CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

FOURTH SECTION

FINAL DECISION

AS TO THE ADMISSIBILITY OF

Application no. 25087/06
by M.

against the United Kingdom

The European Court of Human Rights (Fourth Section), sitting on 24 June 2008 as a Chamber composed of:

Lech Garlicki, *President,*
Nicolas Bratza,
Ljiljana Mijović,
David Thór Björgvinsson,
Ján Šikuta,
Päivi Hirvelä,
Mihai Poalelungi, *judges,*

and Lawrence Early, *Section Registrar,*

Having regard to the above application lodged on 21 June 2006,

Having regard to the decision to apply Article 29 § 3 of the Convention and examine the admissibility and merits of the case together,

Having regard to the interim measure indicated to the respondent Government under Rule 39 of the Rules of Court,

Having regard to the decision to grant the applicant anonymity (Rule 47 § 3),

Having deliberated, decides as follows:

THE FACTS

The applicant is a male national of the Republic of Congo who was born in 1973. The applicant, who was granted legal aid, is represented by Gillman-Smith Lee, a firm of solicitors practising in Middlesex. The Government are represented by their Agent, Mr J. Grainger, Foreign and Commonwealth Office.

A. The circumstances of the case

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

Between 1994 and 1997 the applicant worked for President Lissouba (see below) as a bodyguard and martial arts trainer for his children. The applicant had also been a chief sergeant in the Congolese military. He was in charge of soldiers who fought for President Lissouba and organised defence when the President had to flee into exile. In 1998 he joined the National Council of Resistance (CNR) and its military branch the Autodefence Force of Resistance (FDR). He was closely involved in training fighters for the CNR.

On 15 October 2000 he was arrested along with 31 other soldiers and detained until 17 November 2000. He was subjected to torture in detention, including, *inter alia*, being subjected to electric shocks. The applicant submitted medical evidence in support from the Medical Foundation which attributed multiple scars on his person to torture. He claimed that on 1 January 2001 a senior Congolese army officer opposed to the regime helped him escape. The applicant was shot trying to escape.

The applicant arrived in the United Kingdom on 22 January 2001 via the Democratic Republic of Congo, Zambia and South Africa and claimed asylum on arrival.

After arrival he was diagnosed with AIDS. In 2001 or 2002 the applicant married a British national who had five children from a previous relationship.

The Home Office and the Adjudicator rejected the applicant's asylum claim on 12 March 2001 and 18 June 2003 respectively. They emphasised that there was no risk in returning Congolese citizens unless they had been heavily implicated in anti-government activities and that a UNHCR report suggested that only the most senior members of the Lissouba regime would be at risk. As to his medical condition, the Adjudicator noted that the applicant had family in the Congo who could care for and support him. The Adjudicator also noted that at the time the applicant and his wife married she already had five children and they were aware of his precarious immigration status.

On 18 August 2003 the Immigration Appeal Tribunal (IAT) granted the applicant permission to appeal in relation to lack of suitable medication in the Republic of Congo and in relation to the Adjudicator's acceptance of core elements of the applicant's account whilst making a broad negative credibility finding.

On 1 October 2004, following a hearing at which the applicant was represented, the IAT rejected the applicant's appeal. Whilst the IAT accepted that he had been detained and ill-treated, it found that the applicant had been a low-level supporter of the CNR and that he would therefore be able to benefit from the 1999 amnesty for acts committed during civil conflicts. It noted the applicant's own evidence that since May 2003 the peace process had advanced significantly and an amnesty had been offered, and concluded that even on the applicant's own evidence he would not be at risk merely because of his past association with the defunct CDR party, the successor of which was a legal opposition party taking part in the political process.

As regards the applicant's medical condition, the Tribunal found that he had "full-blown AIDS" and was receiving anti-retroviral treatment. It noted that in his Home Office interview the applicant had accepted that there was medical treatment available in the Congo, the question being the adequacy of that treatment. It referred to a Tribunal determination in 2003 that in Congo anti-retroviral drugs were available, although expensive. It noted that as of 27 February 2003 the applicant's CD4 count was 370 and his viral load 73,800. It noted that as at 28 January 2004 the applicant's viral load was less than 50 (down from just under 80,000) and his CD4 count above 500 (from less than 400) and observed that he was clearly making progress. It noted his doctor's report that he was taking medication with three components one of which (Abacavir) was not available anywhere in Africa. The applicant submitted a medical report dated 28 January 2004 in support. However the IAT also referred to a further letter dated 17 March 2004 which it found indicated that, contrary to the previous impression, some appropriate treatment might be available after all and was sold cheaply, although patients who took Abacavir generally did much better. It concluded that even on the applicant's evidence some treatment for his AIDS was available although it might not be the consultant's treatment of choice and that it was available at a reasonable cost.

The applicant sought leave to appeal to the Court of Appeal as regards the IAT's findings about his illness and the prospects of receiving adequate treatment in the republic of Congo. Leave to appeal was refused by the IAT on 15 November 2004.

On 5 July 2006 the Home Office maintained its refusal of the applicant's asylum claim. It also noted that as the applicant had spent all his formative years in the Congo he would have an adequate support network at home. It concluded that in his present condition, with the treatment available in the

Congo and his support network at home, his removal would not breach Article 3. It also noted that he had separated from his wife.

The applicant is now divorced from his wife. In 2006 he formed a relationship with a British citizen, with whom he has a child born in February 2008. It is not known whether either his present partner or the child are infected with HIV. It does not appear that he has sought leave to remain in the United Kingdom on the basis of his current relationships.

A medical report dated 7 May 2008 stated as follows:

> "The patient is under our care at North Manchester. He has an HIV chronic infection well controlled with antiretrovirals. His last CD4 count was 752 (34%) and viral load is undetectable.
>
> Recently he has had to change his antiretroviral regimen because of a problem with lipodystrophy. He was on Trizivir and changed to Kivexa and Efavirenz. He is tolerating his treatment relatively well. If he can not get the treatment his life expectancy would be 2-3 years because of the possibility of opportunistic infection. If he continues to take his antiretrovirals he can have a life expectancy similar to a normal person but he will be more prone to cardiovascular events like heart attacks or strokes."

A medical report from the applicant's general practitioner, dated 13 May 2008, recorded that the applicant was also receiving treatment for moderate depression and diabetes.

B. Information about conditions in the Republic of Congo

According to the United Kingdom's Foreign and Commonwealth Office Country Profile on the Republic of Congo dated September 2006, in 1992 multi-party democratic elections took place and Pascal Lissouba's party won the majority of seats in both the National Assembly and Senate. This shift in power destabilised the country and led to conflict between the army and militia groups. Civil war broke out between the militia forces loyal to Mr Lissouba and Mr Kolelas, on one side, and Mr Sassou-Nguesso, on the other, one month before the next elections were due to take place, in July 1997. The war continued for five months, and was finally won by Mr Sassou-Nguesso. The ousted President Lissouba and Prime Minister Bernard Kolelas fled. The planned elections did not take place, the constitution was suspended, and a transitional government was set up. The militia forces, however, fought on sporadically for another two years. A peace agreement was finally reached in November 1999.

A new constitution was adopted in 2001 and endorsed by a referendum in January 2002. The provisions of the constitution provided for a strong executive president, with a limit of two terms, with the length of the term extended from five years to seven years. The provisions also provided for a bicameral legislature to be elected every five years. The constitution banned political parties organised on regional, ethnic or religious identity.

In March 2002, renewed violence began in the Pool region, instigated by members of the Ninja militia group. The conflict slowly spread to other parts of the country and intensified as it did so. A peace agreement between the Ninja militia group and the government was signed in March 2003 and ended the fighting. In August 2003, the National Assembly formally approved an amnesty for the former Ninja militia fighters.

Presidential elections were held in March 2002. Most of the key candidates were banned from participating in the elections or withdrew from the election. This left Mr Sassou-Nguesso to win the election virtually unopposed. A peace agreement between exiled former Prime Minister Kolelas and President Sassou-Nguesso was signed in March 2003. In January 2005, President Sassou-Nguesso appointed a new government made up exclusively of members of his PCT party.

In October 2005, clashes between Ninja fighters and government forces occurred, following the return of Mr Kolelas to the country to attend the funeral of his wife. President Sassou-Nguesso subsequently requested that the legislature grant an amnesty to Mr Kolelas in the interests of national reconciliation. This was duly approved, and the death sentence issued in absentia against Mr Kolelas in May 2000, was overturned. Several days after the amnesty was granted, Mr Kolelas apologised to the Congolese people for his role in instigating the 1997 civil war.

According to the United States State Department 2007 Country Report on Human Rights Practices in the Republic of Congo, published 11 March 2008, the government's human rights record remained poor; although there were fewer documented abuses during the year, serious problems remained. Citizens' right to peacefully change their government was limited. In addition, the following serious human rights problems were reported: killings of suspects by security forces; mob violence, including killing of suspected criminals; security force beatings, physical abuse of detainees, rapes, looting, solicitation of bribes, and theft; harassment and extortion of civilians by uncontrolled and unidentified armed elements; poor prison conditions; impunity; arbitrary arrest; lengthy pre-trial detention; an ineffective judiciary; infringement of citizens' privacy rights; limits on freedom of the press; restrictions on freedom of movement; official corruption and lack of transparency; domestic violence and societal discrimination against women; trafficking in persons; discrimination on the basis of ethnicity, particularly against Pygmies; and child labour.

The State Department Report further stated that the government did not prevent the return of citizens, including political opponents of the president. By year's end, former president Pascal Lissouba, who was sentenced in absentia in 2001 to 30 years in prison for "economic crimes," had not returned to the country, despite a November announcement that President Sassou-Nguesso had agreed to allow his return and pardon him. In August a former prime minister, Joachim Yhombi-Opango, returned to the country

after the Council of Ministers granted him an amnesty in May for a 2001 conviction in absentia for allegedly improperly selling the country's oil while in office.

The Country Progress Report for 2005, submitted by the government of the Republic of Congo to UNAIDS in January 2006, stated that at that time the Congo had two outpatient treatment centres, one at Pointe-Noire and the other in Brazzaville. These centres were the main structures providing global treatment for people living in the country. The active list of HIV-positive patients in these two centres in December 2005 numbered 3,478, of whom 1,230 were receiving antiretroviral drugs (ARVs). According to the same report, the total number of patients taking ARVs in the Congo rose from 850 in 2003 to 1,900 in 2004 and 2,550 in 2005, giving an increase in recruitment rate of 33% over the past three years. At the end of 2004, the regular monitoring of patients taking ARVs was 88%, the percentage lost to follow-up was estimated at 10% and the specific mortality rate at 3%.

COMPLAINTS

The applicant complained that his removal to the Republic of Congo would violate his rights under Article 3 as he would be subjected to ill-treatment because of his political affiliation with the Lissouba Government and CNR activities and because he has AIDS. He also claimed that his removal would violate his right under Article 8 to respect for his private and family life.

THE LAW

The applicant complained that his removal to the Republic of Congo would violate his rights under Articles 3 and 8 of the Convention. Article 3 provides:

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

Article 8 provides:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 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 or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

It is the Court's settled case-law that as a matter of well-established international law, and subject to their treaty obligations, including those arising from the Convention, Contracting States have the right to control the entry, residence and removal of aliens. However, expulsion 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 concerned, if deported, faces a real risk of being subjected to treatment contrary to Article 3. In such a case Article 3 implies an obligation not to deport the person in question to that country (*Saadi v. Italy* [GC], no. 37201/06, §§ 124-125, ECHR 2008).

Article 3 principally applies to prevent a deportation or expulsion where the risk of ill-treatment in the receiving country emanates from intentionally inflicted acts of the public authorities there or from non-State bodies when the authorities are unable to afford the applicant appropriate protection (*Saadi v. Italy,* cited above, § 126).

In determining whether substantial grounds have been shown for believing that there is a real risk of treatment incompatible with Article 3, the Court will take as its basis all the material placed before it or, if necessary, material obtained *proprio motu*. The Court's examination of the existence of a real risk must necessarily be a rigorous one. It is in principle for the applicant to adduce evidence capable of proving that there are substantial grounds for believing that, if the measure complained of were to be implemented, he would be exposed to a real risk of being subjected to treatment contrary to Article 3 (*Saadi v. Italy*, cited above, §§ 128-129).

In the present case, the applicant claims that he would be at risk of ill-treatment from the State authorities in the Republic of Congo because of his former support for President Lissouba.

The Court notes that the applicant worked with President Lissouba's children as a martial arts trainer and bodyguard. Between 1997 and 1999 the applicant was involved with the armed resistance to President Sassou-Nguesso's regime and in October 2000 he was arrested and tortured in detention.

The Court further notes that in 1999 a peace agreement was reached between the parties to the 1997 conflict and an amnesty was granted to all who had participated in the conflict except the leaders of the opposition groups. A peace agreement was signed between President Sassou-Nguesso and former Prime Minister Kolelas in March 2003 and Mr Kolelas returned to the Congo in October 2005. In November 2007, former President Lissouba was pardoned and allowed to return.

The IAT, which examined the applicant's case in October 2004, held that the applicant had been a low-level supporter of the opposition movement and, as such, would benefit from the 1999 amnesty. The applicant did not attempt to appeal against this part of the IAT's determination to the Court of

Appeal. The process of reconciliation appears to have progressed since 2004 and the applicant has not adduced any evidence to support his claim still to be at risk of ill-treatment from the Congolese Government.

The applicant, who is HIV positive, alleged in addition that if he were returned to the Republic of Congo he would not have access to the medical treatment he requires and that this would give rise to a violation of Article 3 of the Convention.

The Court recalls that in *N. v. the United Kingdom* [GC], no. 26565/05, §§ 42-43, ECHR 2008, it held as follows:

> "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 and services provided by the expelling State. The fact that the applicant's circumstances, including his life expectancy, would be significantly reduced if he were to be removed from the Contracting State is not sufficient in itself to give rise to breach of Article 3. The decision to remove an alien who is suffering from a serious mental or physical illness to a country where the facilities for the treatment of that illness are inferior to those available in the Contracting State may raise an issue under Article 3, but only in a very exceptional case, where the humanitarian grounds against the removal are compelling. In [*D. v. the United Kingdom*, judgment of 2 May 1997, *Reports of Judgments and Decisions* 1997-III] the very exceptional circumstances were that the applicant was critically ill and appeared to be close to death, could not be guaranteed any nursing or medical care in his country of origin and had no family there willing or able to care for him or provide him with even a basic level of food, shelter or social support.
>
> The Court does not exclude that there may be other very exceptional cases where the humanitarian considerations are equally compelling. However, it considers that it should maintain the high threshold set in *D. v. the United Kingdom* and applied in its subsequent case-law, which it regards as correct in principle, given that in such cases the alleged future harm would emanate not from the intentional acts or omissions of public authorities or non-State bodies, but instead from a naturally occurring illness and the lack of sufficient resources to deal with it in the receiving country."

The applicant in *N. v. the United Kingdom*, cited above, had been diagnosed in 1998 as having two AIDS defining illnesses and a high level of immunosuppression. Her condition became stable as a result of the medical treatment she had received in the United Kingdom and she was fit to travel. The evidence indicated, however, that if she were to be deprived of her medication her condition would rapidly deteriorate and she would suffer ill-heath, discomfort, pain and death within a few years. According to information collated by the World Health Organisation, antiretroviral medication was available in Uganda, although through lack of resources it was received by only half of those in need. The applicant claimed that she would be unable to afford the treatment and that she had no family members willing or able to care for her if she were seriously ill. The Court nonetheless held that her case not disclose very exceptional circumstances, such as in *D. v. the United Kingdom* (cited above), and that the

implementation of the decision to remove her to Uganda would not give rise to a violation of Article 3 of the Convention.

The medical evidence in relation to the present applicant shows that, while in the past he has been very ill with HIV and AIDS, his current condition is stable as a result of antiretroviral treatment. It appears that such treatment is available in the Republic of Congo and that the applicant may have family members there who may be able to care for him.

It does not, therefore, appear that the present case can be distinguished from *N. v. the United Kingdom.*

The complaint under Article 3 is therefore manifestly ill-founded and should be rejected under Article 35 §§ 3 and 4 of the Convention.

Turning to the complaint under Article 8, the Court notes that the applicant has not provided it with any evidence that he has applied to the domestic authorities for leave to remain on the basis of his present relationships. In any event, the Court recalls that Article 8 does not entail a general obligation for a State to respect an immigrant's choice of the country of his residence and to authorise family reunion in its territory. Nevertheless, in a case which concerns family life as well as immigration, the extent of a State's obligations to grant leave to remain in its territory to relatives of persons residing there will vary according to the particular circumstances of the persons involved and the general interest. Factors to be taken into account in this context are the extent to which family life would effectively be ruptured, the extent of the ties in the Contracting State, whether there are insurmountable obstacles in the way of the family living in the country of origin of one or more of them and whether there are factors of immigration control (for example, a history of breaches of immigration law) or considerations of public order weighing in favour of exclusion. Another important consideration will also be whether family life was created at a time when the persons involved were aware that the immigration status of one of them was such that the persistence of that family life within the host State would be precarious from the outset. The Court has previously held that where this is the case it is likely only to be in the most exceptional circumstances that the removal of the non-national family member will constitute a violation of Article 8 (see *Rodrigues da Silva and Hoogkamer v. the Netherlands*, no. 50435/99, § 39, ECHR 2006; *Mitchell v. the United Kingdom* (dec.), no. 40447/98, 24 November 1998, and *Ajayi and Others v. the United Kingdom* (dec.), no. 27663/95, 22 June 1999).

The Court notes that the applicant has never been granted leave to reside in the United Kingdom. His relationship with his current partner was formed, and his son was conceived, during a period when the applicant's immigration status was known to be extremely precarious, since only the

Court's indication under Rule 39 of the Rules of Court was preventing his removal to the Republic of Congo.

It follows that, even assuming that the applicant has exhausted domestic remedies, the complaint under Article 8 is manifestly ill-founded and should be rejected pursuant to Article 35 §§ 3 and 4 of the Convention.

Having regard to the above considerations, the Rule 39 measure should be lifted and Article 29 § 3 of the Convention should no longer be applied in the case.

For these reasons, the Court unanimously

Discontinues the application of Rule 39 of the Rules of Court to the case;

Declares the application inadmissible.

Lawrence Early
Registrar

Lech Garlicki
President