



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

THIRD SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 47683/08  
by S.M.  
against Sweden

The European Court of Human Rights (Third Section), sitting on  
10 February 2009 as a Chamber composed of:

Josep Casadevall, *President*,  
Elisabet Fura-Sandström,  
Corneliu Bîrsan,  
Boštjan M. Zupančič,  
Ineta Ziemele,  
Luis López Guerra,  
Ann Power, *judges*,

and Stanley Naismith, *Deputy Section Registrar*,

Having regard to the above application lodged on 6 October 2008,

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

1. The applicant is a Congolese national who was born in 1966 and lives  
in the Democratic Republic of Congo. She was represented before the Court  
by Ms A. Bergström, a lawyer practising in Umeå.

### A. The circumstances of the case

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

2. According to the applicant, she entered Sweden on 23 March 2005 and applied for asylum and a residence permit on the following day. Before the Migration Board (*Migrationsverket*), she stated that she was born and raised in Kinshasa and had lived in Masina since 1986. She had three children of her own and one niece for whom she had been responsible. These remained in the Democratic Republic of Congo (hereafter “the DRC”) with the applicant’s sister. The applicant claimed that she would risk persecution due to her connections with persons who were fighting against President Kabila. In this respect, she alleged that she had been selling merchandise at a market in Kinshasa which she had purchased in Brazzaville and, for this reason, she had made frequent trips between the two cities. On one of her trips to Brazzaville, she had met a friend, J., who had asked her to deliver a letter to Mr Thomas Kanza, the Ambassador for the DRC to Sweden. In return, Mr Kanza had started sending money to J. This correspondence, the applicant claimed, had continued, with her as courier, until 21 September 2004 when Mr Kanza had said that he was leaving for the USA. He had given the applicant his business card, which she handed over to the Migration Board in April 2006.

3. Moreover, the applicant submitted that, on 22 September 2004, she had been arrested by a group of soldiers belonging to the National Intelligence Agency (*Agence Nationale de Renseignement*; hereafter “the A.N.R.”). She had been taken to their headquarters and told that they knew that she was working with persons who aimed to overthrow President Kabila and that she knew the whereabouts of a certain arms cache. She was threatened and, during the night, she was raped by two of them who also mutilated part of her genitals. Following this, she had not been physically abused again but repeatedly threatened. One of the soldiers had informed her family of her detention and they had arranged for a lawyer, Mr Y., who had come to visit her. He had tried to reach Mr Kanza but had been informed that he had died of a heart attack. On 25 October 2004 the applicant had suffered an asthma attack and had been taken to hospital from where she had managed to escape when she went to take a shower. She had fled to Kinsuka and then, on 7 November 2004, to Brazzaville. However, due to violence in Kinshasa in January 2005, many people had fled to Brazzaville only to be forcibly repatriated. As the applicant had been afraid also to be forced to return to the DRC, she had moved to Djiri. Still, through Mr Y., she had been informed that the A.N.R. soldiers were looking for her and had questioned her family because a search warrant for her had been issued following her escape. Due to this, she had been so afraid that she had left the country on 21 March 2005 and travelled to Sweden.

4. The applicant further claimed that, due to her traumatic experiences, she was in very poor mental health and saw a counsellor regularly. She submitted a medical certificate, dated 19 January 2006, by A. Järnbert, Chief Physician at the Women's Clinic at Kiruna Hospital, which stated that the applicant had been the victim of sexual violence and that, in November 2005, she had undergone plastic surgery to repair the damage caused to her. The surgery had been successful but the applicant had been depressed as she missed her children and wanted to be reunited with them. From another medical certificate, dated 12 March 2007, by S. Sandström, counsellor at the Kiruna Hospital, it appeared that the applicant suffered from Post Traumatic Stress Disorder (PTSD) because of traumatic experiences in her home country. She also suffered from recurring depression due to the stress and uncertainty of her situation.

5. On 30 March 2007 the Migration Board rejected the application. It first noted that the situation for women in the DRC was very difficult and that rape and violence against women was common and used by all parties to the conflict as a mean of intimidation and part of warfare. Often the women who had been raped were also mutilated. Thus, having regard to the medical certificate submitted by the applicant and the information above, the Board accepted that the applicant had been the victim of rape and mutilation. However, the Board questioned the veracity of the applicant's claim that she was wanted by the authorities in the DRC and her story of how she had fled. It considered that the violence to which she had been subjected concerned criminal acts carried out by individual persons and not persecution based on suspected political activities. Thus, the Board concluded that the applicant had failed to show that she would risk persecution on the basis of her alleged activity as a courier if she were to be returned to the DRC and, hence, there was no real risk that she would be arrested and tortured. As concerned the applicant's poor mental health, the Board considered that it was not so serious that she could be granted leave to remain. In this respect, it had regard to reports from the UK Home Office which stated that treatment and competent doctors and medication were available in Kinshasa for persons suffering from, *inter alia*, depression, traumas and PTSD. Lastly, it observed that the applicant's physical injuries had been repaired. Therefore, even having regard to all the circumstances of the case, there were not sufficient grounds on which to grant the applicant leave to remain in Sweden.

6. The applicant appealed to the Migration Court (*Migrationsdomstolen*), maintaining her claims and adding that the police violence against her had been directly connected to her activity as a courier. Even though she herself had not been politically active, the authorities considered her activities as a political standpoint against the regime. Her first transfer of letters had occurred at the beginning of 2004 and she had only done it for the money. The parties involved had then explained to her

that Mr Kanza would be the next President of the country and they had also told her that the letters contained money. She had transferred letters about four times per week and Mr Kanza's guards had known her. She had been aware of the risks but had been hoping to get a good job if Mr Kanza took power. When she had been arrested, they had not questioned her but simply assumed that she was guilty and knew where the arms cache was. Moreover, through a letter dated 4 May 2007 from Mr Y., which she submitted to the court, she had been informed that the soldier from whom she had escaped at the hospital had been imprisoned for negligence and had subsequently died. Thus, his relatives were also looking for her to obtain revenge for his death. Mr Y. had further written that the applicant was sought on suspicion of complicity in treason under Article 184 of the Penal Code which prescribed the death penalty and was without a statutory time limit. In support of this, she also submitted a copy of a search warrant (*Avis de Recherche*), dated 20 January 2005, and issued by the Department for Internal Security at the A.N.R. It stated that the suspect was prosecuted for endangering State security ("*L'intéressée est poursuivie pour atteinte à la sûreté de l'Etat*"). The applicant's name, date of birth, the names of her parents and her address in the DRC were specified in the warrant and it was addressed to all central and provincial directors of the agency.

7. The applicant further alleged that the military had contacted her children about her whereabouts and that the man with whom the applicant's daughter was staying had been arrested and tortured during questioning. The applicant stressed that she would not be protected in her home country and that she would never have left her children unless forced to.

8. Lastly, in support of her claim that she was in poor mental health, she produced a medical certificate, dated 1 November 2007, by U. Dagerman, psychotherapist at the Swedish Red Cross. It stated that the therapist was treating the applicant for trauma arising from the sexual violence of which she had been the victim in the DRC. She was afraid of going out alone, had problems sleeping and difficulties concentrating. She was very afraid of having to return to her home country and this fear hindered effective treatment.

9. On 29 November 2007, after having held an oral hearing, the Migration Court rejected the appeal. It noted first that the applicant had not been able to prove her identity but that a language test showed that she was from the DRC. As concerned the written evidence submitted by the applicant, the court considered that Mr Kanza's business card in itself did not prove any connection between the applicant and Mr Kanza. Moreover, the search warrant was a copy which had not been presented earlier in the proceedings even though, apparently, it had been issued three months after the applicant had fled from the hospital, at a point when she had already left the DRC. The letter from Mr Y. mainly contained second-hand information and assumptions and looked more like a plea to allow the applicant to

remain in Sweden. Therefore, the court found these documents to have a very low evidential value. Furthermore, the court questioned the applicant's credibility, in particular with regard to Mr Kanza and his plans to take power in the DRC. In this respect, the court noted that Mr Kanza had been the DRC's Ambassador to Sweden from 1999 until his death in October 2004. He had lived in exile during the presidency of Mobutu and had returned after Kabila became president and had even been a minister in Kabila's government. It was thus highly unlikely that he would be planning an overthrow of Kabila's government together with members of Mobutu's exiled armed forces (the FAZ; *Forces Armées Zairoïses*). The court also observed that the applicant had failed to explain how she had been in personal contact with Mr Kanza and how she had come to be a courier of money directly between Mr Kanza and a militia group in Brazzaville, when she lacked both experience and political conviction. She had also failed to explain how she had travelled to Sweden and how that trip had been paid for. Hence, despite the violence of which she had been the victim, she had not shown it to be probable that she would be of interest to the authorities and persecuted or arrested and tortured if she returned to the DRC. As concerned her mental health problems, these were not of such a serious nature that she could be granted leave to remain. The Court further noted that the applicant's children and sister were in Kinshasa. Thus, even having regard to all the circumstances of the case, the court concluded that the applicant could not be granted a residence permit in Sweden.

10. Upon further appeal, the Migration Court of Appeal (*Migrationsöverdomstolen*) refused leave to appeal on 22 January 2008. This decision was final and the deportation order therefore became enforceable.

11. In March 2008 the applicant requested the Migration Board to stop her deportation because she had been informed by Mr Y. that she was still sought and her children had been questioned by the military about her whereabouts. Her children and those caring for them had also been harassed by the military.

12. On 26 May 2008 the Migration Board rejected the request. It found that the applicant had not invoked any new evidence but only added to her story, which had already been considered by the Migration Board and the migration courts. Since no new circumstances of importance had been presented, there was no reason to make a new assessment of her case or stay the enforcement of her deportation.

13. The applicant appealed to the Migration Court, maintaining her claims but, on 27 June 2008, the court rejected the appeal. It found that she had invoked no new circumstances of importance but only added evidence in support of circumstances already considered by the migration courts.

14. It would appear that the applicant did not appeal to the Migration Court of Appeal but instead handed in a new request to the Migration Board

to stay her deportation and grant her a new assessment of her case. She stated that new circumstances of importance had appeared. Mr Y. had sent her a new search warrant, dated 14 March 2008, and issued by the Department of Internal Security of the A.N.R. From it, it appeared that she was accused of being an activist of *Bundu dia Kongo*<sup>1</sup> and prosecuted for threatening State security. Her name, date of birth, the names of her parents and her address in the DRC were specified in the warrant and it was addressed to all central and provincial directors of the agency. The applicant emphasised that she was not a member of BDK but asserted that this had surely been added by the authorities in order to apprehend her. Mr Y. and a friend of hers had seen the original search warrant but, unfortunately, the applicant had lost it on the way to see her lawyer in Sweden. However, she did submit a copy of the warrant and two more letters from Mr Y. The first of these letters, dated 29 July 2008, stated that Mr Y. had been informed about the second warrant against the applicant which, according to Mr Y., had been posted at all airports, ports and train stations. By bribing an official, he had managed to obtain one of the warrants, which he had sent with the letter. He further wrote that the applicant's children and relatives continued to be harassed by the police. In the second letter, dated 4 August 2008, Mr Y. listed all the information he had about the applicant, *inter alia*, that she had been sought since 21 September 2004 throughout the DRC on suspicion of being involved with the FAZ, knowing their arms caches and being a courier. These crimes amounted to a threat to the internal security of the country. Mr Y. was convinced that the applicant would be arrested and imprisoned if returned to the DRC.

15. On 1 September 2008 the Migration Board decided not to stay the enforcement of the deportation order as it considered that the circumstances invoked by the applicant had already essentially been tried by the Swedish authorities and that there were no impediments to her deportation. It further decided not to grant the applicant a new assessment of her case since the new evidence invoked only modified and slightly added to her original claims.

16. The applicant lodged an appeal with the Migration Court, relying on the same grounds as earlier and submitting a letter from a friend of hers which stated that, during his visit to the DRC in July 2008, he had seen and read the search warrant regarding the applicant which the Congolese police had issued.

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<sup>1</sup> Bundu dia Kongo (Kingdom of Kongo, BDK) is a political-religious group centred in the Bas-Congo province (west of Kinshasa) which has campaigned for the independence of the Bas-Congo region from the rest of the DRC. In late February and early March 2008, the followers of BDK clashed with police and, later in March 2008, the government banned BDK. (<http://www.globalsecurity.org/military/world/para/bundu-dia-kongo.htm> and [http://en.wikipedia.org/wiki/Bundu\\_dia\\_Kongo](http://en.wikipedia.org/wiki/Bundu_dia_Kongo))

17. On 23 September 2008 the Migration Court upheld the Migration Board's decision in full. The applicant has lodged a further appeal with the Migration Court of Appeal which, apparently, is still pending.

18. On 6 October 2008 the applicant requested the Court to indicate to the Swedish Government, under Rule 39 of the Rules of Court, the suspension of her deportation to the DRC. The President of the Section to which the case had been allocated rejected the request on 7 October 2008.

19. The applicant was deported to her home country on the following day, 8 October 2008. However, on 20 October 2008, she informed the Court, through her legal representative in Sweden, that she wished to maintain her application before the Court.

## **B. Relevant domestic law**

20. The basic provisions mainly applicable in the present case, concerning the right of aliens to enter and to remain in Sweden, are laid down in the 2005 Aliens Act (*Utlänningslagen*, 2005:716 – hereafter referred to as “the 2005 Act”) which replaced, on 31 March 2006, the old Aliens Act (*Utlänningslagen*, 1989:529). Both the old Aliens Act and the 2005 Act define the conditions under which an alien can be deported or expelled from the country, as well as the procedures relating to the enforcement of such decisions.

21. Chapter 5, Section 1, of the 2005 Act stipulates that an alien who is considered to be a refugee or otherwise in need of protection is, with certain exceptions, entitled to a residence permit in Sweden. According to Chapter 4, Section 1, of the 2005 Act, the term “refugee” refers to an alien who is outside the country of his or her nationality owing to a well-founded fear of being persecuted on grounds of race, nationality, religious or political beliefs, or on grounds of gender, sexual orientation or other membership of a particular social group and who is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of that country. This applies irrespective of whether the persecution is at the hands of the authorities of the country or if those authorities cannot be expected to offer protection against persecution by private individuals. By “an alien otherwise in need of protection” is meant, *inter alia*, a person who has left the country of his or her nationality because of a well-founded fear of being sentenced to death or receiving corporal punishment, or of being subjected to torture or other inhuman or degrading treatment or punishment (Chapter 4, Section 2, of the 2005 Act).

22. Moreover, if a residence permit cannot be granted on the above grounds, such a permit may be issued to an alien if, after an overall assessment of his or her situation, there are such particularly distressing circumstances (*synnerligen ömmande omständigheter*) to allow him or her to remain in Sweden (Chapter 5, section 6 of the 2005 Act). During this

assessment, special consideration should be given to, *inter alia*, the alien's health status. In the preparatory works to this provision (Government Bill 2004/05:170, pp. 190-191), life-threatening physical or mental illness for which no treatment can be given in the alien's home country could constitute a reason for the grant of a residence permit.

23. As regards the enforcement of a deportation or expulsion order, account has to be taken of the risk of capital punishment or torture and other inhuman or degrading treatment or punishment. According to a special provision on impediments to enforcement, an alien must not be sent 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 (Chapter 12, Section 1, of the 2005 Act). In addition, an alien must not, in principle, be sent to a country where he or she risks persecution (Chapter 12, Section 2, of the 2005 Act).

24. Under certain conditions, an alien may be granted a residence permit even if a deportation or expulsion order has gained legal force. This applies, under Chapter 12, Section 18, of the 2005 Act, where new circumstances have emerged that mean there are reasonable grounds for believing, *inter alia*, that an enforcement would put the alien in danger of being subjected to capital or corporal punishment, torture or other inhuman or degrading treatment or punishment or there are medical or other special reasons why the order should not be enforced. If a residence permit cannot be granted under this provision, the Migration Board may instead decide to re-examine the matter. Such a re-examination shall be carried out where it may be assumed, on the basis of new circumstances invoked by the alien, that there are lasting impediments to enforcement of the nature referred to in Chapter 12, Sections 1 and 2, of the 2005 Act, and these circumstances could not have been invoked previously or the alien shows that he or she has a valid excuse for not doing so. Should the applicable conditions not have been met, the Migration Board shall decide not to grant a re-examination (Chapter 12, Section 19, of the 2005 Act).

25. Under the 2005 Act, matters concerning the right of aliens to enter and remain in Sweden are dealt with by three instances; the Migration Board, the Migration Court and the Migration Court of Appeal (Chapter 14, Section 3, and Chapter 16, Section 9, of the 2005 Act). Hence, upon entry into force on 31 March 2006 of the 2005 Act, the Aliens Appeals Board ceased to exist.



## COMPLAINT

26. The applicant complained under Article 3 of the Convention that, if deported from Sweden to the DRC, she would be arrested, tortured and imprisoned, and maybe even killed, because she had escaped from detention and was wanted by the authorities in her home country on suspicion of treason.

## THE LAW

27. The applicant alleged that her deportation to the DRC would constitute a violation of Article 3 of the Convention, which provides:

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

28. The Court reiterates 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 deported, 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 deport the person in question to that country (see, among other authorities, *Saadi v. Italy* [GC], no. 37201/06, §§ 124-125, ECHR 2008-...).

29. Since the nature of the Contracting States' responsibility under Article 3 in deportation cases lies in the act of exposing an individual to the risk of ill-treatment, the existence of the risk must be assessed primarily with reference to those facts which were known or ought to have been known to the Contracting State at the time of the expulsion; the Court is not precluded, however, from having regard to information which comes to light subsequent to the expulsion (see, *Cruz Varas and Others v. Sweden*, 20 March 1991, § 76, Series A no. 201). It follows that the examination of this issue in the present case must focus on the foreseeable consequences of the removal of the applicant to the DRC in the light of the general situation there in October 2008 as well as on her personal circumstances at that time (see, among others, *Vilvarajah and Others v. the United Kingdom*, 30 October 1991, § 108, Series A no. 215, and *Salkic and Others v. Sweden*, (dec.), no. 7702/04, 29 June 2004).

30. As concerns the general situation in the DRC, the Court is aware of the occurrence of reports of continuous, serious human rights violations, in

particular against women, in that country. However, it has to establish whether the applicant's personal situation was such that her return contravened Article 3 of the Convention.

31. The Court, like the Swedish authorities, accepts that the applicant has been raped and mutilated as specified in the medical reports. It also notes that she has undergone restorative surgery in Sweden, with good results, although she is still suffering mentally from this traumatic experience. In this respect, the Court notes that the applicant has not invoked her poor mental health as a ground under Article 3 of the Convention and the Court sees no reason to examine it of its own motion.

32. As concerns the applicant's claim that she would risk being arrested and tortured or killed by the authorities in the DRC because she is wanted by the authorities on suspicion of complicity in treason or endangering the State's security, the Court makes the following assessment.

33. The applicant has claimed to have been a courier for Mr Kanza and J., transferring money between them. However, the Court observes that she has only given very general information about this activity and has failed to specify, for example, how she came to be entrusted with such a secret and dangerous task and the circumstances surrounding her arrest on 22 September 2004, one day after the last delivery to Mr Kanza who was apparently leaving for the USA, as well as how exactly she had been able to escape from the hospital where she was guarded by a soldier. The Court further notes that the applicant remained in the region, mostly in Brazzaville, for almost five months following her escape, without any incidents. Here it can also be observed that the applicant was not able to prove her identity before the Swedish authorities and that she gave no information on how she had travelled to Sweden or how the trip had been paid for.

34. As concerns the alleged search warrants, the Court observes that these were only submitted as copies, not originals. It further considers that the applicant's claim that she "lost" the original search warrant of 14 March 2008 on her way to see her Swedish legal representative is very improbable having regard to the importance of this document for her asylum claim.

35. Furthermore, as noted by the Migration Court in its judgment of 29 November 2007, it would seem highly unlikely that Mr Kanza would have co-operated with the FAZ (the exiled army of Mobutu) since he had lived in exile during Mobutu's presidency. He had only returned when Kabila became president and had worked as a minister in his government between 1997 and 1999 when he had been nominated Ambassador and worked as such until his death.

36. Having regard to all of the above, the Court finds that the applicant has not sufficiently substantiated her story. It also notes that her children and sister remain in the DRC. Consequently, the Court considers that the

applicant has failed to show that her return to the DRC has exposed her to a real risk of being persecuted, arrested, tortured and/or killed.

37. It follows that 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.

For these reasons, the Court by a majority

*Declares* the application inadmissible.

Stanley Naismith  
Deputy Registrar

Josep Casadevall  
President