THE HIGH COURT

2005 72 J .R.

BETWEEN

MIGUEL KIALA

APPLICANT

AND
THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM,
THE ATTORNEY GENERAL AND IRELAND

RESPONDENTS

AND
HUMAN RIGHTS COMMISSION

NOTICE PARTY

Judgment of Mr.Justice Murphy delivered the 15th day of July, 2005.

1. The applicant seeks leave to appeal for the following reliefs by way of judicial review:

§ an order of *certiorari* quashing the decision of the respondent making a deportation order in respect of the applicant and communicated by letter dated 12th January, 2005;

§ a declaration that the decision is *ultra vires* and that the Immigration Act, 1999 (Deportation) Regulations, 2002 were made in excess of the powers of the Act and are null and void;

§ an order granting leave to amend the proceedings following the receipt of the analysis and/or reports underpinning the decision of the respondent;

§ an injunction restraining the enforcement of the decision to deport; damages pursuant to s.3 of the European Convention on Human Rights Act, 2003 of that Act that the rule of law governing the scope of judicial review relating to deportation decisions set out in *O'Keeffe v.An Bord Pleanála* is incompatible with the European Convention on Human Rights.

2. Grounds

2. The grounds stated for the above reliefs are:

(1) The decision of the respondent to make the deportation order is ultra vires and unsustainable in law by reason of mistake of law.In failing to apply or properly apply s.4 of the Criminal Justice (United Nations Convention Against Torture) Act, 2000 and/or s.5 of the Refugee Act, 1996 (as amended) in making the deportation order herein, the respondent exceeded his jurisdiction.

(2) The respondent had no lawful authority or statutory basis to make an order deporting the applicant.The Immigration Act, 1999 (Deportation) Regulations, 2002 were made in excess of the powers of the Act and are null and void.Further and in the alternative, the deportation order is irregular and is null and void.In particular, the deportation order fails to state where the applicant is to be deported to, in breach of the constitutional and legal rights of the applicant, including the right to fair procedures.

(3) The respondent failed to consider the representations for leave to remain invited and submitted pursuant to s.3 of the Immigration Act, 1999.The applicant had a legitimate expectation that the said representations would be decided upon, and the respondent ignored the said legitimate expectation.

(4) The applicant has been denied fair procedures throughout the processing of his application for refugee status and/or his application for leave to remain.

(5) The respondent, his servants or agents, have taken into account irrelevant considerations and/or failed to take into account relevant considerations.

(6) Insofar as it is necessary to seek an extension of time in respect of grounds advanced in these proceedings, it is submitted than an extension of time should be granted in the interests of justice having regard to the facts of the case.In particular, the applicant has failed to gain sight of any decision relating to his humanitarian leave representations or to any analyses and/or reports relating to the decision to make a deportation order.

(7) It is disproportionate to make the deportation order.

(8) The applicant's human rights will be compromised by the making of the deportation order by the respondent such that he is entitled to a judicial examination of the decision of the respondent, the reasoning behind the decision and the evidence upon which the decision is based.Insofar as this Honourable Court is restricted to confining itself to the "O'Keeffe test" in reviewing the respondent's decision to make the deportation order, such a review is inadequate and contrary to the rights guaranteed by the European Convention on Human Rights such as to indicate incompatibility with the said Convention, and, if appropriate, the applicant seeks a declaration of incompatibility pursuant to s.5(1) of the European Convention on Human Rights Act, 2003.

(9) The impugned decision does not comply with the Refugee Act, 1996 (as amended) and/or the Immigration Act, 1999 (as amended) and/or the Illegal Immigrants (Trafficking) Act, 2000 (as amended) and/or the Immigration Act, 2003 (as amended) and/or the Immigration Act, 2004.Further, the decision was based on a decision of the Refugee appeals Tribunal which was constitutionally unlawful and the applicant had no opportunity to challenge the decision.

(10) If which is denied the said decision does comply with the aforesaid legislation, it is contended that the Refugee Act, 1996 and/or the Immigration Act, 1999 and/or the Illegal Immigrants (Trafficking) Act, 2000 (save as upheld under Article 26 of the Constitution) and/or the Immigration Act, 2003 and/or the Immigration Act, 2004 are unconstitutional and

contrary to the constitutional rights of the applicant and/or contrary to the European Convention of Human Rights.

(11) The failure to adhere to the statutory scheme in a proper manner or to otherwise examine the applicant's application for refugee status was in breach of the personal rights of the applicant in particular was in breach of the provisions of the European Convention on Human Rights Act, 2003.

(12) The procedures and consideration applied by the first named respondent to the applicant's case are not capable of a perception of objective fairness.

3. Affidavit of Applicant
The applicant, an Angolan national, deposes that he sought asylum in the State by reason of his fear of persecution.He says he remains in fear of persecution if returned to Angola.He arrived in Ireland on 2nd May, 2002, applied for asylum and completed a questionnaire.He was interviewed on 8th October, 2002 and again on 6th November, 2002.

The Commissioner recommended that he not be declared a refugee.He received reports pursuant to ss.11 and 13.He submitted a notice of appeal on 17th February, 2003 and was informed that his appeal was unsuccessful on 16th May, 2003.He says that the respondent relied on inaccurate information and findings in relation to the Commissioner's report and that the appeal decision was deeply flawed; that he was denied any proper opportunity to challenge the decision.The Refugee Legal Service chose not to challenge the decision and by the time he was notified there was no time to organise a challenge.On 12th June, 2003 the respondent proposed to make a deportation order and representations were made for leave to remain.No reply was received to those representations.

By letter dated 12th January, 2005 the respondent's decision to make a deportation order was notified to him.He says that he had not seen the original reports and/or analyses pursuant to s.3 of the Immigration Act, 1999, and s.5 of the Refugee Act, 1996 (as amended) which might be in existence.He says that there is no reference to s.4 of the Criminal Justice (United Nations Convention Against Torture) Act, 2000 in the deportation order.

He said that he fled Angola on account of his fear of persecution resulting from his membership of and activities for the Front for the Liberation of the Enclave of Cabinda (FLEC) and that he feared death if he returned.He referred to the Human Rights Watch reports regarding Cabindan people and to correspondence with the respondent.

He believes that the decision of the respondent to deport him was unreasonable; does not say to which place he was to be deported; that the deportation order was void and that the Immigration Act, 1999 (Deportation) Regulations, 2002 were *ultra vires*.

He says that his application for leave to remain was conducted without any particular diligence and was a violation of the reasonable time required in the fair trial provisions of Article 6.1 of the European Convention on Human Rights.The respondent failed to have any proper regard for his family or domestic circumstances.The absence of diligence breached his personal rights, including his rights to a private and home life, to earn a livelihood and to be treated without discrimination.The respondent acted in breaches of the requirements of natural justice, had regard to irrelevant considerations and failed to have regard to many relevant considerations.The respondent erred in law and failed to set out any proper reasons for the decision.

4. Evidence

4.1 Personal Details
The applicant was born on 23rd June, 1976 and, accordingly, is now 29 years of age.His wife was born on 10th October, 1978 and is now 27 years of age.They have twins, born on 30th December, 1999, and a further child born on 10th May, 2001.He says he travelled under a European passport but lost his documents.He was in police custody for political reasons because he was a member of FLEC.

4.2 Questionnaire
In the questionnaire dated 8th May, 2002 he gave the reasons for seeking asylum as follows:

He is an engine driver or naval mechanic and a member of FLEC – Cabindan Liberation Front which he joined in 1995.FLEC knew that he was travelling on a ship along the entire Angolan coast and would bring letters for FLEC.His briefcase disappeared with the letters and he could not find it.He informed the members of the party.Two weeks later the fiscal police (customs) arrested him and asked if a briefcase containing FLEC documents belonged to him.He was betrayed by a shipmate.The police started to torture him on 4th September, 2001 and he was interrogated, spent two weeks in Viana Prison and was then transferred to Namibe where he spent another six months.

At the beginning of April, 2002, a policeman who was in charge of giving assistance to the prisoners came with a car and drove him to Yuri Gagarin airport to Luanda where he went into hiding in the Samba neighbourhood.Members of the party and relatives informed him that he would be re-arrested if caught.They said they had to sell part of his property to bribe the man who released him and to make arrangements to get him out of the country.He left Luanda for Paris on 30th April, 2002 with a European passport, accompanied by a white man.On 1st May, 2002 he left with that man and came to Ireland.The man asked for the passport back and left him in the city centre and returned to Paris.He asked and was shown the place where he could seek asylum.

4.3 Interview
In his interview on 8th October, 2002 with the immigration authority (the first interview) he said he left his country because he had political problems and persecution, that he was a member of FLEC/FAC political party but was only a member of the political wing which he joined on 15th January, 1995 as his parents had been members.He was born and lived in Luanda.Though his parents were from Cabinda he never lived there.He did not bring his membership card with him but, having got in touch with the Cabindan leader in Belgium, he received a card and a membership certificate for that illegal organisation which is trying to negotiate with the Angolan government to negotiate a deal for Cabinda.The penalty for being found carrying FLEC/FAC documents was prison and being killed.He was caught carrying letters, which he had done since 1995.He described his training and work as a naval mechanic.He eventually worked for a private company and worked on the Corimba, which was a fishing vessel with approximately 40 crew.

On 10th August, 2001, when he arrived in Cabinda, he was approached by FLEC to take back letters to Luanda which took nine days' voyage.Letters are opened if they are posted.They had to go back to sea on 4th September, 2001 and needed a stamp on his certificate before boarding the ship.He was put aside by the fiscal police and his certificate taken.He was handcuffed and beaten and asked questions about the bag he had lost which they said was found on the ship.The police described the documents which stated the movements and activities of the party.He was not shown the bag.A colleague came forward and identified him as the owner of

the bag.There were other documents in the bag which identified him as the owner of the bag.The documents related to FLEC were sealed.He could not tell what was in them.He denied he was a member of FLEC and denied ownership of the bag.He was kept for a few hours and transferred to a prison in Viana.Later, he said he was shown his identity card which they found in the bag and he was charged with a crime against the security of the State.He was not taken to any court and was held in Viana for two weeks and transferred to a prison in Namibe for six months.

On 28th April, 2002 a vehicle from the police sports services came.His name was called and he was driven away in the car and brought to Yuri Gagarin Airport and brought from Namibe to Luanda and brought to the policeman's house where he was visited by his relatives and members of the movement.His relatives explained that they had sold his house so that funds would be generated to facilitate his escape from prison and to leave the country.If he was found it would be very dangerous.On 30th April the policeman brought him a European passport which had another black man's photo on it.He met a white man in France and spent a night with him.

On 1st May the white man took him to the airport and said he was taking him to a place where he could apply for asylum because in France he would not be that secure.He travelled to Ireland with that man who was called Clemente Joao.

He said that other members of the movement had been arrested.He did not reveal any names.FLEC avoid putting names in letters for security reasons.People are put in preventative custody without ever being tried by a court.There was no way that he could have got a solicitor.

He said that if he returned to Angola he feared being persecuted and possibly being killed.He sought the protection of this State because his life was in danger in Angola.

He did not authorise or give permission to sell his house.

4.4 Report
The report pursuant to s.11(2) of the Refugee Act, 1996 would appear to summarise the answers in the interview.

The findings in the report and recommendation pursuant to s.13(1) are as follows:

The s.13(1) report commented that if posted letters were opened as a security measure, such activity could be expected to be carried out in a confidential environment rather than as stated by the applicant that "at all times you can see them opening them".

The applicant said that he was not confronted with the bag or the alleged incriminating documentary evidence when questioned or when charged, even though this was allegedly in the possession of the police and could be deemed to support such a charge.

The version of events of his escape would require collaboration between the police, the prison authorities or at least someone on duty at the prison and the military operating the flight to Luanda, all of whom are agencies of the State.

The report noted that the applicant did not seek asylum in France nor did he nor his wife seek the services of a solicitor when he was arrested.

The applicant's documents relating to his membership of FLEC/FAC appeared since his arrival in Ireland.

The court notes that his house was allegedly sold by his family but he stated that he had not given such authority.It is unclear what the position of his wife and children was at that stage and where they lived or were to live.

4.5 Commissioner's Findings
In view of the findings of the Commissioner that the applicant lacked credibility on the basis that his version of events cannot be proved or disproved, and that his credibility was of the essence.The Commissioner did not accept that the applicant was persecuted nor accept that he had established a well-founded fear of persecution and, accordingly, the Commissioner was satisfied that he had not established a case to qualify him for refugee status as defined by s.2 of the Refugee Act, 1996.

5. Appeal
On 17th February, 2003, the applicant appealed on the basis of ten errors of fact and six errors of law as follows:

5.1 Errors of Fact:

(a) Failing to ascertain the true picture of the applicant's circumstances and consequently drawing erroneous conclusions unfavourable to the applicant.

(b) Failing to consider correctly or at all, the applicant's membership of the political wing of the Front for the Liberation of the Enclave of Cabinda (FLEC/FAC) and the extrajudicial executions and torture suffered by members and sympathizers of that party.(Amnesty International Report)

(c) Having regard to the applicant's failure to request the services of a solicitor when he clearly stated in his answer to Question 57, during his second interview "I was arrested and taken to prison directly, so there was no way that I could get a solicitor".

(d) Having regard to the applicant's wife's failure to request the services of a solicitor or go to the police when he clearly stated in his answer to Question 60, during his second interview, "No, in Angola when somebody is detained in those circumstances you do not go to the police because it becomes a danger for you as well".In this regard see page 3 of the attached Amnesty International Report which states "Reports of soldiers and other officials threatening to harm or kill people or actually carry (sic) out beatings and killings are commonplace".

(e) Finding that the applicant's story, particularly the aspects relating to his alleged release from prison, lacks credibility.In this regard see page 4 of the attached Amnesty International Report which describes an incident in July of 1997 involving several youths who were arrested and beaten by Military Police and whose release was only later secured by bribes.It is submitted that such occurrences are commonplace in Angola.

(f) Finding that if the police had evidence of the applicant's involvement with FLEC/FLAC, in particular his bag and its

contents, they would have confronted him with such evidence.This finding is at odds with the applicant's answer to Question 29 of his second interview where he stated "In the Criminal Directorate they showed me my I.D.that they found in the bag".

(g) Failing to consider correctly or at all the degree of protection afforded to the applicant by the Angolan authorities.

(h) Failing to have regard or any proper regard to the FLEC/FAC membership documents submitted by the applicant.

(i) Failing to have regard or any proper regard to the threats to the applicant's life and liberty.

(j) Failing to consider correctly or at all the safety of the applicant were he to be returned to Angola.

5.2 Errors of Law:

(a) Finding that the applicant has not established a case such as would qualify him for refugee status as defined by section 2 of the Refugee Act, 1996 (as amended).

(b) Failing to consider correctly or at all paragraph 201 of the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status by taking isolated incidents out of context and in failing to consider correctly or at all, all the circumstances of the application.

(c) Failing to consider correctly or at all the applicant's well-founded fear of persecution within the context of paragraphs 51 and 66 of the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status.

(d) Failing to make any sufficient evaluation of whether or not the applicant displayed any subjective fear of persecution in accordance with paragraph 37 of the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status.

(e) Placing an onerous burden on the applicant in contravention of paragraphs 196, 197 and 210 of the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status.

(f) Failing to make any sufficient determination whether or not the applicant had been the victim of persecution or whether such threat might still subsist.

5.3 An excerpt from Amnesty in relation to Angola was appended which included a reference to Cabinda and FLEC/FAC.FLEC attacks have usually been followed by raids by the government, apparently in retaliation, on villages in the vicinity of the attack.Unarmed civilians have been beaten and killed and soldiers have looted and burned house.Soldiers and police appear to act with impunity – so far as Amnesty International knows, there have been no official inquiries into reports of torture or extrajudicial executions, nor have those suspected of carrying out such crimes been brought to justice.… Such killings indicate that the perpetrators are acting with the acquiescence or complicity of the government.In 1997 the number of attacks by Angolan government forces on villages suspected of supporting armed FLEC factions have multiplied.Few people dare to speak about these violations.It is difficult to obtain detailed information about human rights violations and to corroborate reports independently.

Following attacks by FLEC/FAC, FLEC – and the Cabinda Democratic Front in February and March, 1997, dozens of unarmed villagers were reported to have been extrajudicially executed by government troops.Others were tortured.

In July, 1997 several youths were arrested and beaten by military police and had to give bribes to be released.

The Amnesty report was dated 1st April, 1998 and it did not, accordingly, refer specifically to the time when the applicant left nor, indeed, the present position.

6. Decision of the Refugee Appeals Tribunal
The eleven page decision of the Member of the Refugee Appeals Tribunal, dated 17th May, 2003, refers to the applicant's membership of and performance of tasks for FLEC/FAC and records his fear of persecution for reasons of political opinion.

The decision notes that the applicant never lived in Cabinda; that his parents were from Cabinda, were supporters of FLEC and lived in Luanda and that the applicant's wife and children remained in Angola.The decision notes that there was no documentary evidence of his involvement in the youth wing of the organisation and that his membership card issued from Grenoble on 10th July, 2002, giving an Irish address and a date of inscription as 15th March, 1995, as a youth member.The decision records that FLEC appeared to react calmly to the loss of his bag and did not react against him in any way by way of warning or remonstration which appeared to the Tribunal to be at odds with the stated gravity of the task he undertook.There was no medical evidence to substantiate the marks on his body which he said came from the beatings he received.He gave inconclusive evidence in relation to the legal ownership of his house and his family's involvement and ownership and sale and questioned how the applicant's house could be sold without his involvement.The decision states that certain aspects of the applicant's narrative raised questions as to the substance and credibility of his account as he was not an active member of FLEC but was nonetheless trusted by them but left unrebuked.Even though he stated he had heard a colleague on board give evidence to the police that he had seen him get documents from FLEC, he was not arrested immediately.When he disembarked at Luanda he was not confronted by the police with the bag or the letters.In the view of the Tribunal those matters were not evidence of a well-founded fear of persecution and the applicant's story concerning his release was implausible.There were discrepancies appearing in the applicant's official documents.

The decision referred to the Handbook on Procedures and Criteria for Determining Refugee Status, paras.37, 42, 195 and 196, in order to determine the validity and credibility of whether a claim for persecution has been presented.The decision refers to the subjective (fear) and objective (well-founded) elements and refers to the relevant case law in relation to persecution and the text book treatment (Hathaway & Goodwin Gill).Finally, the decision refers to the burden and standard of proof and concluded that the applicant did not hold a well-founded fear of persecution and found that his account was unsatisfactory in terms of credibility and substance.The decision of the Commissioner was affirmed and the applicant's appeal rejected.

The applicant was advised on 28th May, 2003 by solicitor and counsel that they did not believe there were grounds for bringing judicial review proceedings and advised certain choices.The applicant was notified of the intention to make a deportation order on 12th June, 2003.On 28th June, 2003, the applicant's solicitor applied for leave to remain in Ireland on humanitarian grounds and

summarised the facts presented to the Commissioner and to the Appeals Tribunal.The solicitor's letter was accompanied by references and a letter, of the same date, by the applicant to the effect that if the decision was to send him back he would prefer to die over here or "to suicide myself".

7. Submissions on behalf of the applicant
There is a further country of origin report from Human Rights Watch in relation to which no specific comments were made.

Reference was made to the following authorities:

Carciu v.Minister, Finlay Geoghegan J., 4th July, 2003.

Kramarenko, [2004] 2 I.L.R.M.550.

Lelimo, Clarke J., 30th November, 2004.

Da Silveira, Peart J., 9th July, 2004.

J.O.E.and Eksabe, Finlay Geoghegan, 25th October, 2004.

Sibiya, Butler J., 2nd December, 2004.

Amadasun, Peart J., 16th December, 2004.

Idiakheua, Clarke J., May, 2005.

8. Submissions of behalf of the respondents
Mr.Tony Butler, Assistant Principal Officer of the Minister referred to the application of 2nd May, 2002, the interviews of 8th October and 6th November, 2002 and to the refusal of refugee status of 30th January, 2003.The appeal of 7th April, 2003 affirmed that decision.A deportation order was signed on 27th July, 2004 and the applicant was notified on 12th January, 2005.The deponent stated that the principle of refoulement (s.5 of the Refugee Act, 1996 as amended) was properly applied.Section 3 of the Immigration Act, 1999 was considered.

A deportation order was made by lawful authority and was intra vires.The applicant's human rights were not and would not be violated on his return to his country of origin.

The applicant was out of time to make the application.

9. Decision of the Court
This is an application for leave for relief as against the Minister in the making of the deportation order communicated on 12th January, 2005.No relief is sought as against the Tribunal.The issue is, accordingly, the propriety of the deportation order made by the Minister.The respondent maintains that the order was based on the decision of the Tribunal and of the examination of files by, and the recommendation of, the supervisors under ss.3 and 5 of the Refugee Act, 1996.

Notwithstanding, the submissions of both applicant and respondent relate more to the decision of the Refugee Appeals Tribunal that to the decision of the Minister.

In particular, counsel for the applicant submitted that it was difficult to understand the finding in relation to the credibility of the applicant in relation to the applicant leaving a note for the captain and crew; the questions regarding the sale of his house; whether he was an active member of FLEC or not and the circumstances of his release from prison.No relief was sought against that finding nor are there any grounds in relation to credibility.

9.2 The relief and the grounds relate only to the decision to deport:

- that the decision was *ultra vires* the Regulations;

- that the Immigration Act, 1999 (Deportation) Regulations, 2002 were made in excess of the powers of the Act and are null and void;

- that the rule of law governing the scope of judicial review relating to deportation decisions *(O'Keeffe v.An Bord Pleanála)* is incompatible with the European Convention on Human Rights.

Practice Direction dated November 15th, 1993 requires written submissions to be filed in all applications for judicial review but this is not required at the leave stage.What is required is that there are substantial or arguable grounds, reasonable probability of success and a serious issue to be determined.The burden of proof at the leave stage is lighter than at the second substantial stage.The purpose of the leave stage is to act as a preliminary filtering process for which the applicant is required to establish a prima facie case.

The affidavit of the applicant sworn 24th January, 2005, refers to the asylum process.He said that he had not seen the original reports and/or analyses pursuant to s.3 of the Immigration Act, 1999 and s.5 of the Refugee Act, 1996, which might be in existence.He said his solicitor had written on his behalf seeking the reports made pursuant to s.3 of the 1999 Act and s.5 of the 1996 Act without referring to that letter but adding that he would swear a further affidavit on receipt of the requested reports.In fact the applicant has the reports made pursuant to s.11(7) and s.13(1) of the 1999 Act.

He refers to his intention to challenge the decision to make the deportation order (para.13 of grounding affidavit).An extension of time was sought in addition to the substantive reliefs.The applicant's complaint refers to his application for refugee status and for leave to remain (para.15 of his affidavit).

The applicant refers to the Regulations being made in excess of the Immigration Act, 1999 and that *O'Keeffe v.An Bord Pleanála* was incompatible with the European Convention.No reasons were given nor, indeed, were legal submissions made in regard thereto.

The applicant did not appeal the decision of the Refugee Appeals Tribunal.No extension of time was sought to do so.The Tribunal is not a party to the application which is limited to the granting of the deportation order dated 27th July, 2004 sent by registered post to the applicant a.k.a., *inter alia*, Kiala Miguel.The applicant says, without further explanation, that this decision was not communicated to him until 12th January, 2005.This averment at para.11 is unsatisfactory.

Moreover, the applicant's affidavit at para.15, refers to his application for refugee status and/or leave to remain having been conducted without any particular diligence in order to minimise delay in violation of article 6.1 of the European Convention.There was no "minimisation of delay" in respect of the making or execution of the deportation order.

The application is not properly grounded and is out of time.The court refuses to extend time.

The court acknowledges that this is not the substantive hearing but an application for leave.Leave to apply for judicial review is a discretionary remedy and requires the appropriate elements of the burden of proof to be discharged by the applicant.

The court, accordingly refuses leave.