



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

Distr.: General  
19 July 2019  
English  
Original: French

## Committee against Torture

### Decision adopted by the Committee under article 22 of the Convention concerning communication No. 820/2017\*, \*\*, \*\*\*

<i>Communication submitted by:</i>	D.B. (represented by counsel, Alexandre Mwanza)
<i>Alleged victim:</i>	The complainant
<i>State party:</i>	Switzerland
<i>Date of complaint:</i>	9 April 2017 (initial submission)
<i>Document references:</i>	Decision taken pursuant to rules 114 and 115 of the Committee's rules of procedure, transmitted to the State party on 13 April 2017 (not issued in document form)
<i>Date of present decision:</i>	9 May 2019
<i>Subject matter:</i>	Expulsion to Togo
<i>Procedural issues:</i>	Exhaustion of domestic remedies
<i>Substantive issue:</i>	Risk of torture in the event of expulsion on political grounds (non-refoulement)
<i>Article(s) of the Convention:</i>	3

1.1 The complainant is D.B., a national of Togo born on 27 August 1985. She is under an expulsion order to Togo and considers that her expulsion would constitute a violation by Switzerland of article 3 of the Convention. The complainant is represented by counsel, Mr. Alexandre Mwanza.

1.2 On 13 April 2017, the Committee, acting through its Rapporteur on new complaints and interim measures, decided to grant the complainant's request for interim measures and therefore requested the State party to refrain from expelling the complainant to Togo while her complaint was under consideration by the Committee.

\* Adopted by the Committee at its sixty-sixth session (23 April–17 May 2019).

\*\* The following members of the Committee participated in the examination of the communication: Essadia Belmir, Felice Gaer, Abdelwahab Hani, Claude Heller Rouassant, Jens Modvig, Ana Racu, Diego Rodríguez-Pinzón, Sébastien Touzé, Bakhtiyar Tuzmukhamedov and Honghong Zhang.

\*\*\* The text of an individual (dissenting) opinion of Committee member Abdelwahab Hani is appended to the present decision.



**The facts as presented by the complainant**

2.1 The complainant has been a supporter of the Alliance nationale pour le changement (National Alliance for Change) since the opposition movement's inception in October 2010. In 2011, she became an active member of the Alliance and was appointed section secretary for her neighbourhood in Lomé. She participated in several political demonstrations against the regime in power in Togo.

2.2 The complainant was actively involved in planning and staging an anti-government protest in Lomé on 12 June 2012 that was organized on the initiative of Sauvons le Togo, a grouping of opposition parties. The complainant was then seized by two men in civilian clothing, thrown into a car and driven to the military encampment of the Quick Reaction Force in Lomé. She was held there for eight days in isolation under very harsh conditions. After regaining her freedom, with the help of a person close to her, the complainant decided to seek refuge in Ghana. While there, she learned that uniformed men had searched her former home in Lomé. Having then decided to leave for Europe, she arrived in Switzerland via Italy on 18 September 2012. On the same day, she applied for asylum in Switzerland.

2.3 On 19 and 20 September 2012, the complainant filed an application for asylum at the reception and processing centre in Kreuzlingen, Switzerland. On 25 September 2012, a preliminary hearing was held to determine the grounds for her asylum application.

2.4 On 31 March 2014, a federal hearing was held to determine the grounds for the complainant's application. She notes that, in support of her asylum application, she provided four photographs of herself at a political rally in Togo on 19 March 2011 and her voter registration card. On 7 March 2016, the State Secretariat for Migration denied her application on the grounds that the information provided in her statements fell short of the requirements for refugee status in Switzerland. The State Secretariat for Migration therefore ordered her removal from Switzerland. The complainant appealed the expulsion order. On 26 April 2016, the Federal Administrative Court declared the appeal against the State Secretariat for Migration's decision to be inadmissible.

2.5 The complainant adds that her daughter's father has been actively sought by the Togolese authorities since April 2016. He was summoned to the court of first instance of Lomé on 1 and 15 April 2016. On 28 April 2016, the State prosecutor lodged a complaint against him in connection with the complainant's past political activities. Following these summonses, the applicant's husband disappeared with their child and was not heard from again until he and the child reappeared in Ghana on 8 August 2016. He then sent the complainant documents attesting to the problems that he had had with the Togolese authorities. The complainant submits that her husband's summonses, and the State prosecutor's complaint against him, are evidence that she is still being actively sought in Togo on account of her political activism.

2.6 The complainant notes that, following these developments, she requested a review of the decision to return her to Togo. On 28 September 2016, the State Secretariat for Migration dismissed this request. The Federal Administrative Court subsequently dismissed her appeal and, on 2 November 2016, upheld the decision to return her to Togo, with the date for that return being set as 14 April 2017. Consequently, the complainant states that she no longer has recourse to any domestic remedy to contest her return to her country of origin.

2.7 The complainant submits that the State party did not take into consideration either her status as secretary of a prominent opposition party or the evidence of her participation in political protests against the regime in power, for which reasons she is currently being sought by the Togolese authorities. She adds that the State party employed a psychological technique whereby a subject is questioned in two stages and the slightest discrepancy is taken as an indication that the grounds for asylum are implausible, irrespective of the veracity of the facts.

2.8 The complainant notes that, when there are serious doubts about the evidence submitted by an asylum seeker, the State party usually sends trusted officials from its diplomatic missions to verify the veracity of the facts in the country of origin. In the present case, she believes that the State party did not afford her equal treatment with other asylum

seekers, in particular by failing to have its embassy personnel take additional investigative steps.

### **The complaint**

3.1 The complainant contends that her deportation to Togo would constitute a violation by Switzerland of her rights under article 3 of the Convention. She claims that, owing to her political activities in Togo, she faces a personal, present and real risk of being subjected to treatment contrary to the Convention. She states that she risks being subjected to inhuman and degrading treatment because of her prominent position as the section secretary for her party, which is, beyond question, well known to the authorities. She adds that she was arrested and escaped and would therefore face heavy penalties if she were to return. The complainant refers to harsh prison conditions and the manipulation of the justice system in Togo, where she risks being sentenced to a term of over 10 years as a political prisoner. She adds that, in Togo, prisoners are tortured to extract information from them.

3.2 In addition, the complainant submits that it is common public knowledge that the Togolese authorities closely monitor all political protests; therefore, they would be in a position to easily identify her if she returned to Togo.

### **State party's observations on admissibility and the merits**

4.1 On 12 October 2017, the State party submitted observations on the admissibility and merits of the complaint. It recalled the facts and the proceedings undertaken by the complainant in Switzerland with a view to obtaining asylum, noted that the asylum authorities have duly considered the complainant's arguments and stated that the complaint's submission does not include any new information that might invalidate the asylum authorities' decisions.

4.2 Regarding the admissibility of the complaint, the State party is of the opinion that the complainant has not exhausted all available domestic remedies and that her complaint should therefore be found inadmissible.

4.3 The State party recalls that the State Secretariat for Migration rejected the complainant's asylum application, pursuant to its decision of 7 March 2016. On 11 April 2016, the complainant submitted an appeal to the Federal Administrative Court against the decision issued by the State Secretariat for Migration. However, this appeal was submitted outside the legally established time limit. On that same date, she requested an extension of the appeal deadline. The request was dismissed because the complainant was unable to justify it in accordance with Swiss law, which permits such extensions only if the complainant, or his or her agent, through no fault of his or her own, has been prevented from acting within the allotted period.<sup>1</sup>

4.4 The State party submits that, if the complainant had filed her appeal within the prescribed time limit, she could have claimed a violation of the Convention. It also submits that a complaint to the Committee cannot be substituted for a domestic remedy found to be inadmissible because the deadline for filing an appeal has passed.

4.5 Regarding the merits of the case, the State party submits that, according to the Committee's jurisprudence and paragraphs 6 to 8 of its general comment No. 1 (1997) on the implementation of article 3 of the Convention in the context of article 22, the complainant must establish that she faces a personal, present and real risk of being subjected to torture if returned to her country of origin. The existence of such a risk must be assessed on grounds that go beyond mere theory or suspicion; it is also necessary for facts to be adduced that indicate that the risk is serious,<sup>2</sup> including: (a) evidence of the existence of a consistent pattern of gross, flagrant or mass violations of human rights in the State concerned; (b) claims of torture or ill-treatment in the recent past and the existence of

<sup>1</sup> Switzerland, article 24 (1) of the Federal Act of 20 December 1968 on administrative procedure, 172.021.

<sup>2</sup> For information on the factors to be taken into account in order to establish that such a risk exists, see paragraph 8 of the Committee's general comment No. 1. See also paragraph 49 of the Committee's general comment No. 4 (2017) on the implementation of article 3 in the context of article 22.

independent evidence supporting these claims; (c) engagement by the complainant in political activities within or outside the State concerned; and (d) evidence as to the complainant's credibility.

4.6 The State party submits that the complainant is not in a position to provide evidence of a consistent pattern of gross, flagrant or mass violations of human rights in Togo and that she has been unable to demonstrate that she would be at a personal risk of being subjected to torture in that country.<sup>3</sup> The State party further submits that the existence of a pattern of human rights violations, as defined in article 3 (2) of the Convention, does not constitute sufficient grounds to find that a person would be at risk of torture on return to his or her country of origin and that the risk of torture must be assessed on grounds that go beyond mere theory or suspicion. The State party submits that Togo is not currently displaying a consistent pattern of gross, flagrant or mass violations of human rights and that the political situation in Togo therefore does not preclude the complainant's return to that country.<sup>4</sup> Moreover, the general human rights situation is not in itself sufficient to make the complainant's return incompatible with article 3 of the Convention. The State party submits that the complainant has failed to make a convincing argument that she would face treatment prohibited under article 3 if she were returned to Togo.

4.7 The State party submits that the complainant has not claimed to have been subjected to torture or ill-treatment in the recent past or provided independent evidence supporting such a claim. The complainant has stated that the father of her child has been subjected to inhuman and degrading treatment; however, she did not claim to have suffered such treatment herself. The State party emphasizes that, while the complainant stated that she had been arrested and detained for eight days at a military encampment in June 2012, she did not claim, either in the complaint or during the hearings before the national authorities, to have been subjected to treatment prohibited under the Convention or to have had problems with the authorities aside from her arrest in 2012.

4.8 The State party submits that the complainant has failed to provide evidence of any engagement in political activities, either inside or outside her country of origin, that might bear out the claim that she would face a risk of torture upon return. In support of her claims, the complainant submitted four photographs of herself at a political rally in Togo on 19 March 2011, her voter registration card, two summonses dated 1 and 15 April 2016 issued by the lower court of Lomé, and the State prosecutor's complaint. In addition, the State party notes that the State Secretariat for Migration ruled on the claims during its consideration of the complainant's asylum application,<sup>5</sup> and her request for review,<sup>6</sup> noting, in its decision of 7 March 2016, the lack of credibility of the complainant's claims concerning her arrest at the protest of 12 June 2012, her detention and her escape.

4.9 The State party further submits that the complainant's appearance in four photographs, in which she is seen wearing an Alliance nationale pour le changement T-shirt, at a rally that reportedly took place on 19 March 2011, cannot serve to establish that she participated in the protest of 12 June 2012, after which she was allegedly arrested. The State party argues that the complainant has not provided any information likely to invalidate the findings of the State Secretariat for Migration. It considers that there is nothing in the applicant's file to indicate that she is a high-profile member of the Alliance nationale pour le changement and that, to the best of the State Secretariat for Migration's knowledge, activists and ordinary members of that party are not persecuted.

4.10 According to the State party, the decisions of the Swiss asylum authorities make it clear that the complainant's claims are not credible and that her statements do not in any way suggest that there are substantial grounds for believing that she would be subject to torture if she were to return to her country of origin. The complainant failed to provide any factual information to the State Secretariat for Migration regarding the circumstances of her arrest in Togo in June 2012, such as basic information on the two people in plain clothes

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<sup>3</sup> *K.N. v. Switzerland* (CAT/C/20/D/94/1997), para. 10.2.

<sup>4</sup> Decision of the State Secretariat for Migration dated 7 March 2016, p. 5.

<sup>5</sup> See the decision of the State Secretariat for Migration dated 7 March 2016.

<sup>6</sup> See the decision of the State Secretariat for Migration dated 28 September 2016; see also the judgment of the Federal Administrative Court dated 2 November 2016.

who arrested her, the police car in which she was taken to the military encampment or her place of detention.

4.11 The State party notes that the complainant mentioned several new points that she had not raised at her first hearing, including the account of the search conducted of her home. Furthermore, she contradicted herself with regard to her identification documents, which she initially claimed to have lost but then said that she had left at home. Other details about her flight from the country following her detention, with the help of a soldier who allegedly showed her how to reach Ghana on her own, suggest that her statements in this regard are neither founded nor credible. The State Secretariat for Migration and the Federal Administrative Court did not attach probative value to the documents produced by the complainant. The State party also points out that she claimed to have been summoned by a court in Lomé in 2016, shortly after her asylum application in Switzerland was rejected, in connection with events that took place in 2012. The State party also points out that the complainant bases her risk of persecution on the alleged persecution of her child's father, even though the document issued by the prosecutor in Lomé refers to her. Moreover, the State party stresses that, during the asylum procedure, the complainant stated that she was unmarried and had never lived with her child's father. It is therefore difficult to understand why he would be persecuted on her account.

4.12 The State party emphasizes that the Swiss authorities had good reason to find that the documents that had been submitted to them could not be considered sufficient to support the complainant's claims. The State party affirms that it therefore stands by the findings of the State Secretariat for Migration and the Federal Administrative Court and concludes that there is nothing concrete to lend credence to the claim that the complainant would be exposed to a foreseeable, personal and real risk of being subjected to torture, within the meaning of article 3 of the Convention, if she were returned to Togo.

### **Complainant's comments on the State party's observations**

5.1 On 13 December 2017, the complainant submitted her comments on the State party's observations.

5.2 Regarding the admissibility of the complaint, the complainant is of the view that she did lodge an appeal with the Federal Administrative Court, which is the highest court in matters of asylum. This Court found her appeal inadmissible because it was not submitted within the deadline. Nevertheless, the complainant believes that she has exhausted domestic remedies and that it is precisely as a consequence of this procedure that the State party ordered her removal to Togo. She adds that the late application for a domestic remedy in no way authorizes the State party to breach its obligations under article 3 of the Convention.

5.3 With regard to the merits of the case, the complainant stands by all the elements presented in her initial submission. She points out that, on the one hand, the State party claims that domestic remedies have not been exhausted, but, on the other, suggests that the complaint should be dismissed because the first authority to rule on the asylum application had already established the facts of the case. The complainant notes that the State party has not challenged the evidence that she has submitted. She contends that, in the light of the current situation in Togo, returning an activist of her stature to that country would constitute a violation by the State party of its international commitments under article 3 of the Convention.

### **Issues and proceedings before the Committee**

#### *Consideration of admissibility*

6.1 Before considering any complaint submitted in a communication, the Committee must decide whether it is admissible under article 22 of the Convention. The Committee has ascertained, as it is required to do under article 22 (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.

6.2 The Committee recalls that, in accordance with article 22 (5) (b) of the Convention, it shall not consider any complaint from an individual unless it has ascertained that the individual has exhausted all available domestic remedies.

6.3 The Committee notes the State party's argument that the complainant filed an appeal with the Federal Administrative Court, against the decision of the Secretariat of State for Migration of 7 March 2016 on 11 April 2016, i.e. outside the legally established time limit, which is why this appeal was rejected. The Committee further observes that the complainant did not justify her failure to comply with this formality, that she therefore did not exercise due diligence by exhausting the remedies at her disposal in time, and that she is not in a position to attribute the fault to the State party. The Committee is therefore of the view that domestic remedies have not been exhausted and finds the complaint inadmissible in accordance with article 22 (5) (b) of the Convention.

6.4. The Committee therefore decides:

(a) That the communication is inadmissible under article 22 (5) (b) of the Convention;

(b) That the present decision shall be communicated to the complainant and to the State party.

## Annex

### Individual dissenting opinion of Abdelwahab Hani

1. The complainant filed an application for asylum in Switzerland on 19 and 20 September 2012. On 7 March 2016, the State Secretariat for Migration rejected this application because the complainant did not satisfy the requirements for refugee status in Switzerland. The appeal filed by the complainant against the expulsion order was dismissed by the Federal Administrative Court on 26 April 2016. The Committee notes that the request for review of the decision to return the complainant to Togo, following the emergence of new facts, was dismissed by the State Secretariat for Migration on 28 September 2016 and that this dismissal was upheld by the Federal Administrative Court on 2 November 2016.
2. The State party considers that the complainant did not justify her failure to comply with the time limit for appealing against the first decision of the State Secretariat for Migration and that, for this reason, the Federal Administrative Court rejected the request for a review of the expulsion order. It should be noted that the Swiss authorities took almost 42 months – an excessively long time<sup>1</sup> – to reach a decision concerning her request, yet refused to grant her a 4-day extension of the deadline for an appeal.
3. The applicant showed due diligence in requesting an extension of the time limit after she had lodged an appeal outside that time limit, on 11 April 2016, against the decision to reject her initial application for asylum, issued on 7 March 2016. Relatively short time limits<sup>2</sup> for filing appeals are not reasonable or compatible with the difficult and stressful situation in asylum seekers find themselves and thus at odds with the Committee's jurisprudence.<sup>3</sup>
4. The complainant brought her case before the country's highest authority in asylum-related matters, which issued a final decision on her request, dismissing it on 2 November 2016. This second procedure prevails over the first and renders the irregularities of the first procedure null and void.<sup>4</sup>
5. The complainant therefore exhausted all available domestic remedies.
6. The Committee should have found the complaint admissible under article 22 of the Convention with respect to the alleged violation of article 3 and proceeded to consider it on the merits.

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<sup>1</sup> See the Committee's general comment No.4, para. 14.

<sup>2</sup> Ibid., para. 18 (e).

<sup>3</sup> Ibid., para. 29 (a) (vi). See also, inter alia, *Ramírez Martínez et al. v. Mexico* (CAT/C/55/D/500/2012), paras. 17.5 and 17.6; *Gahungu v. Burundi* (CAT/C/55/D/522/2012), para. 7.7; and *X. v. Burundi* (CAT/C/55/D/553/2013), paras. 7.5 and 7.6.

<sup>4</sup> See the Committee's general comment No. 4, para. 41.