United Nations CAT/C/48/D/343/2008

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

Distr.: General
4 July 2012
English
Original: English/French

Committee against Torture

Communication No. 343/2008

Decision adopted by the Committee at its forty-eighth session, 7 May to 1 June 2012

Submitted by:	Arthur Kasombola Kalonzo
Alleged victim:	The complainant
State party:	Canada
Date of complaint:	4 June 2008 (initial submission)
Date of decision:	18 May 2012
Subject matter:	Risk of complainant's deportation to the Democratic Republic of the Congo
Procedural issue:	Non-exhaustion of domestic remedies
Substantive issue:	Risk of torture upon return
Article of the Convention:	3

GE.12-43835 (E) 050712 200712

Please recycle

Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm

Annex

Decision of the Committee against Torture under article 22 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (forty-eighth session)

concerning

Communication No. 343/2008

Submitted by:	Arthur Kasombola Kalonzo
Alleged victim:	The complainant
State party:	Canada
Date of complaint:	4 June 2008 (initial submission)

The Committee against Torture, established under article 17 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,

Meeting on 18 May 2012,

Having concluded its consideration of communication No. 343/2008, submitted on behalf of Arthur Kasombola Kalonzo under article 22 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,

Having taken into account all information made available to it by the complainant, his counsel and the State party,

Adopts the following:

Decision under article 22, paragraph 7, of the Convention against Torture

1.1 The author of the communication is Arthur Kasombola Kalonzo, a Congolese national, born on 2 December 1976 in the Democratic Republic of the Congo. He is currently residing in Canada. He claims that his return to the Democratic Republic of the Congo would constitute a violation by Canada of article 3 of the Convention against Torture.

1.2 On 6 June 2008, acting under rule 108, paragraph 1, of the Committee's rules of procedure, the Rapporteur on new complaints and interim measures requested the State party to refrain from expelling the complainant to the Democratic Republic of the Congo while his complaint was being considered. The State party acceded to this request.

The facts as presented by the complainant

2.1 The complainant was 8 years old when his family went to the United States of America in 1984 in order to escape persecution in the Democratic Republic of the Congo

Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm

resulting from the opposition political activities of his father, who was an influential and well-known member of the Union for Democracy and Social Progress (UDPS).[1]

2.2 In April 2002, the United States authorities deported the complainant to the Democratic Republic of the Congo because he had several criminal convictions. It was also because of his criminal record that he, unlike the other members of his family, was not granted United States citizenship. Upon his arrival at the Kinshasa airport, he was intercepted by the Congolese authorities, who accused him of being a criminal and took the money he had on him. After a few hours, they told him that they were aware of his criminal record in the United States and that they knew his father, a famous former soccer player, and were aware of the latter's activities as a UDPS member. The complainant was accused of being a UDPS member, like his father, and was taken to the Makala prison, where he claims to have been ill-treated, beaten, tortured and sexually assaulted.[2] His detention lasted 4 months and several days. He then escaped from the prison.

2.3 The complainant managed to obtain travel documents for Canada, where he requested asylum on 4 February 2003. Owing to his psychological state following his experiences in the Democratic Republic of the Congo, he wanted to return to the United States, where he had lived for most of his life, in order to join his family. On 1 May 2003, he attempted to return illegally to the United States using a fake birth certificate, but he was stopped, detained and sentenced to 30 months' imprisonment in the United States. As he was still in the United States when the hearing concerning his application for asylum in Canada was to take place, the complainant did not appear at the hearing and the proceedings were discontinued by the Immigration and Refugee Board of Canada on 7 August 2003. A warrant for his arrest pending his removal from the country was issued on 28 June 2004.

2.4 The complainant filed an application in the United States under the Convention against Torture in which he claimed that he would be at risk of torture in the Democratic Republic of the Congo. He set out several facts in support of his claim, including the political activities of his father, a UDPS member; the political views attributed to the complainant as a result of his father's activities; the fact that he was a Luba from Kasaï and the links of this ethnic group to UDPS; the political situation in the Democratic Republic of the Congo; and his detention and torture following his forcible return to the Democratic Republic of the Congo in 2002. He also submitted a medical certificate issued by the University Hospital (Newark, New Jersey) after an examination carried out on 17 October 2005. The certificate states that the complainant bears little physical evidence of the torture and rapes that he underwent, which is not inconsistent with the events he described; that the psychological effects are evident; and that he seems to be suffering from post-traumatic stress disorder.[3]

---

[1] According to the affidavit of the complainant's father, André Kalonzo Ilunga, made on 4 June 2008 and included in the file, he is a co-founder of UDPS, a party that has officially been in existence since 15 February 1982.

[2] Detailed information on the treatment suffered by the complainant is given in his statement to the Canadian authorities, which is contained in the file.

[3] In her report, Dr. Mona El-Gabry indicates: "On physical examination, Mr. Kalonzo bears little physical evidence of the torture and rape experienced, but in my medical opinion, this is not at all inconsistent with the story he describes. (…) I noted a 1 cm linear, hypopigmented scar on the crown of his head, in the midline, which is consistent with his story of having had an open wound in this area. Mr. Kalonzo shows no external signs of the rape that he had experienced; however, it is rare for there to be any external evidence of rape or sodomy. Mr. Kalonzo relates a story of brutalization and trauma at the hands of Congolese authorities. Because Mr. Kalonzo was a young man when he received his wounds and because he received adequate medical attention immediately after his release

Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm

2.5 On 12 February 2005, a United States judge granted the complainant protection under the Convention based primarily on the risk of torture linked to his father's opposition political views.[4] However, the complainant was deported to Canada under the Agreement between the Government of Canada and the Government of the United States of America for Cooperation in the Examination of Refugee Status Claims from Nationals of Third Countries on 9 April 2006, after completing his prison sentence in the United States.

2.6 Upon his arrival in Canada, the complainant applied for refugee status but his application was declared inadmissible because of the discontinuance of the proceedings in 2003. On 18 October 2006, Citizenship and Immigration Canada issued a report stating that the complainant was inadmissible to Canada because of his past criminal activity. On 30 March 2007, he applied for a pre-removal risk assessment (PRRA).[5] His application was rejected on 7 April 2008 on the grounds that: (a) the complainant himself was not a UDPS member; (b) he had failed to demonstrate that his father was still a UDPS member and had experienced problems as a result of his political views during his stay in the Democratic Republic of the Congo in 2006–2007; (c) the complainant could relocate to Kinshasa, as no violence against the Luba seemed to be taking place there; and (d) the complainant's credibility concerning the events allegedly experienced in the Democratic Republic of the Congo in 2002 was in doubt.

2.7 The complainant claims to have submitted evidence to refute the PRRA officer's conclusions, which the latter allegedly failed to take into consideration. For example, he maintains that, during his father's stay in the Democratic Republic of the Congo during the election period from March 2006 to November 2007, the latter had received anonymous phone calls and threats from the police, probably on account of a transfer of money he had made to the UDPS fund and his efforts to have his house, which was illegally occupied by Government officials, returned to him.

2.8 The complainant claims that the PRRA officer, on his own initiative, made enquiries about his father and used extrinsic evidence (not disclosed to the complainant) to call into

---

from prison in the Congo, he bears little physical evidence of his torture. The psychological effects are still evident. Based upon what Mr. Kalonzo describes to me about his current condition and based upon my training and experience in evaluating torture victims, he seems to suffer from aspects of post-traumatic stress disorder. Additionally, he seems to have a very reasonable fear of what may become of his life if he is returned to the Congo."

[4] According to the information submitted by the complainant, the American judge found there was sufficient evidence to conclude that there was a possibility that the complainant would be tortured in the event of his return, albeit not necessarily immediately upon return and not with complete certainty; there was, however, a risk of torture.

[5] The pre-removal risk assessment (PRRA) report is attached to the present complaint. In that report, the PRRA officer states, inter alia, that on the personal information form submitted to the Immigration and Refugee Board of Canada, the complainant stated that his father had died in 2002 as a result of ill-treatment. However, other documents showed that his father was still alive. In addition, the complainant did not mention that he had lived in the United States, but rather submitted that he had lived in the Democratic Republic of the Congo until his arrival in Canada in January 2003. The report also indicates that the complainant, when questioned at a hearing on 17 December 2007, contradicted himself several times and omitted important information. For example, he claimed to be unable to provide any details concerning the prison in which he had been held or the circumstances of his detention. It was unclear from his testimony whether he had escaped from prison or whether he had been released lawfully with the assistance of his lawyer. In different statements, he claimed to have been released in July 2002, August 2002 and January 2003, which means that the duration of his alleged detention ranged from 3 to 9 months. Contradictions were also noted as to the dates of and reasons for his father's trip to the Democratic Republic of the Congo and the latter's current UDPS membership status.

Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm

question his father's UDPS membership and the nature of the problems encountered by the latter during his stay in the Democratic Republic of the Congo from 2006 to 2007. However, the complainant's father was never interviewed, even though he was ready to testify. The PRRA officer also refused to accept a written statement on the grounds that the father's testimony would be biased. The complainant therefore submitted a letter of support from a UDPS member, which was dismissed by the officer as coming from a biased witness, a claim the complainant contests. The complainant points out that the decision by the United States authorities to grant him protection under the Convention against Torture was based primarily on the risk of torture linked to his father's opposition political views. Whether the latter is still a UDPS member is not decisive, as he has been one in the past; the complainant has the same family name; and persons suspected of political opposition are systematically targeted by the authorities of the Democratic Republic of the Congo, which the PRRA officer does not dispute.

2.9 As to the internal flight alternative, according to the complainant, the PRRA officer had no grounds to conclude that he could relocate to Kinshasa despite being a Luba from Kasaï and despite the violence suffered by this ethnic group.

2.10 The PRRA officer calls into question the complainant's credibility as to the events he allegedly experienced in the Democratic Republic of the Congo in 2002 but does so by focusing on minor inconsistencies and by arbitrarily dismissing the evidence that the complainant suffers from post-traumatic stress disorder, which can considerably impair his recollection of events. The officer also fails to take into consideration the letter from the complainant's Congolese lawyer, who was involved in the efforts to secure his release in 2002 and who has confirmed the complainant's allegations. The officer considers the lawyer to be biased but does not advance any reasons for this conclusion. The evidence that the complainant suffers from post-traumatic stress disorder was also dismissed without giving any reason for that decision, despite the fact that the medical certificate was issued by a doctor specialized in examining torture victims.

2.11 On 6 May 2008, the complainant received a notification that his removal was scheduled for 6 June 2008. On 22 May 2008, he filed a motion for a stay of removal with the Federal Court of Canada. His motion was rejected on 2 June 2008.

The complaint

3.1 The complainant claims that, because of his criminal record in the United States, his detention and subsequent escape from prison in the Democratic Republic of the Congo in 2002, and his father's political opinions, he would risk being arrested and tortured again should he be returned to his country of origin. The fact that he is a Luba (Baluba) from Kasaï would also put him at risk, as this ethnic group is linked to the UDPS opposition party. The author claims that the Canadian authorities are aware of this risk, as there is a moratorium on the deportation of Congolese nationals. However, exceptions are made to this moratorium, in particular for persons who are inadmissible to Canada because of past criminal activity, under section 230 (3) (c) of the Immigration and Refugee Protection Regulations. This exception constitutes discrimination based on his criminal record and is thus a violation of the right to equal treatment before the law. The complainant invokes the Committee's decision in communication No. 297/2006, *Sogi v. Canada*, in which the Committee recalled that article 3 affords absolute protection to anyone in the territory of a State party, regardless of the person's character or the danger which that person may pose to society. Therefore, the State party cannot invoke the applicant's criminal record to justify derogating from the moratorium to return him to a country where he is at risk of being tortured.

3.2 The author also cites documents concerning the human rights situation in the Democratic Republic of the Congo, in particular regarding the practice of arbitrary

Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm

detention, torture, extrajudicial killings and impunity. The documents he submitted prove that the Congolese Government is not in control of its security forces in the country and that those forces arrest and detain citizens arbitrarily and with total impunity on the slightest suspicion of political opposition.

3.3 Given his extended stay outside the country, the fact that he applied for asylum, his criminal record, his deportation, his connection to UDPS through his father, the identity checks made upon arrival in the Democratic Republic of the Congo and his medical condition, he is at greater risk of being detained and ill-treated.

State party's observations on admissibility

4.1 On 5 August 2008, the State party submitted observations on the admissibility of the communication. It argues that the complainant has not exhausted domestic remedies, that his complaint is manifestly unfounded, that it constitutes an abuse of process, and that the complainant has failed to demonstrate that the decisions of the Canadian authorities have been arbitrary or have amounted to a denial of justice. The complainant disagrees with the decisions of the Canadian authorities in his case. The Committee should not, however, act as a fourth instance and should not re-examine the facts and evidence or review the application of domestic law by the Canadian authorities.

4.2 The complainant applied for asylum on 4 February 2003. On 19 March 2003, he submitted information under a false name and gave an account of his persecution in the Democratic Republic of the Congo that proved to be entirely invented. In particular, he claimed that he had lived his entire life in the Democratic Republic of the Congo, that he had been arrested together with his father because of their political activities, and that his father had died in 2002 as a result of torture.

4.3 The complainant failed to appear at the hearing on 5 August 2003, when his asylum application was to be considered. On that date, another hearing was scheduled. Given that neither the author nor his counsel appeared, the proceedings were discontinued. He did not apply to the Federal Court for judicial review of the decision to discontinue the proceedings.

4.4 On 30 March 2007, the complainant applied for a PRRA assessment; his application was rejected on 7 April 2008. The PRRA officer found that there were significant omissions and contradictions in the information provided by the complainant and concluded that he was not credible. On 20 May 2008, the complainant applied to the Federal Court for the PRRA decision and the removal order to be reviewed. This application was rejected on the ground that he had repeatedly lied to the Canadian and United States authorities, which called into question his credibility with regard to the alleged facts. In addition, the Court did not find any errors in the risk assessment prepared by the PRRA officer.

4.5 The State party maintains that the complainant has not exhausted domestic remedies because: (a) he failed to pursue his application for asylum in Canada and to apply for judicial review of the decision to discontinue the proceedings; and (b) he failed to file an application for residence based on humanitarian and compassionate (H&C) grounds. Such applications are filed on the basis of the potential risk to the person in his or her country of origin and are examined by a PRRA officer. However, unlike PRRA applications, the consideration of H&C applications is not limited to new evidence submitted since the previous decision in a case. The examination takes into account all the circumstances, not only risk factors, and goes beyond the criteria established with respect to PRRA assessments.

4.6 The State party disagrees with the decisions of the Committee in which it determined that, given the discretionary nature of ministerial decisions, it was not necessary to exhaust the H&C procedure. The fact that a remedy is discretionary does not mean that it

Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm

is ineffective. While it is discretionary from a technical point of view, the ministerial decision must nevertheless be based on certain criteria and procedures. The discretion must be exercised in conformity with the law, the Canadian Charter of Rights and Freedoms and the international obligations of Canada. An H&C application can be based on the risk of torture in the country of return, and ministerial decisions can be reviewed by the Federal Court. A negative decision by the Federal Court can be appealed before the Federal Court of Appeal if the case raises an issue of general importance. A decision by the Federal Court of Appeal can be appealed before the Supreme Court of Canada.

4.7 The State party contends that the complaint is manifestly unfounded and thus inadmissible. The complainant's allegations and the evidence he has provided to the Committee are essentially the same as those submitted to the Canadian authorities. The complainant was interviewed by the PRRA officer, who was able to make a personal assessment of his credibility. The officer's conclusions concerning the risk in the event of return are appropriate and well-founded. The State party recalls the Committee's jurisprudence, according to which it is not its role to re-evaluate findings of fact and credibility made by competent national authorities, unless it emerges that the assessment was arbitrary or constituted a denial of justice. The documents submitted by the complainant to the Committee do not show that the conclusions of the PRRA officer were tainted by such irregularities. Therefore, there are no grounds on which the Committee could consider it necessary to re-evaluate the findings of the Canadian authorities concerning the facts and the complainant's credibility.

4.8 The State party submits that the complainant lacks credibility for the following reasons: (a) his account is contradictory as to the date on which he arrived in Canada for the first time. On different occasions, he has claimed to have arrived in September 2002, January 2003 and April 2003; (b) he also provided contradictory information as to his identity, in particular his family name and his date of birth; (c) he provided false information concerning, inter alia, his father's political activities, persecution, arrest, torture and death; (d) he provided false information to the United States immigration authorities, which led to his arrest and sentencing to 30 months' imprisonment; (e) upon release, he was deported to Canada, where he initially denied having requested asylum in the past; and (f) during the PRRA procedure, he provided contradictory information concerning the treatment he allegedly suffered in 2002 in the Democratic Republic of the Congo. In particular, he was unable to give details concerning the prison in which he had been detained. He failed to clarify whether he had been released or whether he had escaped. He contradicted himself with regard to the date on which he regained his freedom and the time spent in Lumumbashi following his detention. He also provided contradictory information to the PRRA officer concerning his father's return to the Democratic Republic of the Congo in 2006–2007. Following the interview, the PRRA officer asked the complainant to provide certain documents. However, the documents he provided were deemed unsatisfactory. For example, the photocopy of his father's passport was illegible and did not show the dates of his stay in the Democratic Republic of the Congo, and the complainant provided a copy of a letter from UDPS, not the original requested by the officer.

4.9 With regard to the medical certificate provided by the complainant as evidence of the torture suffered in the Democratic Republic of the Congo, the PRRA officer found it inconclusive. He notes that there is little evidence of torture or abuse. The doctor indicates that the complainant shows symptoms of post-traumatic stress disorder but draws no definitive conclusion. It was the complainant himself who claimed to have had suicidal and depressive thoughts. The doctor does not explain what tests were used to diagnose post-traumatic stress disorder. While it is stated that the complainant has injuries consistent with his allegations, there is no evidence that these injuries were inflicted during his detention in the Democratic Republic of the Congo. The doctor does not explain the link between the complainant's angina and high blood pressure and his alleged torture. In view of the above,

Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm

the complainant has failed to demonstrate that the PRRA officer's conclusion as to the weight that should be given to the medical certificate is unreasonable.

4.10 Given the complainant's lack of credibility, the PRRA officer concluded that his detention in the Democratic Republic of the Congo in 2002 and the risk to which he would be exposed in the event of his return had not been established. The officer noted that UDPS members might be arrested and ill-treated. However, according to a report of the United Kingdom Home Office, the situation had improved in 2007 compared to 2005.

4.11 The PRRA officer also noted that the United States judge had expressed doubts about the author's credibility. The officer nevertheless made an independent assessment, concluding that the complainant had not demonstrated that he or his father was an active UDPS member or that he would be ill-treated because of his ethnic origin, especially if he lived in Kinshasa. The officer was not unaware of the difficulties that the complainant could encounter, given that he had lived most of his life in the United States. Those difficulties, however, could not be said to amount to persecution within the meaning of the Convention or to a risk to his life or a risk of torture or cruel and unusual treatment or punishment.

4.12 The State party is of the view that the situation in the Democratic Republic of the Congo has been difficult for years. However, this is not sufficient to establish that the complainant would be exposed to a real, personal and foreseeable risk of torture in the event of his return. The State party maintains that, even if this were the case, the complainant has failed to demonstrate that such a risk exists across the entire territory. The PRRA officer has acknowledged that the situation could be difficult for the Luba in the Katanga region, but the complainant has failed to demonstrate that such a risk exists in Kinshasa.

Complainant's comments on the State party's observations on admissibility

5.1 On 13 November 2008, the complainant submitted comments on the State party's observations on admissibility. He reiterates the reasons why he tried to enter the United States illegally on 1 May 2003 and was detained in that country, which prevented him from appearing at the hearing in Canada. Given the application for protection that he filed in the United States under the Convention against Torture, and the psychological circumstances that led him to leave Canada and seek the support of his family in the United States, he cannot be held responsible for not having pursued his asylum application in Canada at that time or for failing to apply for leave and judicial review of the decision to discontinue the proceedings.

5.2 Contrary to the State party's assertions, the complainant did file an application for permanent residence based on humanitarian and compassionate grounds on 29 May 2008.[6] At the time of the submission of his comments, no decision had yet been taken on the application. A decision had, however, been rendered by the Federal Court on his application for leave and judicial review of the PRRA decision. That application was rejected, without any reason being given, on 14 August 2008.

5.3 The complainant contends that neither the PRRA assessment nor the H&C procedures constitute effective remedies. Decisions to grant H&C applications are not made on a legal basis, but rather ex gratia by a minister. Filing an H&C application does not

[6] A copy of the application is contained in the file. The application states, inter alia, that the Democratic Republic of the Congo is one of eight countries for which there is a moratorium on the return of unsuccessful asylum seekers owing to widespread violence. The complainant is excluded from the moratorium because of his illegal entry into the United States from Canada.

Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm

legally stay the removal of the applicant. Appeals against negative PRRA decisions (applications to the Federal Court for leave and judicial review and appeals before the Federal Court of Appeal) also fail to constitute effective remedies, as none of these procedures legally stays the removal of the applicant. In the present case, the PRRA assessment of the facts and evidence is manifestly arbitrary and/or amounts to a denial of justice.

5.4 The complainant argues that his claims are sufficiently substantiated. His father is a long-standing political opponent who is known and recognized in the Democratic Republic of the Congo as a co-founder of UDPS, the main opposition party. Contrary to the State party's assertions, the complainant's identity has never been questioned by the Canadian authorities, nor has the family relationship between the complainant and his father ever been contested. Furthermore, the complainant's identity and his relationship to his father are clearly established by the complainant's passport and birth certificate. The complainant cites the United States Department of State Country Report on Human Rights Practices for 2007 to show that political opponents, whether actual or only perceived as such, are routinely arrested and tortured in the Democratic Republic of the Congo, and that family members of suspected or wanted persons are at risk of being arrested, detained and tortured.

5.5 The State party's assertions concerning the complainant's lack of credibility are irrelevant and should be dismissed. The Canadian courts have decided on several occasions that an asylum seeker's lack of credibility does not rule out the possibility of that person being a Convention refugee. Likewise, the complainant's credibility with regard to certain allegations is of little importance, as he could still objectively and subjectively be at risk of being tortured if returned to the Democratic Republic of the Congo.

State party's observations on the merits

6.1 On 6 February 2009, the State party submitted observations on the merits of the complaint. At the same time, it reiterated that the complaint should be declared inadmissible.

6.2 The complainant attempts to justify his failure to pursue his asylum application by citing his psychological condition following the treatment to which he was allegedly subjected in the Democratic Republic of the Congo and his need to join his family in the United States. This explanation is not valid because he has failed to provide medical or other evidence in support of his allegations. The only medical certificate that he has provided was issued in 2005 and was inconclusive, as has already been stated. Psychological stress is not unusual among asylum seekers. This cannot, however, absolve the complainant of his obligation to pursue his application, especially since he was represented by a lawyer. He should thus have been aware of the consequences of failing to do so. In addition, the State party rejects the complainant's argument concerning the judicial review of the discontinuance of the proceedings and maintains that this is an effective remedy. The State party confirms that the complainant filed an H&C application and emphasizes that this remedy must be exhausted.

6.3 The State party reiterates that the complainant's claims are manifestly unfounded and therefore inadmissible. As for the merits, he has failed to demonstrate that there are sufficient grounds for believing that he would be subjected to torture if returned to the Democratic Republic of the Congo for the reasons listed below.

6.4 The complainant provided contradictory information concerning his detention and the ill-treatment experienced in the Democratic Republic of the Congo in 2002. As regards the length of his detention, he declared on different occasions that it had lasted three, four and nine months. With regard to communication with his co-detainees, he first stated that they could not speak French. When he was told that French was an official language in the

Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm

country, he said that some of them spoke French. Eventually, he said that most of them spoke French. Regarding the fact that he had kept 20 or 40 dollars on his person, he first said that he had kept the money in his socks. When confronted with his previous statement that he had been barefoot, he said that he had hidden the money in his trousers, where it had not been found. For the State party, these statements are not credible in view of his allegations that he was repeatedly abused. As to the manner in which he regained his freedom, he claimed in his written statements that a guard who knew his grandfather had set him free during the night. However, in a letter that, according to him, was written by his lawyer, it is stated that the release was the result of the intervention of a public prosecutor and a senior military judge. Lastly, in his PRRA application, he claimed to have been detained in the Democratic Republic of the Congo until his departure for Canada in January 2003. However, during his interview, he claimed to have stayed in Zambia for several months before travelling to Canada.

6.5 In his asylum application of February 2003, the applicant does not mention having been tortured in the Democratic Republic of the Congo. According to the State party, it is improbable that the complainant would have omitted to refer to the torture in his asylum application if he really had been tortured. Psychological stress cannot explain such behaviour.

6.6 Further information provided by the complainant to the Canadian authorities has proved to be contradictory. For example, as regards his family name and his date of birth, he gave a false name in his asylum application of 2003; he stated different dates of first arrival in Canada; he tried to enter the United States using false documents and denied that he had previously requested asylum in Canada; and he told the PRRA officer in December 2007 that his father had not returned to the Democratic Republic of the Congo for a long time, although the latter had just come back from a 20-month stay in the country.

6.7 The State party reiterates its comments concerning the medical certificate submitted by the complainant. This certificate, which is based on the complainant's account, states that he seems to be suffering from aspects of post-traumatic stress disorder. The State party also argues that the PRRA officer was right not to attach weight to the affidavits submitted in support of the complainant, since they either came from persons who were biased or contained inaccuracies.

6.8 The complainant has never participated in activities that could give rise to a risk of being subjected to torture. He is not a member of any political organization and has not shown that his criminal record in the United States or his deportation itself could constitute a risk. His parents have reportedly spent time in the Democratic Republic of the Congo in recent years (in particular his father between March 2006 and November 2007) without being detained or tortured. The complainant submitted a letter from a UDPS member stating that threats were made against the complainant's father by the police while he was in the process of trying to recover his house. However, there is no mention of any incident involving detention or physical danger.

6.9 The American judge who determined that there was a risk of torture in 2005 had attached considerable importance to the situation of the complainant's father. However, his father stayed in the Democratic Republic of the Congo after this date without being detained. In addition, the judge does not seem to have been aware of the fact that the complainant had submitted false information to the Canadian authorities in connection with his asylum application in 2003.

6.10 Lastly, the State party submits that there are very few references to the torture of UDPS members or Luba from Kasaï in reports on the human rights situation in the Democratic Republic of the Congo, such as the 2007 Amnesty International report or the United States Department of State report for 2008.

Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm

Complainant's comments on the State party's observations on the merits

7.1 On 17 June 2009, the complainant submitted comments on the State party's observations on the merits. He recalls that he filed an application for judicial review of the PRRA decision. This application having been rejected, no other remedies are available to him to challenge his removal. His motion for a stay of removal pending a decision on his H&C application has been rejected.

7.2 The complainant explains that he failed to pursue his asylum application because he was suffering from post-traumatic stress, which has been confirmed by the certificate issued by a doctor who specializes in such matters. As regards the contradictions in his statements to the Canadian authorities to which the State party refers, he emphasizes that, in the absence of recordings of his interview with the PRRA officer, the Committee should not give any weight to this interview, as it is not possible to prove that there actually were any such contradictions. When asked about his father's whereabouts, he had answered that he had travelled to the Democratic Republic of the Congo to participate in the elections. This reply was not inconsistent with any of the information he had given.

7.3 The complainant reiterates that he was tortured in the Democratic Republic of the Congo on account of his father's political opinions and that, since he has been tortured before, he fears being tortured again. As to the State party's argument that his father was not troubled in the Democratic Republic of the Congo, the complainant contends that, while he himself is of Congolese nationality, his father has a United States passport, which may afford a certain level of protection. This explains why the two were treated differently. If he were to be sent back, he would arrive at the airport in the Democratic Republic of the Congo under a deportation order, a situation which would be much more likely to lead to problems with the Congolese authorities.

7.4 The claimant submits that, when he applied for asylum in Canada, he did not mention that he was the son of Ilunga André Kalonzo. After what he experienced in the Democratic Republic of the Congo because of his links to his father, he thought that not mentioning these ties would be the best way to ensure his safety.

7.5 The State party has failed to mention that a moratorium on the removal of Congolese nationals is still in force owing to the state of insecurity in the country. The situation in the Democratic Republic of the Congo has not really changed since the American judge granted the complainant protection because of his potential risk of torture. Detainees continue to be tortured in the country, regardless of whether or not they belong to a political party. In this regard, he refers to the United States Department of State report for 2008 and the 2007 Amnesty International report on the situation in the country.

7.6 Lastly, the complainant informs the Committee that, since his arrival in Canada, he has found a job and that he is the father of a Canadian child. He requests the Committee to find a solution to prevent him from being separated from his daughter and his partner, who is a Canadian resident.

Issues and proceedings before the Committee

Consideration of admissibility

8.1 Before considering any claims contained in a complaint, the Committee against Torture must decide whether or not it is admissible under article 22 of the Convention. The Committee has ascertained, as it is required to do under article 22, paragraph 5 (a), of the Convention, that the same matter has not been and is not being examined under another procedure of international investigation or settlement.

Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm

8.2 The Committee takes note of the State party's observations concerning non-exhaustion of domestic remedies and of the complainant's comments in this regard. The Committee recalls that, following his deportation to Canada from the United States on 9 April 2006, he applied for refugee status, but that his application was found inadmissible. On 30 March 2007, the complainant applied for a PRRA assessment, the only available remedy. His application was rejected on 7 April 2008. On 20 May 2008, he applied to the Federal Court for review of that decision and of the removal order; this application was also rejected, without any reason being given, on 14 August 2008.

8.3 On 29 May 2008, the complainant applied for permanent residence on humanitarian and compassionate grounds (H&C). With regard to the State party's observations concerning the effectiveness of this remedy, the Committee recalls that, at its twenty-fifth session, in its concluding observations on the report of the State party, it considered the question of requests for ministerial stays on humanitarian grounds. It noted the apparent lack of independence of the civil servants deciding on such a remedy and the possibility that a person could be expelled while such an application was being considered. It concluded that those circumstances could detract from effective protection of the rights covered by article 3, paragraph 1, of the Convention. It observed that, although the right to assistance on humanitarian grounds may be a remedy under the law, such assistance is granted by a minister on purely humanitarian grounds, rather than on a legal basis, and is thus ex gratia in nature. The Committee has also observed that when an application for judicial review is approved, the Federal Court returns the file to the body that took the original decision or to another decision-making body and does not itself conduct the review of the case or hand down any decision.[7] Rather, the decision depends on the discretionary authority of a minister and, thus, of the executive. Based on these considerations, the Committee concludes that, in the present case, the possible failure to exhaust this remedy does not constitute an obstacle to the admissibility of the complaint.

8.4 As regards the alleged violation of article 3, the Committee is of the opinion that the complainant's arguments raise substantive issues which should be examined on the merits rather than on the basis of admissibility alone. Accordingly, the Committee finds the communication admissible and proceeds to its consideration on the merits.

Consideration on the merits

9.1 The issue before the Committee is whether the removal of the complainant to the Democratic Republic of the Congo would constitute a violation of the State party's obligation under article 3 of the Convention not to expel or to return a person to another State where there are substantial grounds for believing that he or she would be in danger of being subjected to torture.

9.2 In assessing whether there are substantial grounds for believing that the complainant would be in danger of being subjected to torture if returned to the Democratic Republic of the Congo, the Committee must take account of all relevant considerations, including the existence of a consistent pattern of gross, flagrant or mass violations of human rights in the Democratic Republic of the Congo. However, the aim of such an analysis is to determine whether the complainant runs a personal risk of being subjected to torture in the country to which he would be returned.

9.3 The Committee recalls its general comment on the implementation of article 3 of the Convention, which states that the risk of torture must be assessed on grounds that go beyond mere theory or suspicion. Although the risk does not have to meet the test of being

[7] See communication No. 333/2007, *T.I. v. Canada*, decision of 15 November 2010, paragraph 6.3.

Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm

highly probable, the Committee recalls that the burden of proof normally falls upon the complainant, who must present an arguable case establishing that he runs a "foreseeable, real and personal" risk. The Committee also recalls that, as set forth in its general comment No. 1 (1996),[8] while it gives considerable weight to the findings of fact of the State party's bodies, it is entitled freely to assess the facts of each case, taking into account the specific circumstances.

9.4 The Committee takes note of the State party's observations concerning the complainant's lack of credibility, which are based, in particular, on the fact that contradictory information was submitted to the Canadian authorities regarding the length of his detention in the Democratic Republic of the Congo, his communication with his co-detainees, the money that he allegedly kept on his person, the manner in which he regained his freedom, his stay in Zambia before travelling to Canada, his father's stay in the Democratic Republic of the Congo and other matters. The Committee also notes the State party's observations concerning the fact that the complainant is not a member of a political party and that his parents have travelled to the Democratic Republic of the Congo several times without being troubled.

9.5 The Committee takes note of the difficult human rights situation in the Democratic Republic of the Congo and of the moratorium declared by Canada on the removal of rejected asylum seekers to that country. In this regard, the Committee notes the information submitted by the complainant, according to which the moratorium was put in place owing to the widespread violence existing in the Democratic Republic of the Congo and the fact that the moratorium would not apply in his case because of his criminal record. The State party has not challenged this information. The Committee is of the view that this information points up the discretionary nature of the moratorium procedure, whereas, in the spirit of article 3 of the Convention, it is to be understood that a moratorium on the removal of persons who would be at risk in their country because of widespread violence should apply to everyone without distinction.

9.6 The Committee also takes note of the complainant's claims regarding: (a) his detention and torture in the Democratic Republic of the Congo in 2002; (b) the medical certificate issued in 2005, according to which, although the complainant bore little physical evidence of torture, this was not the case with regard to psychological effects, as he showed signs of post-traumatic stress disorder fully consistent with his account and appeared to have a reasonable fear of what might befall him should he be returned to the Democratic Republic of the Congo;[9] and (c) the view of the American judge who granted him protection under the Convention that there were substantial grounds for believing that the complainant would be in danger of being subjected to torture in the event of his return.

9.7 The Committee also takes note of the State party's reference to reports dating from 2007 and 2008 that mention few cases of the torture of UPDS members or Luba from Kasaï. In this regard, the Committee is of the view that, even if cases of torture are rare, the risk of being subjected to torture continues to exist for the complainant, as he is the son of a UDPS leader, is a Luba from Kasaï and has already been the victim of violence during his detention in Kinshasa in 2002. In addition, the Committee considers that the State party's argument that the complainant could resettle in Kinshasa, where the Luba do not seem to be threatened by violence (as they are in the Katanga region), does not entirely remove the personal danger for the complainant. In this regard, the Committee recalls that, in accordance with its jurisprudence, the notion of "local danger" does not provide for

[8] *Official Records of the General Assembly, Fifty-third Session, Supplement No. 44* (A/53/44).

[9] See communication No. 374/2009, *S.M. et al. v. Sweden*, decision of 21 November 2011, paragraph 9.7.

Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm

measurable criteria and is not sufficient to entirely dispel the personal danger of being tortured.[10]

9.8 In the light of the above, the Committee concludes that the complainant has established that he would run a real, personal and foreseeable risk of being subjected to torture if he were to be returned to the Democratic Republic of the Congo.

10. The Committee against Torture, acting under article 22, paragraph 7, of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, considers that the State party's decision to return the complainant to the Democratic Republic of the Congo, if implemented, would constitute a breach of article 3 of the Convention.

11. In conformity with rule 112, paragraph 5, of its rules of procedure, the Committee wishes to be informed, within 90 days, of the steps taken by the State party in response to this decision.

[Adopted in English, French, Spanish and Russian, the French text being the original version. Subsequently to be issued also in Arabic and Chinese as part of the Committee's annual report to the General Assembly.]

[10] See communication No. 338/2008, *Mondal v. Sweden*, decision of 23 May 2011, paragraph 7.4.

Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm