alleged that he was taken from his cell to another room with an iron chair. Metal terminals were attached to his wrists and the wires from these were plugged into a source of electricity, three times in rapid succession each time for about three to five seconds. The treatment was excruciating and it made the applicant jerk violently. Eventually he lost consciousness. He said that he still has nightmares about this experience. On another occasion the applicant was lowered by a rope into a well filled with sewage.

Dr. Tonge medically examined the applicant and was "totally convinced" that the applicant had suffered torture and ill-treatment in prison. Dr. Tonge also confirmed that from his experience of Africa, the applicant's story of bribery and escape was also credible. The Medical Foundation considered that the applicant's reticence to describe his experience immediately to the immigration authorities could be explained by the disorientation and confusion experienced by torture victims and the possible post traumatic stress syndrome.

Dr. West, whose report had been commissioned by the Secretary of State, found the applicant to be an extremely anxious young man. He found no evidence of scarring caused by electrical burns on the applicant's wrists, but confirmed that the scarring on the applicant's knees could have been caused by him being forced to kneel in the remains of a fire. He commented that if such injuries had been inflicted when the applicant claimed, they would not have healed and would still have caused discomfort at the time of his arrival in the UK. A medical examination conducted on or shortly after arrival should have identified these injuries. The applicant alleges that he had only had cursory medical examinations by the prison authorities, during which he was not asked to undress. He had not complained of his injuries, only of general weakness in October 1990. The prison medical staff had carried out routine medical examinations which did not reveal any illness.

The immigration authorities rejected the submission made on the applicant's behalf that the applicant's failure to draw the attention, or subsequent failure to seek medical treatment, could have been the result of fear and disorientation caused by his recent ordeal and by the circumstances of being detained in a strange country, only able to communicate through an interpreter. None of the records of the applicant's interviews, either with immigration officers or medical staff, suggested any prolonged disorientation or confusion as to what was happening to him. He seemed to have been perfectly capable of presenting his case and there is no evidence to suggest that his condition was such as to prevent him from realising how important it was to say that he had been tortured and to show the physical signs of this at an early stage. Even if he were disorientated on first arrival it was reasonable to suppose that by the time of his second interview on 29 November 1990, in which he did mention torture, he would have been sufficiently composed to want to give details of all the alleged ill-treatment which is said to be supported by medical evidence.

On 14 June 1991 the applicant's renewed application for leave to move for judicial review was refused by the Court of Appeal. The Court of Appeal regarded as significant the fact that the applicant did not mention that he had been recently tortured when examined by prison

medical doctors, and the fact that the medical examination conducted on or shortly after his admission should have identified such injuries. Lord Justice Parker held as follows:

"... if this had been a story which was worthy of any credibility the applicant - who quite plainly complained to the doctor of any trivial malaise or complaint - had he had unhealed burn wounds on his arrival in detention there could be no doubt whatever that he would promptly have applied to the doctor. I do not regard that ground as being a ground of any substance at all".

The Court of Appeal noted that the applicant had the benefit of legal advice throughout and had signed the notes of the various asylum interviews as an accurate record of what was said.

The applicant later claimed to have received a letter from his mother informing him that the guard who facilitated his escape from detention had been killed. This was supposedly corroborated by letters from the applicant's uncle (who has escaped to France where he has been granted asylum) and brother. It was also reported that the applicant's father disappeared in June 1991 and that the applicant's mother had been hospitalised after being beaten by soldiers looking for the applicant in July 1991.

B.The relevant domestic law and practice

The relevant domestic law and practice for asylum seekers in the UK is set out in full in the Commission's Report in the case of Vilvarajah and Others (Application Nos. 13163/87, 13164/87, 13165/87, 13447/87 and 13448/87, Vilvarajah, Skandarajah, Sivakumaran, Navratnasingam and Rasalingam v. the United Kingdom, Comm. Report 8.5.90, paras. 106-132).

Paragraphs 16 and 73 of the Statement of Changes in Immigration Rules HC 169 contain the practical application of the UK's obligation to grant leave of entry to refugees under the United Nations Convention and Protocol relating to the Status of Refugees. If an asylum application is refused there is a right of appeal to immigration appellate authorities under Section 13 of the Immigration Act 1971, but such a right may in general only be exercised from outside the UK. Section 17 of the 1971 Act also enables appeal against the designated country of destination if the appellant can find another country to accept him. Judicial review of the Secretary of State's decision to refuse asylum will lie if he has left out of account a factor that should have been taken into account, or he has taken into account a factor he should have ignored, or if he came to a conclusion so unreasonable that no reasonable authority could have reached it (cf. Associated Provincial Picture Houses Ltd v. Wednesbury Corporation [1948] 1 K.B. 223). Compassionate, exceptional leave may be granted by the Secretary of State in the exercise of his unfettered discretion in this field, should a person not qualify for full refugee status. In theory judicial review might lie on the aforementioned "Wednesbury" principles if such leave were refused. Asylum seekers may be assisted by the United Kingdom Immigrants Advisory Service and by Members of Parliament.

COMPLAINTS

The applicant complained that he will be killed or tortured again if he is returned to Zaire. He invoked Article 3 of the Convention and relies on, inter alia, the Soering and Vilvarajah and Others cases (Eur. Court H.R., Soering judgment of 7 July 1989, Series A no. 161, and Nos. 13163/87, 13164/87, 13165/87, 13447/87 and 13448/87, Vilvarajah, Skandarajah, Sivakumaran, Navratnasingam and Rasalingam v. the United Kingdom, Comm. Report 8.5.90). He also complained that,

contrary to Article 13 of the Convention, he had no effective remedy in the UK for his Article 3 claim.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 21 August 1991 and registered on 22 August 1991. A request was made that the Commission indicate to the respondent Government, under Rule 36 of the Rules of Procedure, a stay in the applicant's removal to Zaire pending the Commission's examination of the case.

On 21 August 1991 the Government had submitted observations explaining why, in their submission, the Commission should not accede to the Rule 36 request. The applicant's representative submitted comments on the Government's observations on 22 August 1991. On examining the question of the admissibility of the application, the President of the Commission, on 22 August 1991, decided, in accordance with Rules 34 paragraph 3 and 48 paragraph 2 (b) of the Rules of Procedure, that notice should be given to the respondent Government of the application and that the parties be invited to submit their written observations on the case. The President also decided to give precedence to the application in accordance with Rule 33 of the Rules of Procedure. It was unnecessary to deal with the applicant's request under Rule 36 as the Government undertook to defer the applicant's removal pending the Commission's examination of the case.

The Government submitted their observations on admissibility and merits on 13 September 1991, after an extension of the time limit, to which the applicant replied on 1 October 1991.

On 14 October 1991 the Commission decided to invite the parties to submit further observations orally at a hearing, pursuant to Rule 50 (b) of the Rules of Procedure. The hearing was held on 11 December 1991, the President of the Commission having granted the applicant legal aid on 28 November 1991 for his legal representation at the hearing. Pre-hearing briefs were submitted by the Government on 29 November 1991 and the applicant on 6 December 1991. The parties were represented at the hearing as follows:

For the Government :

Mrs. Audrey GloverAgent
Mr. Michael Baker, QCCounsel
Mr. Clive Osborne, Home OfficeAdviser
Mr. Edward Sprunt, Home OfficeAdviser
Ms. D. OramAdviser

For the applicant :

Mr. Ian Macdonald, QC
Ms. Nuala Mole, Executive Director, Interights
Ms. Jane Coker, Solicitor )Jane Coker & Co,
Ms. Sonal Ghelani, Solicitor )Solicitors

The hearing was held on the same day as a hearing in a similar application, No. 18631/91, Mayingi Zatunda v. the United Kingdom. The general issues common to both cases were dealt with at the applicant's hearing.

THE LAW

1.The applicant has complained that he will be seriously ill-treated if he is returned to Zaire and he alleged that the United Kingdom Government would be in breach of Article 3 (Art. 3) of the Convention if they were to send him back to that country.

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 Commission recalls the constant case-law of the Convention organs "that expulsion by a Contracting State of an asylum seeker may give rise to an issue under Article 3 (Art. 3), and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person concerned faced a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the country to which he was returned" (Eur. Court H.R., Vilvarajah and Others judgment of 30 October 1991, para. 103, to be published in Series A no. 215).

The Commission's assessment of the risk of ill-treatment to which the applicant may be exposed must be made in the light of all the material placed before it. This assessment must be a rigorous one in view of the absolute character of Article 3 (Art. 3) of the Convention (ibid. paras. 107-108).

The Commission notes that the British asylum authorities have considered the applicant's claims carefully. After each modification of his allegations and the submission of new material, such as medical evidence obtained seven months after his arrival in the UK, his case has been fully reviewed. However, the Secretary of State concluded that the inconsistencies in the applicant's story were so serious that they made it incredible. The Commission agrees with the Government. The Commission is particularly struck by the fact that the applicant was in no obvious discomfort when he arrived in the UK and made no complaint to the medical staff where he was detained pending the asylum proceedings. Yet only a couple of days before his arrival in the UK he claimed to have been severely beaten, subjected to electric shocks, covered in sewage and burnt on his knees after being made to kneel on hot ashes. It hardly seems credible that if the applicant had suffered the treatment he alleges it would not have been obvious to all who came into contact with him so soon afterwards. In the circumstances of the present case the Commission finds that the applicant has not shown substantial grounds that he faces a real risk of serious ill-treatment if he is returned to Zaire. It follows that this aspect of the case is manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

2.The applicant also complained that he had no effective domestic remedy for his Article 3 (Art. 3) complaint, contrary to Article 13 (Art. 13) of the Convention, which reads as follows:

"Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

However, according to the constant case-law of the Convention organs, "Article 13 (Art. 13) cannot reasonably be interpreted so as to require a remedy in domestic law in respect of any supposed grievance under the Convention that an individual may have, no matter how unmeritorious his complaint may be: the grievance must be an arguable one in terms of the Convention" (Eur. Court H.R., Boyle and Rice judgment of 27 April 1988, Series A no. 131, p. 23 para. 52).

The Commission has found the applicant's substantive complaint under Article 3 (Art. 3) of the Convention to be manifestly ill-founded and, in the light of the reasons for this decision, it also finds that the applicant has no arguable claim under Article 3 (Art. 3) warranting an effective domestic remedy pursuant to Article 13 (Art. 13) of the Convention. It follows that this aspect of the case is also 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.

Deputy Secretary Acting President
to the Commission of the Commission

(J. RAYMOND) (J.A. FROWEIN)