CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

SECOND SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 34391/05
by Wiyao PELLO-SODE
against Sweden

The European Court of Human Rights (Second Section), sitting on 13 December 2005 as a Chamber composed of:

Mr J.-P. COSTA, *President*,
Mr I. CABRAL BARRETO,
Mr K. JUNGWIERT,
Mr V. BUTKEVYCH,
Mr M. UGREKHELIDZE,
Mrs A. MULARONI,
Mrs E. FURA-SANDSTRÖM, *judges*,
and Mrs S. DOLLÉ, *Section Registrar*,

Having regard to the above application lodged on 23 September 2005,

Having regard to the decision to grant priority to the above application under Rule 41 of the Rules of Court.

Having deliberated, decides as follows:

THE FACTS

The applicant, Mr Wiyao Pello-Sode, is a Togolese national who was born in 1979 and is currently in Sweden. He was represented before the Court by Mr L. Lundin, a lawyer practising in Stockholm.

A. The circumstances of the case

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

1. The applicant's personal circumstances

The applicant belongs to the Kabye ethnic group and was born and raised in Sodoke in central Togo. He is the youngest of seven siblings and, in 1989, he moved to the home of his oldest brother in Lomé in order to attend school.

In 1993 his oldest brother, who had been a high ranking military officer within the Togolese military and in opposition to the Government, fled to Benin after having spent two years in a Togolese prison. He was recognised as a refugee by the United Nations High Commissioner for Refugees (UNHCR) in Benin and transferred to Sweden where he was granted asylum. Following his flight, the rest of the family was allegedly repeatedly questioned and harassed by the Togolese authorities, for which reason they also fled to Benin. During the autumn of 1994 the oldest brother's wife and children, as well as the applicant, were granted temporary residence permits in Sweden based on their close relationship with him.

On 11 January 1995 the applicant arrived in Sweden and, on 14 June 1995, he was granted a permanent residence permit based on his family ties to his brother.

2. The criminal proceedings and the order of expulsion

On 28 August 2002 the applicant was convicted by the District Court (*tingsrätten*) in Helsingborg of aggravated attempted rape (*försök till grov våldtäkt*) and of making illegal threats (*olaga hot*). He was sentenced to forensic psychiatric care, the duration of which was subject to a medical evaluation (*rättspsykiatrisk vård med särskild utskrivningsprövning*) and expulsion from Sweden for a period of 15 years.

The applicant had denied the charges but the victim had positively identified him and he had had blood belonging to the victim on his clothes and injuries to his face, where the victim stated that she had scratched him. He had attacked the victim on a bicycle path, hit her with a glass bottle and then taken a stranglehold and squeezed until she had lost consciousness. He had then dragged her into the bushes and undressed her at which point she had regained consciousness and managed to escape. The District Court found that the crime was aggravated as the victim had sustained serious injuries, the stranglehold had put her in a life-threatening situation and the applicant had shown particular ruthlessness and brutality.

In order to determine the appropriate sentence for the crimes, the applicant had undergone a psychiatric examination. This concluded that (1) he had committed the said crimes under a serious mental disturbance, (2) he

still suffered from such a disturbance, and (3) there was a risk that he, due to his mental disturbance, would continue to commit crimes of a serious nature for which reason he was in need of psychiatric care. The District Court agreed with these findings.

With regard to the expulsion order, the District Court noted that, except for his oldest brother, the rest of the applicant's family remained in Togo. Moreover, in 1998 he had left his brother's home and lived by himself, at times being homeless and dependent on the social services for his survival. Thus, although he had been seven years in Sweden, he had not integrated well. Furthermore, the District Court had consulted the Migration Board (*Migrationsverket*) which had stated that, according to its documents concerning the applicant, there were no impediments to expelling him to Togo. Therefore, the court concluded that, having regard to the serious crime which he had committed and the risk that he would continue committing crimes, there were special reasons to expel him, with a prohibition on returning before 28 August 2017.

The applicant appealed against the judgment to the Court of Appeal (*hovrätten*) for Skåne and Blekinge, maintaining his innocence and requesting that, in any event, the expulsion order be repealed. He further stated that he did not suffer from a serious mental disturbance but that he had always been in good mental health.

The prosecutor requested the Court of Appeal to expel the applicant for life from Sweden.

On 15 November 2002 the Court of Appeal upheld the District Court's judgment, except as concerned the expulsion order. It considered that the applicant had been found guilty of a very serious crime and that he would pose a serious risk to general order and security if he were allowed to remain in Sweden. Thus, it decided that he should be expelled from Sweden for life. It further concluded, based on information from the chief physician at the psychiatric clinic where the applicant was treated, that he still suffered from serious mental disturbance.

The applicant appealed to the Supreme Court (*Högsta domstolen*) which, on 18 December 2002, refused leave to appeal.

In December 2004 the applicant requested the Government, through the Ministry of Justice, to revoke the expulsion order. He claimed that only his father, who was old and ill, remained in Togo as his mother had disappeared in 1990 and the rest of his siblings, and some cousins, had fled from the country, due to persecution, and were living as refugees in Benin. Moreover, he stated that the human rights situation in Togo was very poor and that, because his oldest brother was a well-known opponent to the Togolese Government, the applicant would also be at risk of being arrested and tortured if returned. In this respect he pointed out that he and his family came from the same area, Kara in Northern Togo, as the President of Togo, and that they were therefore supposed to support him. By their support of

the opposition, they were considered to be traitors. He relied on two letters from non-governmental organisations in Togo as evidence of the dangers he would face if expelled.

The first letter, dated 20 April 2004, from the *Ligue Togolaise des Droits de l'Homme* and signed by its President, Mr A. G. Akwei, stated that the Togolese regime did nothing to promote democracy or respect for human rights. Moreover, he confirmed that a refugee who was a close relative to a military man, himself a refugee, would face a real risk of being arrested if he were to be returned to Togo. The letter also gave a few examples of persons who had been arrested in Togo, most of them from the military.

The second letter, dated 25 April 2004, from Mr K. A. Ezuke, Deputy Secretary General of the *Association Togolaise de lutte contre la torture* and *Alternative de paix* (in exile in Germany), stated that the applicant's security could not be guaranteed if he returned to Togo, having regard to his oldest brother's activities, the unstable political situation in the country and the very poor human rights situation, where fundamental rights were not respected.

The applicant also pointed out that he had now been in Sweden for about ten years and that his oldest brother supported and helped him. Lastly, he invoked his illness, schizophrenia, and his need for medication, rehabilitation and social support in order to keep it under control. Since it was well known that health care in Togo was very poor, and he would have no family support there, he would face a real risk of becoming psychotic again, which could be dangerous for both himself and others.

On 23 March 2005 the Government refused to revoke the expulsion order. It found that there was neither any impediment to the enforcement of the expulsion nor any other special reason under the Aliens Act to revoke the order.

The applicant was placed in the psychiatric clinic in Helsingborg on 20 August 2002 and remains there for treatment.

3. Particulars on the applicant's state of health

According to medical certificates, dated 11 August 2003, 10 November 2004 and 26 August 2005, all written by the applicant's doctor at the psychiatric clinic in Helsingborg, A. Varenius, the chief physician, the applicant had been in the clinic since August 2002 and been given medication by way of compulsory injections, as he had considered that he was not in need of treatment. Through the medication and support in the clinic, the applicant had become more open and sociable, but continued to claim that he was not in need of medication or treatment as he was not ill. The physician attested that the applicant suffered from schizophrenia and was in need of medication and continuous social support (from family, the close environment and the social authorities). If he were to stop taking his

medication, he would seriously risk becoming psychotic again and could then also become dangerous for others.

During 2004 and 2005 the applicant had been granted leave from the clinic, under supervision, which he had followed impeccably. The physician also noted that the medication which the applicant had to take was available in Togo according to a list from the World Health Organisation (WHO).

In the last certificate, the physician stated that the applicant now accepted medication and that he had a better insight into his illness.

B. Relevant domestic law

Pursuant to Chapter 1, Article 8 of the Penal Code (*Brottsbalken*), a crime may, apart from ordinary sanctions, result in special consequences defined by law. Expulsion on account of a criminal offence constitutes such a special consequence.

Provisions on expulsion on this ground are laid down in the Aliens Act. According to Chapter 4, section 7 of the Act, an alien may not be expelled from Sweden on account of having committed a criminal offence unless certain conditions are satisfied. First, he or she must have been convicted of a crime that is punishable by imprisonment. Secondly, he or she may only be expelled if the sentence is more severe than a fine, and if (1) it may be assumed, on account of the nature of the crime and other circumstances, that he or she will continue committing crimes in Sweden, or (2) the offence, in view of the damage, danger or violation involved for private or public interests, is so serious that he or she ought not to be allowed to remain in the country.

Furthermore, under Chapter 4, section 10 of the Act, when considering whether or not an alien should be expelled, the court shall take into account the person's links to Swedish society. As regards aliens who are considered to be refugees and in need of protection in Sweden, they may be expelled only if they have committed a particularly serious crime and it would entail a serious danger for public order and safety to allow them to remain in Sweden. An alien with refugee status shall be considered as a refugee in need of protection in Sweden unless it is evident that he or she is no longer a refugee in such need.

Moreover, the court must have regard to the general provisions on impediments to the enforcement of an expulsion decision. Thus, pursuant to Chapter 8, section 1 of the Act, there is an absolute impediment to expelling an alien to a country where there are reasonable grounds for believing that he or she would be in danger of suffering capital or corporal punishment or of being subjected to torture or other inhuman or degrading treatment or punishment. Further, a risk of persecution generally constitutes an impediment to enforcing an expulsion decision.

According to Chapter 7, section 16 of the Act, if the Government finds that a judgment or decision to expel a person on account of having committed a criminal offence cannot be executed or if there are otherwise special reasons not to enforce the decision, the Government may repeal, in part or completely, the judgment or decision of the court. The Government may also, in accordance with Chapter 11, Article 13, of the Instrument of Government (*Regeringsformen*), pardon or reduce a penal sanction or other legal effect of a criminal act.

COMPLAINTS

The applicant complained under Article 3 of the Convention that, if expelled from Sweden to Togo, he would risk being persecuted, arrested and tortured due to his brother's known political opposition to the Togolese regime. He noted that the human rights situation in Togo was very poor. Furthermore, as he suffered from schizophrenia, he would not be able to receive proper medication and care in his home country which would imply a real risk of him becoming psychotic again and committing new crimes. Invoking Article 8 of the Convention, he also complained that, since he had lived with his oldest brother almost all his life and he was dependent on his help and support, it would violate his right to family life to expel him.

THE LAW

1. The applicant complained under Article 3 of the Convention that his expulsion from Sweden to Togo would expose him to real risk of being arrested and tortured because his oldest brother was a known critic of the regime. This provision reads as follows:

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

The Court reiterates at the outset that Contracting States have the right, as a matter of well-established international law and subject to their treaty obligations, including the Convention, to control the entry, residence and expulsion of aliens. However, the expulsion of an alien by a Contracting State may give rise to an issue under Article 3, and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person in question, if expelled, would face a real risk of being subjected to treatment contrary to Article 3 in the receiving country. In these circumstances, Article 3 implies the obligation not to expel the person in question to that country (see, among

other authorities, *H.L.R. v. France*, judgment of 29 April 1997, *Reports of Judgments and Decisions* 1997-III, p. 757, §§ 33-34).

Whilst aware of reports on continuous human rights violations in Togo, including persecution of political activists critical of the regime, the Court has to establish whether the applicant's personal situation is such that his return to Togo would contravene Article 3 of the Convention.

The Court notes that the applicant has not claimed that he has ever been politically active himself or tortured or imprisoned before leaving Togo in 1994. Moreover, he was granted a residence permit in Sweden based on his close relationship to his oldest brother, and the Migration Board, when consulted by both the national courts and the Government, found no impediment to expelling him to his home country.

In fact, the applicant has only claimed that he would risk persecution due to his oldest brother's political activities and because his family comes from the same region as the Togolese President. They would therefore be considered as traitors for not supporting him. In this respect, the Court stresses that neither the applicant nor his brother have been in Togo for more than ten years, but that their father remained there until his death, following illness, in February 2005 without having been imprisoned or persecuted. Furthermore, the applicant would not be forced to return to his home village but could remain in Lomé, where he has lived previously, or another area of the country if he feared returning to his region.

In these circumstances, the Court finds that it has not been established that there are substantial grounds for believing that the applicant would face a real risk of being subjected to treatment contrary to Article 3 of the Convention if returned to Togo.

It follows that this part of the application is manifestly ill-founded within the meaning of Article 35 § 3 of the Convention and must be rejected pursuant to Article 35 § 4 of the Convention.

2. The applicant further claimed, under the same provision, that the expulsion would pose a grave risk to his health as he suffered from schizophrenia and he would not receive the necessary treatment and medication in his home country.

The Court reiterates that, due to the fundamental importance of Article 3, the Court has reserved to itself the possibility of scrutinising an applicant's claim under Article 3 where the source of the risk of the proscribed treatment in the receiving country stems from factors which cannot engage either directly or indirectly the responsibility of the public authorities of that country, or which, taken alone, do not in themselves infringe the standards of that Article. In any such contexts, however, the Court is obliged to subject all the circumstances surrounding the case to rigorous scrutiny, especially the applicant's personal situation in the expelling State (see the *D. v United Kingdom* judgment of 2 May 1997, *Reports* 1997-III, § 49).

Consequently, the Court will examine whether the expulsion of the applicant to Togo would be contrary to Article 3 having regard to all the material before it, including the most recently available information on the applicant's state of health.

Here the Court would highlight that, according to established case-law, aliens who are subject to expulsion cannot in principle claim any entitlement to remain in the territory of a Contracting State in order to continue to benefit from medical, social or other forms of assistance provided by the expelling State. However, in exceptional circumstances the implementation of a decision to remove an alien may, owing to compelling humanitarian considerations, result in a violation of Article 3 (see, for example, the *D. v. United Kingdom* judgment, cited above, § 54).

In the present case, the applicant is suffering from a long-term mental illness, schizophrenia. He is currently receiving medication (cisordinol) which assists him in managing his symptoms. According to the applicant's treating physician, this medication can be replaced by haldol which, according the World Health Organisation would be available to the applicant in Togo. The Court observes that the applicant lived in Lomé, the capital of Togo, between 1990 and 1994, and that he should be able to obtain the medication at a hospital there. The Court is aware that, unlike in Sweden, he might have to pay for the medication in his home country.

The applicant alleged that the stress inherent in returning to Togo, where he has no family left to support him and the human rights situation is very poor, would seriously endanger his health. Deterioration in his already existing mental illness could also involve relapse into a psychosis involving a risk of harm to others. The Court considers that the suffering associated with such a relapse could, in principle, fall within the scope of Article 3 (see *Bensaid v. the United Kingdom*, no. 44599/98, § 37, ECHR 2001-I).

The Court observes, however, that the applicant faces the risk of relapse even if he stays in Sweden as his illness is long-term and requires constant management. The differences in available personal support and accessibility of treatment will arguably increase the risk of relapse. Nonetheless, medication is available to the applicant in Togo. The fact that his circumstances in Togo would be less favourable than those enjoyed by him in Sweden is not decisive from the point of view of Article 3 of the Convention. Moreover, it appears from the medical certificates that the applicant is now taking his medication willingly and that, were he to remain in Sweden, he would soon be released from supervision by the psychiatric clinic. Thus, it can reasonably be expected that, if he were to be expelled, he would continue taking his medication as he has understood the importance of it for his mental health.

Furthermore, the Court finds that the risk that the applicant would suffer a deterioration in his condition if he were returned to Togo and that, if he

did, he would not receive adequate support or care, is to a large extent speculative.

In conclusion, the Court accepts the seriousness of the applicant's medical condition. However, having regard to the high threshold set by Article 3, particularly where the case does not concern the direct responsibility of the Contracting State for the possible harm, the Court does not find that there is a sufficiently real risk that the applicant's removal in these circumstances would be contrary to the standards of Article 3. In the Court's view, the present case does not disclose the exceptional circumstances established by its case-law (see, among other, *D v. United Kingdom*, cited above, § 54, and *Amegnigan v. the Netherlands*, (dec.), no. 25629/04, 25 November 2004).

It follows that this part of the application must also be rejected as being manifestly ill-founded pursuant to Article 35 §§ 3 and 4 of the Convention.

3. Finally, the applicant complained under Article 8 of the Convention that his right to respect for his family life would be violated by the expulsion since his oldest brother and family were in Sweden and he was dependent on their support. Moreover, he had lived in Sweden for ten years, since the age of sixteen.

This Article provides insofar as relevant as follows:

> "1. Everyone has the right to respect for his ... family life ...
>
> 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 ... for the prevention of disorder or crime, ... or for the protection of the rights and freedoms of others."

The Court accepts that the expulsion of the applicant would constitute an interference with his right to respect for his family life, as guaranteed by Article 8 § 1 of the Convention, since he lived with his brother's family between 1990 and 1998. In fact, he was granted a residence permit in Sweden based on his close relationship with his brother, as he was part of his household.

The Court further finds that the interference had a legal basis in Swedish law, in particular Chapter 1, section 8 of the Penal Code in conjunction with the relevant provisions of the Aliens Act, and pursued a legitimate aim, namely the prevention of disorder or crime, within the meaning of Article 8 § 2 of the Convention.

It remains to be determined whether the interference was "necessary in a democratic society".

The Court recalls that the Convention does nor guarantee any right for an alien to enter or to reside in a particular country. Nevertheless, the expulsion of a person from a country where close members of his family are living may amount to an infringement of the right to respect for family life, guaranteed by Article 8 § 1 of the Convention (see, among other authorities,

Moustaquim v. Belgium, judgment of 18 February 1991, Series A no. 193, p. 18, § 36).

It is for the Contracting States to maintain public order, in particular by exercising their right, as a matter of well-established international law and subject to their treaty obligations, to control the entry and residence of aliens. To that end they have the power to expel aliens convicted of criminal offences. However, their decisions in this field must, in so far as they may interfere with a right protected under paragraph 1 of Article 8, be necessary in a democratic society, that is to say justified by a pressing social need and, in particular, proportionate to the legitimate aim pursued (see *Dalia v. France*, judgment of 19 February 1998, *Reports* 1998-I, p. 91, § 52; *Boultif v. Switzerland*, judgment of 2 November 2001, *Reports* 2001-IX, p. 130, § 46; and *Jakupovic v. Austria*, no. 36757/97, § 25, 6 February 2003, unreported).

Accordingly, the Court's task consists in ascertaining whether the expulsion order in the circumstances struck a fair balance between the relevant interests, namely the applicant's right to respect for his family life, on the one hand, and the prevention of disorder and crime, on the other.

The applicant's family connection to Sweden consists of his oldest brother and the latter's family. The Court finds that, although the applicant and his brother have renewed their contact during the last couple of years, his relationship to his brother cannot be considered to be very strong since he has not lived with him for more than seven years. Moreover, after the applicant left his brother's home in 1998, they had very little contact, if any, until after the applicant's conviction in 2002.

Furthermore, the Court notes that the applicant has not integrated into Swedish society and that, between 1998 and his conviction in 2002, he was dependent on the social authorities and, at times, homeless. Since August 2002, he has been in psychiatric care awaiting his expulsion. The Court is aware that one reason for the applicant's inability to integrate has most likely been his schizophrenia, but that this cannot be seen as the sole reason.

In this connection, the Court takes note that the applicant claims that he has no relatives left in Togo who could help him. However, five of his siblings are apparently in Benin and the applicant has stated before the Court that his oldest brother visited them there in the summer of 2005, at which time he was informed that their father had died. Thus, there would be a possibility for the applicant to join his siblings in Benin and thereby also keep in closer contact with his oldest brother. The applicant's expulsion can therefore not be said to render impossible a continued relationship with his oldest brother and his family.

Moreover, in order to decide whether the interference was justified, the interests of the applicant to remain in Sweden have to be balanced against the public order interests of Sweden on account of the nature and the seriousness of the crimes of which he was convicted (in particular

aggravated attempted rape). The Court observes that the national courts found that the applicant had shown particular ruthlessness and brutality, and had put the victim in a life-threatening situation. Moreover, they had concluded that there was a risk, due to his mental disturbance, that he would continue to commit crimes of such a serious nature. Although the Court takes note that the applicant has now acknowledged his illness and is taking his medication, there remains a risk that he will commit new crimes if he does not continue his medication once he is released from compulsory psychiatric care. In these circumstances, the Court considers that the crime of which the applicant was convicted is of such a serious nature that his expulsion must be considered to have been justified by weighty public order interests.

Having regard to the considerations above, the Court finds that it cannot be considered disproportionate to the legitimate aim of the prevention of disorder or crime to enforce the expulsion order. It follows that this part of the application is also manifestly ill-founded and must be rejected pursuant to Article 35 §§ 3 and 4 of the Convention.

For these reasons, the Court unanimously

Declares the application inadmissible.

S. DOLLÉ
Registrar

J.-P. COSTA
President