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

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Committee against Torture

Decision adopted by the Committee under article 22 of the Convention, concerning communication No. 888/2018*, **

Communication submitted by:	H.T. (represented by counsel, Alfred Ngoyi wa Mwanza of the BUCOFRAS association)
Alleged victim:	The complainant
State party:	Switzerland
Date of complaint:	4 September 2018 (initial submission)
Document references:	Decision taken pursuant to rules 114 and 115 of the Committee's rules of procedure, transmitted to the State party on 23 October 2018 (not issued in document form)
Date of decision:	30 December 2020
Subject matter:	Expulsion from Switzerland to Cameroon
Procedural issue:	Failure to exhaust domestic remedies
Substantive issue:	Non-refoulement
Articles of the Convention:	3 and 22

1.1 The complainant is H.T., a citizen of Cameroon, born in 1967. She applied for asylum in Switzerland but her application was denied. She claims that returning her to Cameroon would constitute a violation by the State party of her rights under article 3 of the Convention, since she would be subjected to torture and other cruel, inhuman or degrading treatment or punishment. The State party made the declaration under article 22 (1) of the Convention on 2 December 1986. The complainant is represented by counsel, Alfred Ngoyi wa Mwanza of the BUCOFRAS association.

1.2 The complainant requested that the Committee grant interim measures during its consideration of her complaint. On 23 October 2018, the Committee, acting through its Rapporteur for new complaints and interim measures, decided not to grant this request.

1.3 On 3 February 2020, at the request of the State party, the Committee, acting through its Rapporteur on new complaints and interim measures, decided to examine the admissibility of the complaint separately from the merits.

* Adopted by the Committee during the intersessional period, on 30 December 2020.

** The following members of the Committee participated in the examination of the communication: Essadia Belmir, Claude Heller, Erdoğan İşcan, Liu Huawen, Jens Modvig, Ilvija Pūce, Diego Rodríguez-Pinzón, Sébastien Touzé and Bakhtiyar Tuzmukhamedov.

The facts as presented by the complainant

2.1 The complainant entered Switzerland on 2 November 2001 and lodged an asylum application. In a decision of 22 February 2002, the Swiss authorities decided not to examine the merits of her asylum application and ordered her removal from the territory. On 19 April 2002, the complainant married Mr. R., a Swiss and Italian national born in 1962, residing in the canton of Zurich. As a result of the marriage, she was granted a residence permit and then a permanent residence permit in the canton of Zurich.

2.2 In 2015, the complainant travelled to Yaoundé, Cameroon. There she met M.K., a woman of Cameroonian origin, married to a Congolese man and living in Yaoundé. The two women maintained a secret romantic relationship given that homosexual relations are criminalized in Cameroon. Throughout 2015, they managed to keep their relationship a secret.

2.3 In January 2016, the complainant returned to Yaoundé at the invitation of M.K. and continued her relationship with her. On 20 January 2016, they were caught by M.K.'s husband in the family home. The complainant managed to escape and leave the country immediately, after bribing immigration officials at the airport through the intermediary of a friend. After she left, legal proceedings were initiated against her and M.K. for homosexuality. M.K. was arrested and admitted the facts. She remains in custody pending trial. The complainant is therefore wanted by the Cameroonian authorities to appear and testify. Since then, the complainant has not returned to Cameroon.

2.4 On 21 September 2017, the aliens police of the canton of Zurich revoked the complainant's permanent residence permit and ordered her removal from Switzerland by 21 December 2017. This decision became enforceable and, on 2 January 2018, the complainant was placed in administrative detention by the Zurich cantonal police pending her return to Cameroon. On 5 January 2018, she submitted an asylum application verbally.

2.5 On 1 February 2018, the complainant was summoned by the State Secretariat for Migration for a hearing at her place of detention on the grounds for her asylum application. The hearing was attended by a male member of the Secretariat staff responsible for the hearing, a representative of an independent charitable organization, a minute-taker and an interpreter. The complainant's legal representative was not informed of the hearing, despite the fact that the complainant had signed a written power of attorney giving him the power to represent her. In a decision of 14 February 2018, the State Secretariat rejected her asylum application and ordered her deportation from Switzerland. On 27 February 2018, the complainant submitted an appeal to the Federal Administrative Tribunal. By judgment of 15 March 2018, the Tribunal overturned the decision of the State Secretariat and returned the case for a hearing in the presence of the complainant's legal representative, which took place on 9 May 2018. To substantiate the grounds for her asylum application, the complainant produced an article from the Cameroonian newspaper *Le Courrier* of 29 February 2016 about her love affair with M.K. and the proceedings initiated against her by the Cameroonian authorities.[1]

2.6 In a decision of 11 June 2018, the State Secretariat for Migration rejected the complainant's application for asylum, ordered her removal from Switzerland and ordered the execution of this measure. On 9 July 2018, the complainant appealed against this decision. In its judgment of 21 August 2018 ending the proceedings, the Federal Administrative Tribunal declared the appeal inadmissible. Thus, the State Secretariat's decision of 11 June 2018 became enforceable.

2.7 The complainant claims that the Swiss authorities rejected her asylum application on the grounds that some of her allegations were implausible, without taking into account other relevant elements of her case. She based her claim for asylum on the situation she faced as a homosexual in Cameroon, having been caught in a sexual act with her female partner. This behaviour is punishable both criminally and socially in Cameroon. The fact that some elements of the complainant's statement at her hearing on 9 May 2018 were contradictory should not call into question the plausibility of her account, in accordance with the principle of the balance of probabilities. Several other elements of the case support the credibility of

[1] *Le Courrier*, edition of 29 February 2016, front page and page 3 (included in the file).

the reasons for the asylum application. The contradictions noted during her hearing can be explained by the fact that the complainant is mentally unwell as a result of her administrative detention, especially since learning that legal proceedings had been instituted against her in her country of origin. Furthermore, the lower authority based its decision on the fact that the complainant had misled the Swiss authorities about her identity when she first applied for asylum in 2001. This fact is not relevant to the examination of her second asylum application. In the course of the proceedings under the law on foreign nationals, the complainant had handed over to the Swiss authorities her Cameroonian passport, which proved her identity. As to the fact that the passport was issued in 2015 and that she might be subjected to persecution in the event of her return to Cameroon, the complainant notes that she contacted the Cameroonian authorities at the time of her 2015 trip, during which she met her partner. Thus, the passport was processed prior to the events during her 2016 trip that gave rise to the grounds for asylum.

2.8 The complainant is in administrative detention and faces deportation. Because of her homosexual relationship with M.K., she is facing legal proceedings that have been described as unfair on the grounds that Cameroon is one of the many African countries that criminalize homosexuality. Article 347-1 of the Cameroonian Criminal Code stipulates that: "Any person who has sexual relations with a person of the same sex shall be punished with 6 months' to 5 years' imprisonment and a fine of 20,000 to 200,000 francs."

2.9 The complainant was caught in the middle of a sexual act at M.K.'s home. M.K. has admitted the facts and is still in detention awaiting trial. The complainant considers that the acts in question meet the requirements of article 347-1 of the Cameroonian Criminal Code and that she therefore risks imprisonment of between 6 months and 5 years and a fine.

The complaint

3.1 The complainant alleges a violation of article 3 of the Convention in respect of her return to Cameroon, where she risks being detained by the Cameroonian authorities. The publicity surrounding her case and her homosexuality, which was revealed to everyone, including her family, friends and other acquaintances, in the *Le Courrier* newspaper of 29 February 2016, puts her at risk of torture and other cruel, inhuman or degrading treatment or punishment.

3.2 The complainant states that judicial proceedings conducted in Cameroon against persons accused of homosexuality take place in appalling conditions and that conditions of detention are deplorable, since such persons are not only punished by law but are also rejected by society and their relatives in light of African and, more specifically, Cameroonian culture.[2]

State party's observations on admissibility

4.1 In a note verbale of 6 December 2018, the State party challenged the admissibility of the communication due to non-exhaustion of the available domestic remedies. The State party submits that it is clear from the Federal Administrative Tribunal's judgment of 15 March 2018 that the Federal Office for Migration (now the State Secretariat for Migration), in its decision of 22 February 2002, did not examine the merits of the complainant's first asylum application lodged on 2 November 2001. Because of her marriage to an Italian-Swiss national, the complainant obtained a permanent residence permit in 2007, which the Migration Office of the canton of Zurich revoked on 21 September 2017 since, among other things, she had been convicted of serious crimes and offences. This revocation became final because the appeal of 25 October 2017 was filed past the deadline.

4.2 The complainant was arrested on 2 January 2018 and on 4 January 2018 was placed in detention prior to deportation. The Coercive Measures Court of the canton of Zurich, the Administrative Court of the canton of Zurich and the Federal Tribunal examined and confirmed the legality of her detention. On 5 January 2018, the complainant filed a second asylum application. On 1 February 2018, the State Secretariat for Migration heard her reasons

[2] See C. Bordenet, "Le calvaire de deux jeunes homosexuels au Cameroun", *Le Monde*, updated on 18 June 2014; and Human Rights Watch, "Criminalisation des identités: atteintes aux droits humains au Cameroun fondées sur l'orientation sexuelle et l'identité de genre", 4 November 2010.

before rejecting the application in a decision issued on 14 February 2018. Ruling on the complainant's appeal, on 15 March 2018 the Federal Administrative Tribunal overturned the decision of the State Secretariat for Migration and returned the case to the lower court for a new decision. On 9 May 2018, the State Secretariat conducted a new hearing with the complainant, in the presence of her legal representative. In a decision of 11 June 2018, the State Secretariat rejected her asylum application. Acting through her legal representative, the complainant lodged an appeal before the Federal Administrative Tribunal on 9 July 2018. In a decision of 25 July 2018, the examining magistrate of the Tribunal rejected the application for free legal aid, considering that the appeal had no chance of success, and gave the complainant until 9 August 2018 to pay the advance on procedural costs of 750 Swiss francs. Since the complainant did not pay the advance on costs as requested, the Tribunal did not proceed to examine the appeal of 9 July 2018 and concluded the proceedings by decision of 21 August 2018.

4.3 The State party recalls that, under article 22 (5) (b) of the Convention, the Committee does not consider any communication from an individual unless it has ascertained that the individual has exhausted all available domestic remedies.[3] This rule does not apply where it has been established that the application of those remedies has been or would be unreasonably prolonged or would be unlikely to bring effective relief to the individual. According to the Committee's jurisprudence, the illusory nature of the remedy may, in general, be overlooked if the author of a communication has furnished no evidence that such remedies would be unlikely to succeed.[4] In its practice, the Committee has previously noted that, in principle, it is not within the scope of its competence to evaluate the prospects of success of domestic remedies, but only whether they are proper remedies for the determination of the author's claims.[5] In keeping with the Committee's practice, a remedy is shown not to be proper when it has no suspensive effect[6] or when the cost of the procedure is too high.[7]

4.4 In this case, the interim ruling on the appeal's chances of success and the advanced payment of costs was taken by the single investigating judge. If the fees are paid in advance, the judgment on the merits can be handed down by the single judge, provided that a second judge concurs, in accordance with article 111 (e) of the Asylum Act (No. 142.31) of 26 June 1998. Failing such agreement, the judgment on the merits is handed down by a panel of three judges, in accordance with article 21 (1) of Act No. 173.32 of 17 June 2005 on the Federal Administrative Tribunal, in conjunction with article 105 of the Asylum Act. Thus, the interim ruling did not prejudge the ruling on the merits. Moreover, it is not apparent from the file that the request for the complainant to pay costs in advance prevented her from exhausting this remedy.[8]

4.5 Therefore the State party concludes that the complainant did not exhaust the available domestic remedies.

Issues and proceedings before the Committee

Consideration of admissibility

5.1 Before considering any claims submitted in a communication, the Committee must decide whether it is admissible under article 22 of the Convention.

5.2 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.

[3] *A.K. v. Switzerland* (CAT/C/36/D/248/2004/Rev.1), para. 7.2.

[4] *R.K. v. Canada* (CAT/C/19/D/42/1996), para. 7.2; see also *N.D. v. France* (CAT/C/15/D/32/1995), para. 5; *D. v. France* (CAT/C/19/D/45/1996), para. 6.2; *R. v. France* (CAT/C/19/D/52/1996), para. 7.2; *P.S. v. Canada* (CAT/C/23/D/86/1997), para. 6.3; and *L.O. v. Canada* (CAT/C/24/D/95/1997), para. 6.5.

[5] *M.A. v. Canada* (CAT/C/14/D/22/1995), para. 4.

[6] *Arana v. France* (CAT/C/23/D/63/1997), para. 6.1.

[7] *A.E. v. Switzerland* (CAT/C/14/D/24/1995), para. 3.

[8] *X. v. Switzerland* (CAT/C/63/D/704/2015), para. 8.3.

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

5.4 The Committee notes that the State party challenged the admissibility of the communication on the basis of non-exhaustion of the available domestic remedies. It takes note of the State party's argument that: (a) the complainant submitted a second asylum application in 2018; (b) the State Secretariat for Migration heard her reasons before rejecting the application; (c) the Federal Administrative Tribunal overturned the State Secretariat's decision and returned the case to the lower authority for a new decision; and (d) the State Secretariat conducted a new hearing with the complainant, in the presence of her legal representative, and again rejected the application for asylum. The complainant, represented by her legal counsel, again lodged an appeal with the Federal Administrative Tribunal; the investigating judge dismissed the application for free legal aid, taking the view that the action had no chance of success, and set the complainant a time limit for payment of the advance on the costs of the proceedings. The Committee notes that, since the complainant did not pay the advance on costs as requested, the Tribunal did not proceed with her appeal.

5.5 The State party asserts that, if the complainant had paid the fee for the procedure, the judge could have ruled on her application for review and that, in the absence of such a payment, the application must be considered inadmissible. The Committee notes that, having failed to pay the review application fees, the complainant showed a lack of due diligence in her efforts to see the extraordinary review process through to its conclusion. It also notes that she has never claimed to be unable to afford to pay the required fees within the prescribed time limit and finds that she has not provided a satisfactory explanation as to why she did not pay them. The Committee recalls that the opening of a new asylum application gives the applicant the right to stay in Switzerland until the procedure is completed[9] and that the complainant has not provided any information to the contrary. The Committee is therefore of the view that domestic remedies have not been exhausted in accordance with article 22 (5) (b) of the Convention.

6. The Committee therefore decides:

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

(b) That this decision shall be transmitted to the State party and to the complainant.

[9] Ibid.