AS TO THE ADMISSIBILITY OF

Application No. 33708/96
by Beatrice NGALOLA KASHAMA
against the Netherlands

The European Commission of Human Rights sitting in private on 25 February 1997, the following members being present:

Mr. S. TRECHSEL, President
Mrs. G.H. THUNE
Mrs. J. LIDDY
MM. E. BUSUTTIL
G. JÖRUNDSSON
A.S. GÖZÜBÜYÜK
A. WEITZEL
J.-C. SOYER
H. DANELIUS
F. MARTINEZ
C.L. ROZAKIS
L. LOUCAIDES
J.-C. GEUS
B. MARXER
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
Mr. R. NICOLINI

Mr. H.C. KRÜGER, 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 19 August 1996 by Beatrice NGALOLA KASHAMA against the Netherlands and registered on 8 November 1996 under file No. 33708/96;

Having regard to the report provided for in Rule 47 of the Rules of Procedure of the Commission;

Having deliberated;

Decides as follows:

THE FACTS

The applicant is a Zairean national, born in 1969, and currently resides in the Netherlands. In the proceedings before the Commission, the applicant is represented by Mr P. Bouman, a lawyer practising in Helmond, the Netherlands.

The facts of the case, as submitted by the applicant, may be summarised as follows.

On 1 November 1995, an unidentified woman visited the applicant's privately owned tailor's workshop in Kinshasa. After having looked at the applicant's stock she told the applicant she would return with fabric from which she wished the applicant to make "boubous", a traditional Zairean dress.

The woman returned to the applicant's workshop on 3 November 1995 and stated that the fabric had not arrived yet. Later on the same day, the fabric was delivered in the presence of the unidentified woman, who explained she needed the boubous before 24 November 1995, on which day the ruling Zairean President would be 30 years in power. On the fabric the letters M.P.R. were printed. The letters M.P.R. are the initials of the ruling political party in Zaire.

The applicant informed the woman that she could not accept the order, as her brother had been killed in the course of a demonstration held on 29 July 1995. The woman did not accept the applicant's refusal and asked her "Who is stronger, you or the M.P.R.?"

When the applicant arrived at her workshop on 20 November 1995, soldiers had arrested the applicant's four employees and seized the applicant's stock and sewing machine. Upon her arrival the applicant was also arrested by soldiers and taken away in a jeep. In the car, she was threatened and sexually harassed by the soldiers. The soldiers released her after she had paid them US$ 3.000.

After her release, the applicant went in hiding in the house of one of her customers. On 25 February 1996, with the aid of a third person to whom she had paid US$ 7.000, the applicant left Zaire for Belgium. She arrived in the Netherlands on 28 February 1996, where she requested asylum, or alternatively a residence permit on humanitarian grounds.

On 29 February 1996, the State Secretary of Justice (Staatssecretaris van Justitie) rejected the applicant's requests. The State Secretary noted that the applicant could only name four kinds of fabric, could not name different kinds of yarn, did not know what a pattern is, did not know how to make jackets, sweaters and shirts and did not know with what fabrics are coloured. Given that the applicant stated that she privately owned a tailor's workshop and also that she worked there herself, the State Secretary concluded that the applicant's very limited knowledge of her trade strongly affected the credibility of her account.

The State Secretary further considered that the applicant had not made it plausible that she, by refusing to make certain clothes had identified herself as a political opponent of the current Zairean regime. In this respect, the State Secretary also noted that, after the events on 20 November 1995, the applicant had remained in Kinshasa for a period of four months without having encountered any problems from the side of the authorities.

This decision was served on the applicant on the same day. She was further informed that she had to leave the Netherlands immediately.

On 1 March 1996, the applicant filed an objection (bezwaarschrift) with the State Secretary of Justice against the latter's decision of 29 February 1996. On the same day, the applicant requested the President of the Aliens' Chamber (Vreemdelingenkamer) of the Regional Court (Arrondissementsrechtbank) of The Hague to grant an interim measure (voorlopige voorziening) allowing her to await the outcome of the objection proceedings in the Netherlands.

Following a hearing held on 15 March 1996, the President of the Regional Court rejected the applicant's request for an interim measure on 18 March 1996. Like the State Secretary, the President found the applicant's account not credible. In reaching this finding, the President had regard to the applicant's very limited knowledge of her alleged trade and the fact that it had remained unclear how the applicant had obtained, within a limited period, the amount of US$ 10.000 which she had used for leaving Zaire. The President further considered that the applicant had never been politically active and had only left Zaire several months after the alleged events.

Insofar as the applicant relied on Article 3 of the Convention, the President held that there were no circumstances indicating that her expulsion to Zaire would entail a genuine risk for the applicant of treatment contrary to this provision. The President further found no circumstances on the basis of which a residence permit on humanitarian grounds should be granted.

Having reached this finding and as no other legal rules appeared to have been violated, the President concluded that the State Secretary's decision not to allow the applicant to remain in the Netherlands pending the outcome of her objection could not be regarded as unreasonable. As the applicant's objection did not stand a reasonable chance of success and as a further investigation was not held to be able to contribute to the examination of the applicant's case, the President, in pursuance of Article 33b of the Aliens Act, also decided the merits of the applicant's objection against the State Secretary's decision of 29 February 1996 and rejected it as ill-founded.

COMPLAINTS

1. The applicant complains under Article 2 of the Convention that her expulsion to Zaire would certainly result in her being killed by the present regime.

2. The applicant complains under Article 3 of the Convention that her expulsion to Zaire will result in a real risk of ill-treatment, given the fact that she is wanted by the Zaïrean authorities.

3. The applicant complains under Article 6 of the Convention, both in itself and in conjunction with Article 13 of the Convention in that she cannot submit her case to an independent and impartial tribunal in such a way that this provides her with an effective remedy. She submits in this respect that the President of the Regional Court did not examine the full merits of her case.

4. The applicant complains that her expulsion to Zaire constitutes a violation of her rights under Articles 9 and 10 of the Convention in that she cannot exercise these rights in Zaire.

THE LAW

1. The applicant complains under Article 2 (Art. 2) of the Convention that her expulsion to Zaire would certainly result in her being killed by the present regime.

Article 2 (Art. 2) of the Convention reads as follows:

"1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

2. Deprivation of life shall not be regarded as inflicted in

contravention of this Article when it results from the use of force which is no more than absolutely necessary:

a. in defence of any person from unlawful violence;

b. in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;

c. in action lawfully taken for the purpose of quelling a riot or insurrection."

The Commission recalls that Article 2 (Art. 2) contains two separate though interrelated basic elements. The first sentence of paragraph 1 sets forth the general obligation that the right to life shall be protected by law. The second sentence of this paragraph contains a prohibition of intentional deprivation of life, delimited by the exceptions mentioned in the second sentence itself and in paragraph 2 (cf. No. 17004/90, Dec. 19.5.92, D.R. 73 p. 155).

The Commission finds nothing to indicate that the expulsion of the applicant would amount to a violation of the general obligation contained in the first sentence of paragraph 1.

As to the prohibition of intentional deprivation of life, the Commission does not exclude that an issue might be raised under Article 2 (Art. 2) in circumstances in which the expelling State knowingly puts the person concerned at such high risk of losing his or her life as for the outcome to be a near-certainty. The Commission considers, however, that a "real risk" - within the meaning of the case-law concerning Article 3 (Art. 3) of the Convention - of loss of life would not as such necessarily make expulsion an "intentional deprivation of life" prohibited by Article 2 (Art. 2), although it would amount to inhuman treatment within the meaning of Article 3 (Art. 3) (cf. No. 25894/94, Bahaddar v. the Netherlands, Comm. Rep. 13.9.96, paras. 72-81).

It is not necessary for the Commission to decide in what precise circumstances the risk of the person being killed might constitute a violation of Article 2 (Art. 2) in a case like the present one, since in any event the facts of the case do not disclose such a risk.

The Commission notes that it appears from her submissions that the applicant fears that she may be killed if expelled. The Commission notes that the applicant has not been sentenced to death, has not submitted that she is facing any criminal proceedings on charges carrying capital punishment or that she has received any death threats.

In these circumstances, the Commission cannot find that the applicant's expulsion to Zaire raises an issue under Article 2 (Art. 2) of the Convention.

It follows that this complaint must be rejected as manifestly-ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

2. The applicant complains under Article 3 (Art. 3) of the Convention that her expulsion to Zaire will result in a real risk of ill-treatment, given the fact that she is wanted by the Zaïrean authorities.

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

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

The Commission observes that Contracting States have the right, as a matter of well-established international law and subject to their treaty obligations including Article 3 (Art. 3), to control the entry,

residence and expulsion of aliens. Furthermore it must be noted that the right to political asylum is not protected in either the Convention or its Protocols. However, an expulsion decision may give rise to an issue under Article 3 (Art. 3), and hence engage the responsibility of a 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 or she is to be expelled. A mere possibility of ill-treatment is not in itself sufficient to give rise to a breach of this provision (cf. Eur. Court HR, Vilvarajah and Others v. United Kingdom judgment, ibid., p. 34, para. 103, and p. 37, para. 111).

The Commission also recalls that ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3 (Art. 3) (cf. No. 27776/95, Dec. 26.10.1995, D.R. 83, p. 101). An assessment of whether such a treatment is in breach of this provision, must be a rigorous one in view of the absolute character of this Article (cf. Eur. Court HR, Chahal v. United Kingdom judgment, ibid., para. 96).

The Commission has examined the applicant's submissions and the documents in support of her application. The Commission notes that the applicant has been unable to answer a number of basic questions relating to her alleged trade. It cannot, therefore, find the national authorities' findings as regards the credibility of the applicant's account unreasonable.

The Commission further notes that the alleged events on 20 November 1995 apparently gave the applicant no cause to flee the country immediately, but only after four months. The Commission further notes that the applicant's allegation that she is wanted by the Zairean authorities has remained wholly unsubstantiated.

The Commission finds that the applicant's submissions concerning her personal situation, as well as the general situation, does not establish that her position differs from that of the generality of inhabitants of Zaire.

The Commission is, therefore, of the opinion that it has not been established that the applicant will be exposed to a real risk of being subjected to treatment contrary to Article 3 (Art. 3) of the Convention if returned to Zaire.

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

3. The applicant complains under Article 6 (Art. 6) of the Convention, both in itself and in conjunction with Article 13 (Art. 13) of the Convention, in that she cannot submit her case to an independent and impartial tribunal in such a way that this provides her with an effective remedy.

Article 6 para. 1 (Art. 6-1) of the Convention, insofar as relevant, reads:

> "In the determination of his civil rights and obligations ... everyone is entitled to a fair ... hearing ... by a ... tribunal established by law...."

Article 13 (Art. 13) of the Convention provides 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."

The Commission recalls its constant case-law, that Article 6 para. 1 (Art. 6-1) of the Convention is not applicable to proceedings

concerning the granting of political asylum or residence permits for aliens (cf. No. 9285/81, Dec. 6.7.82, D.R. 29, p. 205; and No. 13162/87, Dec. 9.11.87, D.R. 54, p. 211).

Insofar as the applicant relies on Article 13 (Art. 13) of the Convention, the Commission notes that the applicant's case, including her argument that her expulsion would amount to a violation of Article 3 (Art. 3) of the Convention, has been examined by the State Secretary of Justice and the President of the Regional Court, respectively. The Commission is, therefore, of the opinion that the applicant had effective remedies within the meaning of Article 13 (Art. 13) of the Convention, of which she did in fact avail herself.

It follows that this part of the application must also be rejected as manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

4. The applicant finally complains that her expulsion to Zaire constitutes a violation of her rights under Articles 9 and 10 (Art. 9, 10) of the Convention in that she cannot exercise these rights in Zaire.

Article 9 (Art. 9) of the Convention protects the right to freedom of thought, conscience and religion. Article 10 (Art. 10) of the Convention concerns the right to freedom of expression.

Even assuming that the applicant's expulsion could raise issues under these provisions of the Convention, the Commission notes that this complaint has remained unsubstantiated.

It follows that this part of the application must also be rejected as manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

For these reasons, the Commission, unanimously,

DECLARES THE APPLICATION INADMISSIBLE.

H.C. KRÜGER	S. TRECHSEL
Secretary	President
to the Commission	of the Commission