CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

SECOND SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 47638/99
by Christian BASIKA-NKINSA
against Germany

The European Court of Human Rights (Second Section) sitting on 31 August 1999 as a Chamber composed of

Mr C. Rozakis, *President*,
Mr M. Fischbach,
Mr G. Bonello,
Mrs V. Strážnická,
Mr P. Lorenzen,
Mr A.B. Baka,
Mr E. Levits, *Judges*,

with Mr E. Fribergh, *Section Registrar*;

Having regard to Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms;

Having regard to the application introduced on 19 March 1999 by Christian Basika-Nkinsa against Germany and registered on 22 April 1999 under file no. 47638/99;

Having regard to the report provided for in Rule 49 of the Rules of Court;

Having deliberated;

Decides as follows:

THE FACTS

The applicant is a Angolan national, born in 1968. He lives currently in Sundern (Germany).

He is represented before the Court by MM. Albert Sommerfeld, Manfred Strahl and Mrs. Barbara Weiser, lawyers practising in Soest (Germany).

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

On 15 April 1993 the applicant arrived in Germany. On 22 April 1993 he applied for political asylum. In support of his request he submitted that he had lived in Cabinda, an enclave separated from the rest of Angola by a strip of territory of the Democratic Republic of Congo, where he had engaged in activities in favour of the organisation *Frente de Libertação do Enclave de Cabinda*, the Front for the Liberation of the Enclave of Cabinda (FLEC). He was charged with propaganda and mobilisation and with the co-ordination between the population and the various offices of the FLEC. During the presidential elections in September 1992 he organised a demonstration in Ngoyo persuading people not to participate at the elections. He was arrested and taken into detention in Tshowa where he was held for six months, during which time he was, he contended, beaten and tortured. On 31 March 1993 he managed to escape through the assistance of his uncle. On 4 April 1993 he arrived in Luanda. On 7 April 1993 he took a plane to Lisbon and subsequently arrived in Germany. He asserted that he could not return to his country without risking his life.

On 23 September 1993 the Federal Office for Refugees (*Bundesamt für die Anerkennung ausländischer Flüchtlinge*) dismissed the applicant's request and invited him to leave the German territory within one month. The Federal Office did not consider that the evidence he adduced in support of fear of persecution to be reliable and doubted the credibility of his asylum claim.

On 2 February 1994 the applicant filed an action against the refusal of asylum and his envisaged expulsion with the Arnsberg Administrative Court (*Verwaltungsgericht*). He claimed that if returned to Angola he had a well-founded fear of persecution, not only because of his political engagement in Angola, but also because of his political activities in Germany where he collaborated closely with the organisation of the FLEC and the *Forças Armadas de Cabinda*, the Cabindan Armed Forces (FAC). In the proceedings before the Administrative Court he was represented by counsel.

On 5 June 1997 the Arnsberg Administrative Court dismissed the action. The court pointed out that information provided in particular by the German Ministry of Foreign Affairs on 7 February 1997 and Amnesty International on 8 April 1997 could not confirm the applicant's submissions that a demonstration had taken place in Ngoyo in September 1993 and that he had been detained in prison in Tshowa. The court further observed that the situation complained of was limited to Cabinda, but members of the FLEC were present in Cabinda and could move freely. There was no indication that Angolan citizens who had requested political asylum abroad were subjected to political persecution upon their return to Angola. According to information of the German Ministry of Foreign Affairs, the known political activities of Angolan citizens abroad, in particular in Germany, would be unlikely to attract the interest of Angolan authorities unless they were to include acts of violence against Angola. The applicant

had assured that he had not taken part in any military action against the Angolan army. There was therefore no reasonable likelihood that the applicant would be persecuted if he were to return to Angola.

On 9 June 1998 the Administrative Court of Appeal (*Oberverwaltungsgericht)* of the Land of North Rhine-Westphalia rejected the applicant's request for leave to appeal (*Antrag auf Zulassung der Berufung*) on the ground that the applicant's submissions were not sufficiently substantiated.

On 1 July 1998 the applicant renewed his request to be granted asylum (*Asylfolgeantrag*). He referred to his previous statements and added that on 21 February 1998 he had been elected president and co-ordinator of the German fraction of the FLEC- FAC which had 51 members. According to him, it must be assumed that members of the Angolan embassy knew of his political engagement and that, in the event of his return to Angola, he would be persecuted. Further, according to a report of Amnesty International of April 1998, the situation in Cabinda had deteriorated. Unarmed civilians were deliberately tortured or killed during army raids by Angolan troops on their villages following FLEC attacks in the vicinity. There was no investigation into the reports of beating and other abuses or to prosecute those responsible.

On 9 July 1998 the Federal Office for Refugees refused to conduct new asylum proceedings. It took the view that the applicant's submissions gave no ground for a more favourable decision. There was no indication that the applicant would be exposed to political persecution for his political activities in Germany.

On 20 July 1998 the applicant filed an action with the Arnsberg Administrative Court claiming to be to granted political asylum.

On 29 July 1998 the applicant applied for an *interim injunction* (*einstweilige Anordnung*) requesting to stay his expulsion pending the administrative court proceedings.

On 11 August 1998 the Arnsberg Administrative Court dismissed this request. The court observed that pursuant to the relevant legal provisions, a further set of asylum proceedings was only admissible if there were reasons to reopen the proceedings and the refugee had been prevented, through no fault of his own, from submitting these reasons in the first set of proceedings. Moreover, the change of circumstances had to be presented in a conclusive manner. In the applicant's case, his new submissions did not constitute relevant circumstances for a more favourable decision. It further confirmed the view that, in any event, the applicant's purely political activities in Germany were not likely to attract the interest of the Angolan authorities and that there were no solid reasons to believe that on his return to Angola he might suffer political persecution.

The applicant filed a constitutional complaint against this decision.

On 25 September 1998 a panel of three judges of the Federal Constitutional Court (*Bundesverfassungsgericht*) declined to accept the applicant's constitutional complaint for adjudication.

In summer 1998 the applicant had requested to be transferred to the United States of America. Pending this request the German authorities granted the applicant a provisional

residence permit (*Duldung*). On 29 July 1999 the applicant was informed that his referral request had been dismissed and that the expulsion order would be implemented as soon as a travel document would be available.

COMPLAINTS

1. The applicant complains that his expulsion to Angola would expose him to a real risk of torture or inhuman or degrading treatment in violation of Article 3 of the Convention, because of his political involvement for Cabinda in Angola and his activities as a leading figure of the FLEC-FLAC in Germany.

2. The applicant further complains that in breach of Article 6 § 1 of the Convention he was refused a fair hearing in the asylum proceedings. He contends that as the German courts had not properly taken into account his recent political activities as a leading figure of the FLEC-FAC in Germany which, he claimed, confirmed the dangers to which he would be exposed upon his return to Angola.

3. The applicant finally complains that, contrary to Article 13 of the Convention, he had no effective remedy for his claim under Article 3 of the Convention. He contends that the refusal of taking into account his political activity as president of the FLEC-FAC in Germany in the asylum proceedings rendered his right to seek asylum ineffective.

PROCEEDINGS BEFORE THE COURT

The application was introduced on 19 March 1999 and registered on 22 April 1999.

By a letter of 6 August 1999 the applicant requested the Court to stay his expulsion from Germany.

On 20 August 1999 the President of the Chamber decided not to indicate to the Government of Germany, pursuant to Rule 39 of the Rules of Court, the measure requested by the applicant.

THE LAW

1. The applicant complains under Article 3 of the Convention about his envisaged expulsion to Angola where he fears reprisals and imprisonment on account of his former political activities in that country and in particular his activities in Germany as a leading figure of the FLEC-FAC.

Article 3 of the Convention provides as follows:

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

The Court recalls that Contracting States have the right, as a matter of well-established international law and subject to their treaty obligations including the Convention, to control

the entry, residence and expulsion of aliens. Moreover, the right to political asylum is not contained in either the Convention or its Protocols. However, it is well established in the case-law of the Court that expulsion by a Contracting State may give rise to an issue under Article 3 and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person in question, if expelled, would face a real risk of being subjected to treatment contrary to Article 3 in the receiving country. In these circumstances, Article 3 implies the obligation not to expel the person in question to that country (see, among other authorities, the Chahal v. the United Kingdom judgment of 15 November 1996, *Reports of Judgments and Decisions* 1996-V, p. 1853, §§ 73-74; and the Ahmed v. Austria judgment of 17 December 1996, *Reports* 1996-VI, p. 2206, §§ 38 and 39).

However, the mere possibility of ill-treatment on account of the unsettled general situation in a country is in itself insufficient to give rise to a breach of Article 3 of the Convention (see the Vilvarajah and others v. United Kingdom judgment of 30 October 1991, Series A no 215, p. 37, § 111).

The Court recalls that its examination of the existence of a real risk of ill-treatment must necessarily be a rigorous one in view of the absolute character of Article 3 (see the above-mentioned Chahal judgment, p. 1859, § 96). It notes in this regard that the German authorities had due regard to the arguments submitted by the applicant in the administrative court proceedings as well as to the past and current situation in the receiving country. It also observes that the Federal Office for Refugees found that the applicant's recollection of the events which led him to leave the Angola was unreliable and that it had serious reservations about the credibility of the applicant's account in general. Furthermore, the Federal Office for Refugees carefully evaluated the evidence which the applicant submitted in support of his renewed asylum request. The Court observes that the findings of the Federal Office for Refugees were confirmed by the Arnsberg Administrative Court.

Having regard to the above considerations and having examined the arguments and materials submitted by the applicant, the Court considers that the applicant has not shown that there are substantial grounds for believing that he would face a real risk of being subjected to treatment proscribed by Article 3 if removed to Angola. It follows that this complaint is manifestly ill-founded within the meaning of Article 35 § 3 of the Convention and must be rejected pursuant to Article 35 § 4.

2. The applicant complains that, in breach of Article 6 § 1 of the Convention, he was refused a fair hearing, as the German courts refused to take into account his political activities in Germany as a leading figure of the FLEC-FAC which, he claimed, showed a concrete risk militating against his return to Angola.

Article 6 § 1 of the Convention provides insofar as relevant:

> "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair ... hearing ... by an independent and impartial tribunal established by law."

The Court does not consider it necessary to examine whether the guarantees contained in Article 6 of the Convention apply to the impugned proceedings. It notes that in the instant case the Arnsberg Administrative Court has taken into consideration the applicant's political

activities in Germany and has concluded in the light of the information provided by the German Ministry of Foreign Affairs that purely political activities in Germany were not likely to attract the interest of the Angolan authorities. The court proceedings do not indicate any element of unfairness. It is to be observed that the applicant was legally represented in those proceedings. These considerations lead it to conclude that the applicant's complaint under this head is manifestly ill-founded within the meaning of Article 35 § 3 of the Convention and must be rejected pursuant to Article 35 § 4.

3. Invoking Article 13 of the Convention in conjunction with Article 3, the applicant complains that the refusal of taking into account his political activity as president of the FLEC-FAC in Germany in the asylum proceedings rendered his right to seek asylum ineffective.

Article 13 reads as follows:

"Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

The Court recalls that Article 13 of the Convention guarantees the availability of a remedy at national level to enforce the substance of the Convention rights and freedoms in whatever form they may happen to be secured in the domestic legal order. Its effect is thus to require the provision of a domestic remedy allowing the competent "national authority" both to deal with the substance of the relevant Convention complaint and to grant appropriate relief (see the see the above-mentioned Vilvarajah and others v. the United Kingdom judgment, p. 39, § 122).

In the Court's view, the remedy at the applicant's disposal under German law, namely the applicant's constitutional complaint to the Federal Constitutional Court, satisfies these requirements.

It follows that this complaint is also manifestly ill-founded within the meaning of Article 35 § 3 of the Convention and must be rejected pursuant to Article 35 § 4.

For these reasons, the Court, unanimously,

DECLARES THE APPLICATION INADMISSIBLE.

Erik Fribergh
Registrar

Christos Rozakis
President