

**REFUGEE STATUS APPEALS AUTHORITY**  
**NEW ZEALAND**

**REFUGEE APPEAL NO 76342**

**AT AUCKLAND**

**Before:** B L Burson (Member)

**Counsel for the Appellant:** C Curtis

**Appearing for the Department of Labour:** No Appearance

**Date of Hearing:** 15, 30 & 31 July 2009; 24 & 25  
March 2010

**Date of Decision:** 23 April 2010

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**DECISION**

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[1] This is an appeal against a decision of a refugee status officer of the Refugee Status Branch (RSB) of the Department of Labour, declining the grant of refugee status to the appellant, a national of the Democratic Republic of Congo (DRC).

**INTRODUCTION**

[2] This is the appellant's second appeal to the Authority. The appellant arrived in New Zealand on 11 October 2007. He lodged a claim for refugee status on 23 October 2007 ("the first claim"). He was interviewed by the RSB in respect of the first claim on 10 December 2007, 3 and 4 January 2008. By decision dated 31 March 2008 the RSB declined the appellant's first claim. The appellant appealed to the Authority. By decision dated 1 October 2008 the Authority (differently constituted) dismissed the first appeal.

[3] On 23 December 2008, the appellant lodged a second claim for refugee status. He was interviewed by the RSB in respect of his second claim on

20 February 2009. By decision dated 21 April 2009 the RSB declined jurisdiction to hear and consider his subsequent claim. The appellant again appealed to the Authority.

[4] Because this is the appellant's second appeal, the appellant must first establish that the Authority has jurisdiction to hear the appeal.

### **JURISDICTION OF THE AUTHORITY TO HEAR THE APPEAL**

[5] Section 129O(1) of the Immigration Act 1987 (which came into force from 1 October 1999) ("the Act") provides:

"A person whose claim or subsequent claim has been declined by a refugee status officer, or whose subsequent claim has been refused to be considered by an officer on the grounds that the circumstances in the claimant's home country have not changed to such an extent that the subsequent claim is based on significantly different grounds to a previous claim, may appeal to the Refugee Status Appeals Authority against the officer's decision."

[6] To address this issue, the Authority must compare the appellant's original claim and his second claim. Unless the appellant's second claim is based upon significantly different grounds, the Authority will not have jurisdiction to consider the second appeal: see *Refugee Appeal No 75139* (18 November 2004).

[7] Where jurisdiction to hear and determine the subsequent claim is established, the Authority must consider the merits of the subsequent claim in order to determine whether the appellant is a refugee within the meaning of Article 1A(2) of the Refugee Convention. This hearing may be restricted by the findings of credibility or fact made by the Authority in relation to the previous claim. That is because s129P(9) of the Act prohibits any challenge to a finding of fact or credibility made by the Authority in relation to a previous claim and the Authority has a discretion as to whether to rely on any such finding.

[8] In this appeal, therefore, it is proposed to consider the appellant's original claim and his further claim, as presented at the second appeal, with a view to determining:

- (a) whether, in terms of s129O(1) of the Act, the Authority has jurisdiction to hear the second appeal and, if so,
- (b) whether the appellant is a refugee within the meaning of Article 1A(2)

of the Refugee Convention.

### **The first claim**

[9] The appellant's first claim was based on allegations that he had been involved in various political activities opposed to the president of the DRC, Joseph Kabila. He claimed to have joined a church lead by a pastor opposed to Kabila. He also claimed to have joined an opposition party, the *Mouvement de Liberation de Congo* (MLC) and that his brother, who had been the MLC treasurer and right-hand man of its leader, was killed in fighting between MLC forces and pro-Kabila government forces in March 2007. He further claimed to have been detained on two separate occasions in 2006 and 2007. He claimed that in 2007 during his second detention of some two to three months' duration he was subjected to torture to the point of being hospitalised. He claimed to have escaped from the hospital and thereafter travelled clandestinely to Congo Brazzaville before travelling to New Zealand via South Africa on a false passport.

[10] The Authority hearing the first appeal found that the appellant had been involved with the church but rejected as not credible his account of being involved with the MLC, his being detained and tortured, and his account of the death of his brother.

### **The second claim**

[11] The appellant's second claim is based on his ethnic identity as a Banyamulenge. The Banyamulenge are Congolese Tutsis who historically originated in Rwanda and who have suffered harassment and periodic persecution at the hands of Congolese ethnic groups. The appellant claims that following the determination of his first claim, inter-communal fighting in the east of the DRC has erupted making it unsafe for all Banyamulenge. Although he is only part-Banyamulenge, his facial features resemble those of a Banyamulenge and this is enough to expose him to harm at the hands of the Congolese population who harbour resentment and animosity towards Banyamulenge. Also, during the course of the hearing, the appellant was diagnosed with Type 1 diabetes. He claims he will be discriminated against in accessing health care services and medicines he needs to control his diabetes. He also fears he will be denied Congolese nationality. Finally, the appellant asks the Authority to revisit the finding made by the previous panel in respect of the death of the person he claimed to be his brother in light of fresh evidence.

## **Assessment of jurisdiction**

[12] On 15 July 2009, the Authority determined in a preliminary ruling that it has jurisdiction to hear this appeal. The appellant's second claim is founded upon a resumption of large-scale fighting between protagonists in the conflict raging in eastern Congo in late August 2008. As will be discussed in more detail in due course, this outbreak of fighting is no more than the latest round in a conflict which has plagued the DRC on an ongoing and episodic basis since at least 2003. However, at the time of the Authority's decision in respect of the first appeal, there was a temporary lapse in fighting between the protagonists as a result of diplomatic efforts in late 2007 and early 2008 – see International Crisis Group *Congo: Five Priorities for a Peacebuilding Strategy* (11 May 2009) at p2. This resumption of conflict, coupled with the claim now being advanced on the ground of ethnicity (race), meant that the Authority was satisfied that circumstances in the DRC have changed to such an extent from that which pertained in October 2008 and that the appellant's second claim is based on significantly different grounds to his first.

## **Preliminary issue – the question of the appellant having Canadian nationality**

### *Background*

[13] On 9 September 2009, while the Authority was in the process of finalising its decision, the Authority received a letter from the RSB dated 8 September 2009 advising that it had received information that the appellant may in fact hold Canadian nationality. The significance of this is that in order to be recognised as a Convention refugee, the appellant must establish that he has a well-founded fear of being persecuted for a Convention reason in respect of each of his countries of nationality. No final determination of this appeal could therefore be made unless a finding was reached as to whether the appellant was a national of Canada in addition to being a national of the DRC.

[14] On 24 September 2009, the Authority received from the RSB copies of fingerprints taken from the appellant for forwarding to the Canadian immigration authorities for comparison with the fingerprint evidence of the person whose passport the appellant used, together with a copy of the interview report completed following an interview by Immigration New Zealand (INZ) with the appellant 19 August 2009. In this interview, the appellant denied being a Canadian national but admitted entering New Zealand on a Canadian passport belonging to a person he

claimed was his cousin.

[15] In her letter of 10 December 2009, counsel referred to the impact the stress of waiting for the outcome of the investigations was having on the appellant's health problems. In early August 2009, the appellant had been hospitalised following a diagnosis of Type 1 diabetes. Counsel now advised that on 8 December 2009 the appellant was found "near a coma" at the hostel where he lives. On 15 December 2009, the Authority received a further letter from counsel submitting a Patient Report form completed by St John's dated 8 December 2009. The appellant is noted as becoming hypoglycaemic and shaking because he had "not eaten all day". The report notes: "Refugee – problems with getting food/money".

[16] Attached to counsel's letter of 10 December 2009 were copies of a series of emails between counsel and Mr MacRae, a compliance officer with INZ's Compliance Operations Branch. In an email to counsel dated 24 November 2009, but not copied to the Authority, Mr MacRae states:

"The Canadians indicated that an initial search had not resulted in a match for [the appellant's] fingerprints.

However, we are currently awaiting a definitive response from the Canadians of the results of an extended search.

It is anticipated that the outcome will be available in the not too distant future.

I hope to be in a position to advise you further before very long."

[17] Having regard to the ongoing health problems being experienced by the appellant, as a result of his diabetes, and the pressure being placed on the Auckland Refugee Council who, by letter dated 2 September 2009, had written regarding the large cost to the ARC of subsidising and assisting the appellant in managing his diabetes, the Authority determined that this matter should be relisted to hear further evidence as to the issue of the appellant having Canadian nationality. Accordingly, the Authority set the matter down for hearing on 24 and 25 March 2010, this being three months after Mr MacRae's email to Ms Curtis and sufficient time for INZ to submit such further information it received from the Canadian authorities. Despite requests being made of INZ for any further information regarding the investigations being made with the Canadian authorities, as at the date of the reconvened hearing in late March 2010, no further information had been received from INZ.

[18] At the reconvened hearing, the appellant repeated the account he had

given to Mr MacRae. The appellant explained that, fearing for his safety, he fled to Congo Brazzaville by boat where he stayed with a friend of a cousin. His cousin arranged for a false passport to be obtained for him and, using this passport, he fled to South Africa. In South Africa he contacted another cousin who was, by that time, a Canadian citizen and arranged with his cousin to borrow his Canadian passport to come to New Zealand. His cousin was approximately the same age, shared the same surname and they looked very similar. The appellant duly entered New Zealand using this passport. The appellant explained that, as a result of telling the truth about this assistance his cousin gave him, his cousin is now under investigation by the Canadian authorities for having allowed the appellant to use it in this way. This has caused his cousin's father (the appellant's paternal uncle) to become very angry with him. This uncle had been looking after the appellant's children in the DRC but is no longer doing so. They are now being cared for by the appellant's fiancée, AA, and an email to this effect was produced.

#### *Determination of the preliminary issue*

[19] The Authority is not satisfied on the evidence before it that the appellant holds Canadian nationality. The fingerprint evidence available is that the appellant's fingerprints and those of the Canadian national whose passport he used to enter New Zealand do not match. While the email from Mr MacRae dated 24 November 2009 talks about further inquiries being made, the Authority has been provided with no further information by INZ as to those inquiries and how they could potentially outweigh the fingerprint evidence. Noting the appellant's account to the Authority was consistent with what he told Mr MacRae, the Authority finds that the appellant is a national of the DRC only.

[20] What follows, therefore, is a summary of the evidence given in support of this second claim in relation to the DRC. An assessment follows thereafter.

## **THE APPELLANT'S CASE**

### **Evidence of the appellant**

[21] The appellant was born in the mid-1960s. His father is an ethnic Nande, an ethnic Congolese tribe originating from the west of Congo. He is the pastor in a church in DRC. The appellant's mother is from North Kivu, in eastern Congo, and is a Banyamulenge. The Banyamulenge are mainly Tutsis of Rwandan origin who

migrated to the DRC over the last 150 years. The Banyamulenge mainly live in the eastern parts of the DRC.

[22] The appellant's surname is an ethnic Nande surname. He cannot speak the Banyamulenge language apart from understanding basic commands that had been given to him by his mother. He does not converse in that language. Rather, he is fluent in the four national languages of the DRC and in French. However, his facial features are ones he inherited from his mother's side. Whereas ethnic Congolese tribal groups have round faces, the facial features of Banyamulenge Tutsis are narrower and, accordingly, he is readily identifiable as a Banyamulenge.

[23] The appellant undertook his primary schooling in Kinshasa at his father's parish. At secondary school level he was sent to a boarding school in Bandundu province. In the late 1970s, his parents moved from Kinshasa to a town in Bandundu province. The appellant returned home from boarding school during the school holidays. Following completion of his secondary schooling in 1984, the appellant attended university and obtained his degree in 1992.

[24] Following completion of his degree, the appellant began teaching at a secondary school attached to his father's church. The appellant married in 1994, and taught at this school until 1997. At this time he decided to cease teaching, because it was poorly paid, and became a street-trader travelling between Kinshasa and towns near the Angolan border to trade his goods and purchase small quantities of diamonds to fund purchases of further goods in Kinshasa.

[25] By 2000, the appellant was tired of this work which was hard and dangerous. By now he had three small children. During 2001, the appellant travelled from Kinshasa to Kivu in eastern DRC on a number of occasions to try and find better employment. While there he stayed at his mother's familial village. Eventually, his persistence was rewarded and he was offered employment at an educational institute called ABC. ABC ran both primary and secondary schools as well as an orphanage. Although the children in the orphanage were primarily Banyamulenge, there were also Rwandan and some ethnic Congolese children. The appellant's principal role was to travel around the Kivu region and identify children who had been orphaned or abandoned as a result of conflict in the region.

[26] Whilst working at ABC, there was conflict between the Democratic Forces for the Liberation of Rwanda (FDLR) – a Rwandan hutu militia comprised in part of members of the Hutu *interahamwe* largely held responsible for the genocide of

Tutsis and moderate Hutus in the Rwandan genocide in the mid-1990s, the forces of Laurent Nkunda – a Tutsi Brigadier in the Rwandan-backed rebel group the Congolese Rally for Democracy (RCD), and the Congolese national armed forces loyal to President Joseph Kabila. This resulted in many deaths and mass displacement of civilians. The appellant travelled to internally displaced persons' (IDP) camps in the outlying countryside in the wake of armed conflict. While the FDLR blocked access by international humanitarian organisations and international organisations, it tended to allow locally based non-governmental organisations (NGO) access. ABC was one such NGO and the appellant and his colleagues travelled to IDP camps after UNHCR-secured humanitarian corridors. The appellant's role was to identify children abandoned or orphaned as a result of the fighting and bring a list of those children back to the head of the school who tried to accommodate as many as possible in the orphanage. In the event that there was too great a number of children their details were given to United Nations (UN) agencies or international NGOs.

[27] The appellant's family remained living in Kinshasa during this time as periodic fighting made it too dangerous for them to come to the eastern part of the DRC. The appellant worked in this capacity until March 2007 at which point he returned to Kinshasa. While he was in Kinshasa, his brother, BB, was killed. BB was a well-known businessman and a right-hand man to Jean-Pierre Bemba, who had stood against Joseph Kabila in the disputed 2006 presidential election. His brother was killed in post-election violence between the armed forces and guards loyal to Bemba.

[28] The appellant fears being persecuted if returned to the DRC for two reasons. First, while it is the case that there were tensions between Banyamulenge and other Congolese ethnic groups in the past, the situation has now worsened following the resumption of conflict between Laurent Nkunda and the Congolese army in the eastern part of the country in October 2008. No matter where the appellant would be in the DRC he would not be safe from attack by members of the Congolese population who see Banyamulenge as Rwandan and blame them for waging wars against the Congolese people inside the DRC. Whereas, before, the fact that he could speak the Congolese national languages protected him from the previous bouts of anti-Banyamulenge violence, now mere facial similarity suffices to expose him to harm. He will be discriminated against in accessing essential health care needs to manage his diabetes. While managing diabetes in the DRC is generally problematic in that insulin is not widely available



and is expensive, and it is difficult to maintain an appropriate diet, the situation for him as a Banyamulenge will be appreciably worse. He believes, even assuming he could afford insulin, that he will be refused it because he is Banyamulenge or, if it is sold to him, it will be at a vastly inflated price. Because of this, he has no doubt that he will only survive a matter of days if returned to DRC.

[29] Second, because of his filial relationship to BB. Prior to his brother's death, Joseph Kabila often visited the appellant's brother at the latter's home and the appellant was present on some of these occasions. At these meetings Joseph Kabila tried, to no avail, to convince the appellant's brother to transfer his financial backing and loyalty from Jean-Pierre Bemba to him. However, the appellant's brother refused and made it clear that he was maintaining a relationship with Jean-Pierre Bemba. The appellant believes that, because he is the brother of a close confidant and political associate of Jean-Pierre Bemba, he is at risk. The government has maintained a secret list of people to be assassinated and those with links such as his to Jean-Pierre Bemba would be on that list.

[30] The appellant explained that because his mother is Banyamulenge he is no longer entitled to DRC nationality. As such he would not be able to get a passport and if he were to be returned to the DRC it would be under a travel document. He would therefore be questioned at the airport which would expose his relationship to his now deceased brother.

### **The evidence of CC**

[31] The Authority heard from CC on two occasions – on 30 July 2009 and, following counsel's request that he give further evidence, on 25 March 2010. He has been in New Zealand since September 1996. CC, at the time he first gave evidence, was the President of the Congolese Community of New Zealand Incorporated (CCNZ). CC has been associated with the CCNZ since its inception in 1998 and indeed was its first president. He has also served as vice-president and his latest role as president was, in fact, his second.

[32] CC explained to the Authority that he has no doubt that the appellant is indeed the brother of BB. He knows this because he went to the same boarding school as BB (who was then known by another name) albeit CC was in a more junior year. The senior students made the junior students carry out mundane tasks for them. On one occasion in 1980, BB asked CC to carry his bags and boots to a football tournament and he was invited back to BB's parents' house

after the game. He and other invited students stayed for dinner and were at the house for approximately three hours. During the dinner the students were served food by BB's younger sisters and his younger brother brought them drinks of water.

[33] CC told the Authority that he had no idea that the appellant was the brother of BB until approximately February or March of this year. On this occasion the appellant and CC were at the house of another Congolese person and, during the course of conversation, the name of BB was raised. The appellant then mentioned to the group that this person was his brother. CC explained that this initially brought laughter and scorn from the assembled Congolese who did not believe him. However, the appellant went on to describe the place where the family home was and its layout. At this point CC mentioned that he too had been to the family home after a football match. Without prompting, the appellant then recounted what had happened that very evening and, in particular, recounted a heated conversation between his mother and father about the appellant's father trying to proselytise to the young schoolboys. The appellant told the group that his mother was chastising his father telling him that he should "let the boys rest". CC was astonished. This was exactly what had happened during this dinner conversation and it had been mentioned unprompted by the appellant. He remembers even during his school years that BB was harassed on the basis that he, like the appellant, looked Rwandese and not Congolese. For these reasons he has no doubt that this is the brother of BB.

[34] CC told the Authority that as a result of the resumption of fighting in the DRC in late 2008, the appellant had been ostracised from the Congolese community in New Zealand because he is considered a Banyamulenge. There is another Banyamulenge couple who also tried to have involvement with the Congolese association but like the appellant, they too have been ostracised. He explained that there are approximately ten Banyamulenge families in New Zealand but they tend to associate with the Rwandese or Burundian communities and not the Congolese. CC told the Authority that, whereas before October 2008, ethnic Congolese in New Zealand were willing to listen to the appellant and engage him in conversation, after this time they would not even acknowledge him if he was in a meeting. He explained that the appellant's previous lawyer had asked for representatives of the community to attend the RSB hearing and while they initially agreed, in the end they refused.

[35] CC explained that what happened in New Zealand was replicated in the Congolese communities in other parts of the world. If there was relative stability in the DRC the groups got on. Whenever there was conflict, the diaspora groups polarised along these ethnic lines. When CC gave evidence in March 2010 he explained that the situation had deteriorated since he first gave evidence in July 2009. He explained that in February 2010 he and the existing executive had been forced to resign due to pressure from a group within the ethnic Congolese community who objected to the support they had been giving to the appellant.

[36] Finally, CC told the Authority that in June/July 2009 he had attended a UNHCR conference in Geneva on resettlement on behalf of the Association of Refugee Communities of New Zealand. At that conference, two Banyamulenge from the DRC spoke and they explained that daily life is “one of real stress”. They said Banyamulenge throughout the DRC were treated very badly, some killed and others discriminated against. CC has kept in contact with one of them who has told him she was too afraid to re-enter the DRC via Kinshasa after the conference and rather entered the country using the overland border with Rwanda – something which was very difficult. This person fled to South Africa in late 2009 due to an attack on her daughter for an unrelated reason. She told CC that after returning to DRC she stayed in Goma but had found life very difficult. Congolese verbally abused her and refused to sell her goods to the point where she had to get others to do her shopping, her house was also attacked by youths on one occasion.

[37] CC told the Authority that the problem for the appellant, as a Banyamulenge, was not so much with the government or army, but with the ordinary Congolese population who blame the Banyamulenge (Tutsi) and the Hutu dominated FLDR for waging war on the Congolese. To ethnic Congolese, both are Rwandans. Banyamulenge are routinely discriminated against throughout the DRC. He has heard reports of Banyamulenge being killed by having tyres placed around their necks and then being set ablaze. CC told the Authority that he is concerned for the appellant’s wellbeing due to his diabetic condition. He believes that it is unlikely that, as a Banyamulenge, he would be sold insulin and other things he needed to control his diabetes

### **The evidence of DD**

[38] DD, who is in his seventies, told the Authority that he knew the appellant’s family in the DRC. He originated from South Kivu in the eastern DRC and has

children there. Two of his friends from school were the brothers of the appellant's grandfather. He knew that his friends, who were Banyamulenge, had a brother living in eastern DRC and that this brother had allowed his daughter to marry an ethnic Congolese man from the Western DRC. DD explained that he had met the appellant in New Zealand through the CCNZ. In conversation with DD, the appellant told him something of his family background and mentioned that he grew up in the same western province. He mentioned that his mother had come from the same place in eastern DRC that his two friends had mentioned as being the place where their brother lived. DD has no doubt the appellant is Banyamulenge.

[39] He confirmed that the appellant has not been accepted by the Congolese community in New Zealand because he is Banyamulenge. The Banyamulenge and Rwandans are blamed for many deaths in the Congo. He believes the appellant could be arrested and killed if returned to DRC. In telephone conversations he has had with his children recently, his children have mentioned that "right now" the Banyamulenge are not on good terms with the ethnic Congolese population.

### **Submissions and documents**

[40] Many documents have been received from counsel in the course of this appeal. Thus, on the dates specified below, the Authority has received the following documents:

- (a) On 6 July 2009, a memorandum of submissions dated 3 July 2009;
- (b) On 16 July 2009, a document written in French attached to an email from Ms Curtis dated 15 July 2009;
- (c) On 22 July 2009, an unsigned copy of the statement from CC;
- (d) On 24 July 2009, a copy of the translation of the document received on 16 July 2009 together with a translation of a document said to be a blacklist compiled by the National Information Agency in Kinshasa in which the appellant's brother, BB, is mentioned;
- (e) On 30 July 2009, medical certificate from Dr Wansbrough dated 28 July 2009;

- (f) On 2 September 2009, counsel's written submissions on the documents served together with:
- (i) A letter dated 2 September 2009, from Elizabeth Walker, the executive officer at the Auckland Refugee Council regarding the cost to the ARC of subsidising and assisting the appellant to manage his diabetes;
  - (ii) A further bundle of country information;
  - (iii) Copy of the Authority's decision in *Refugee Appeal No 2254/94*;
  - (iv) Copy of article by Roger Marley Lukunga entitled "The CNDP of Knundabatware fanned the flame..." of unspecified date and unspecified origin together with translation; and
  - (v) Copy of emails passing between CC, counsel and the person said by CC to have attended the UNHCR meeting in Geneva, together with a list of six questions provided by counsel to be answered by that person;
- (g) On 22 September 2009, a letter from the Auckland District Health Board dated 25 August 2009 referring to the appellant's attendance at cardiology outpatients in respect of a detected heart murmur;
- (h) On 24 March 2010, a letter from Dr Paul Drury, Medical Director of the Auckland Diabetes Centre;
- (i) On 24 March 2010, an email in French dated 23 March 2010 from AA regarding the appellant's children; and
- (j) On 16 April 2010, letter dated 15 April 2010 enclosing country information as to attacks in 2010 on Banyamulenge by the Congolese national army.

[41] In addition, the Authority served on counsel the following documents throughout the hearing:

- (a) A copy of the decision in *Refugee Appeal No 72175* (14 December 2000);

- (b) A partial copy of a report by the International Crisis Group *Congo: Bringing Peace to North Kivu* (31 October 2007) (“the ICG North Kivu report”);
- (c) A copy of a report by the International Crisis Group *Congo: Five Priorities for a Peacebuilding Strategy* (11 May 2009) (“the ICG Peacebuilding report”);
- (d) A bundle of country information from UNHCR relating to conflict and displacement in North and South Kivu between October 2008 and July 2009;
- (e) International Crisis Group *Congo: A Comprehensive Strategy to Disarm the FDLR* (9 July 2009) (“the ICG FDLR report”);
- (f) Human Rights Watch *World Report: Congo* (2009);
- (g) Minority Rights Group International *State of the World’s Minorities 2008 – Democratic Republic of Congo* (11 March 2008);
- (h) Immigration and Refugee Board of Canada, *Democratic Republic of Congo: Current treatment of the Banyamulenge people in the Democratic Republic of Congo* (11 June 200) RDC41641.FE;
- (i) Immigration and Refugee Board of Canada, *Democratic Republic of Congo: Treatment of Congolese Tutsis (Banyamulenge) from the East in the western and southern parts of the country, mainly in Kinshasa and Lubumbashi; whether Banyamulenge are specifically singled out by the general population and by government authorities because of their ties to the rebel movements for whom they are believed to be spies* (12 December 2005) COD100781.FE;
- (j) Copies of the decision of the United Kingdom Court of Appeal in *R v SSHD ex parte Kalombo* [2009] EWCA Civ 302 and Immigration Appeal Tribunal in *AB and DM v SSHD* (Risk categories reviewed – Tutsis added) DRC CG [2005] UKIAT 00118.

[42] At the conclusion of the hearing counsel made further oral submissions. Counsel submitted that, as a Banyamulenge, the appellant would suffer discrimination by the ethnic Congolese. This would expose him to an ongoing risk

of physical attack and there is a real chance that he would be denied access to essential health services and medical needs to manage his diabetes. Without this he would suffer serious health consequences.

## **THE ISSUES**

[43] The Inclusion Clause in Article 1A(2) of the Refugee Convention provides that a refugee is a person who:

"... owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it."

[44] In terms of *Refugee Appeal No 70074/96* (17 September 1996), the principal issues are:

- (a) Objectively, on the facts as found, is there a real chance of the appellant being persecuted if returned to the country of nationality?
- (b) If the answer is yes, is there a Convention reason for that persecution?

## **ASSESSMENT OF THE APPELLANT'S CASE**

### **Credibility**

[45] While the appellant's admission of telling lies in the context of his first claim weighs against him in assessing his evidence in support of this second claim, having regard to the evidence of CC and DD who both presented as credible witnesses, the Authority accepts that the appellant possesses the morphology of a Banyamulenge such that his facial features resemble a Banyamulenge more than an ethnic Congolese. This is despite the fact that he is only part-Banyamulenge on his mother's side. Also, the medical evidence establishes that the appellant has Type 1 diabetes. Having regard to the evidence of CC (which was not available to the Authority hearing the first appeal) the Authority also accepts that he is the natural brother of BB as he claims. The question is whether by these facts he has a well-founded fear of being persecuted.

**Objectively, on the facts as found, is there a real chance of the appellant being persecuted if returned to the country of nationality?**

**The Banyamulenge in the DRC**

*General overview*

[46] The appellant's second claim has as its main driver the claim that anti-Banyamulenge sentiment has reached extreme levels following a fresh outbreak of fighting in 2008 linked to Laurent Nkunda. In order to contextualise that claim a brief account of the satiation of Banyamulenge in the DRC is required. A useful background is contained in Appendix C to the ICG North Kivu report. Although dealing with ongoing conflict in North Kivu, the report sets out various factors which have lead to problems for the Banyamulenge community in the DRC generally. It notes, at p22:

"Local violence originates in inter-communal resentment. It is fuelled by competition for land and political/economic power and has been exacerbated by massive migration of Rwandans (Banyarwanda), years of political manipulation and bad governance from Kinshasa, and the consequences of the genocide in Rwanda."

[47] Similar observations are set out in a report to the Human Rights Council *Technical Assistance And Capacity-Building: Combined report of seven thematic special procedures on technical assistance to the Government of the Democratic Republic of the Congo and urgent examination of the situation in the east of the country* UN doc A/HRC/10/59 (5 March 2009) ("the HRC Seven Experts report").

This report notes:

77. The political instrumentalization of ethnic cleavages in the eastern DRC feeds the conflicts in the region and exacerbates the human rights violations that precede and accompany them.

...

78. To some extent, the ethnic divisions in eastern DRC are related to colonial resettlement programmes, population displacements into the DRC, including the massive inflow of Tutsi refugees fleeing pogroms in Rwanda in the 1960s, the political instrumentalization of minorities under the Mobutu regime and the large-scale displacements in the aftermath of the genocide in Rwanda. In a region that was historically sparsely populated, the demographic changes in the eastern DRC also created tremendous competition over scarce resources, in particular agricultural land and grazing areas, thus creating an environment that is prone to the manipulation of ethnic cleavages. Many land conflicts result from competing claims based on formal titles or customary law; tensions between returnees and those who stayed further complicate the situation. Extensive documentation is available showing how armed factions have been created along ethnic lines as a consequence of displacement and the manipulation of ethnic divisions.



79. Limited progress has been achieved to address this dimension of the crisis in the eastern DRC. Yet, it will be impossible to treat the most recent outbreak of violence and the massive human rights violations accompanying it without focusing on its underlying causes, among which lies the interplay of politics, economics and ethnicity. Particular action is needed at the local level in order to bring peace to communities that have yet to recover from the ethnic divisions that were fuelled by years of conflict. The success of local reconciliation programmes is also contingent on effective policies that address the local distribution of resources, in particular land.”

### *The Nkunda insurgency*

[48] The Nkunda insurgency, upon which the appellant based his second claim, grew out of these dynamics. The ICG North Kivu report, at pp22-25, details the history of Banyarwanda (a collective term for Rwandan tribes) settlement in the DRC and in the Kivu region in particular which forms the background to the Nkunda insurgency. The ICG North Kivu report explains how war broke out following the collapse of the alliance between President Laurent Kabila and the governments of Uganda and Rwanda which supported him militarily during his seizure of power in 1997. In the wake of the disintegration of this alliance, its proxy agent in the east, the *Rassemblement Congolais pour la Démocratie* (Congolese Rally for Democracy (RCD)) split. In North Kivu, the dominant RCD faction relied on both Tutsi officials and Rwandan security forces to assert economic control of the region.

[49] Following the collapse of the June 2003 Sun City peace deal, a former RCD Tutsi general, Laurent Nkunda, became head of a dissident movement which refused to recognise the authority of the military regional commissioner appointed by Joseph Kabila, who succeeded his father (Laurent Kabila) to the presidency following the latter’s assassination in 2001. Nkunda unveiled his own movement, the National Congress for the Defence of People (CNDP) and projected himself as the protector of Tutsis. Between 2003 and 2007, heavy fighting occurred between the Nkunda-led CNDP forces and the Congolese National Army. An anti-Tutsi militia, the Coalition of Resistance Congolese Patriots (PARECO) was formed which escalated the conflict further. Nkunda’s troops, led by officers of mostly Tutsi origin who had been with him in the RCD, began systematically targeting ethnic Congolese civilians in a reprisal campaign.

[50] Presidential elections were held in 2006. In late November 2006, prior to the announcement of the election result, Nkunda renewed attacks on the Congolese National Army leading to fresh fighting in the Kivu region of eastern DRC. This round of conflict was brought to a temporary lapse with the signing of

the Nairobi communiqué of 9 November 2007 and the Goma conference of 2008. However, this process collapsed in May 2008 following the resumption of open fighting between the CNDP and the Congolese National Army. The IGC North Kivu report notes, at p3, that:

“By early October [2008] CNDP started to raise the stakes calling for a liberation of the Congo, challenging the legitimacy of national institutions and questioning economic contracts with China.”

With the assistance of the Rwandan army, the CNDP successfully attacked the Congolese National Army positions and marched towards Goma, only stopping under international pressure.

[51] In early 2009, Nkunda was placed under house arrest in Rwanda and replaced as head of the CNDP. The Congolese and Rwandan governments agreed to a joint military operation designed to remove the FDLR from Congolese territory – ICG FDLR report at pp1-5. These military operations have had only limited success but resulted in a new round of mass displacement and attacks on civilians in both North and South Kivu by the FDLR. According to the United Nations Office for the Co-ordination of Humanitarian Affairs, approximately 30,000 people were newly displaced in North Kivu alone between 1 January and 20 February 2009 as a result of FDLR reprisal attacks – see ICG FDLR report at p12. Equally, South Kivu has not been immune from the recent violence. Fighting erupted in South Kivu in mid-2009 which as a result of clashes between the government forces and the FDLR resulted in approximately 536,000 being displaced – see UNHCR News stories “At least 35,000 Congolese civilians displaced by fighting in South Kivu province” (24 July 2009).

#### *Conflict and inter-communal relations*

[52] Unsurprisingly, country information establishes that this history of violence and bloodshed has had a poisonous effect on inter-communal relations. Following the outbreak of war in 1998, the RCD campaign in North Kivu saw the forced reinstatement of Congolese Tutsi refugees in the region alongside the appropriation of property belonging to ethnic Congolese tribes. As the IGC North Kivu report observes, at p24, this increased resentment towards Tutsi. At this time, most Banyamulenge were driven out or evacuated from Kinshasa and other areas controlled by the Congolese government. With the assassination of Laurent Kabila in Kinshasa more popular anger and anti-Banyamulenge sentiment erupted with them being aggressively stereotyped as “non Congolese” – see here *Refugee*

*Appeal No 72175/2000* at [27]-[29].

[53] Summarising the general position as at 2005, the Immigration and Refugee Board of Canada 2005 report notes:

“During recent years, Congolese citizens of Rwandan origin, particularly Tutsis, have been subject to exclusion, shunning, resentment and hostility by members of other ethnic groups, who were often encouraged by certain media and politicians that touted hatred against those considered to be Rwandan. For that reason, most Congolese citizens of Rwandan origin who live in various regions of the country, Kinshasa in particular, feared violence and fled to the East or to neighbouring countries, or were evacuated to other countries, mainly those of Europe and of the Americas.”

[54] Sources consulted for this report paint something of a mixed picture. The various sources note that, as at 2005, with the exception of those involved in various transition institutions, few Congolese citizens of Rwandan origin would dare to return to live in Kinshasa or in the other western regions of the country. However, according to one source, this attitude is more a reflection of the fear of possible renewed hostilities than of “known abuse”. Another person consulted by the Canadian Immigration and Refugee Board also note that a few Banyamulenge live in Kinshasa and other urban centres but that those who do appear to be able to live without being targeted by other ethnic groups.

[55] That said, discrimination certainly remains. Commenting on the situation of Banyamulenge in 2008, the Minority Rights Group International report states:

“The events in eastern Congo in 2007 are a continuance of the poisonous ethnic strife which led to the genocide of minority Tutsis and Hutu moderates in Rwanda in 1994. Beyond Nkunda’s immediate circumstances, the long-term issue of the insecurity of the Banyamulenge minority in the DRC, and how they may best combat this, remains unresolved. The Banyamulenge themselves are divided over the way to a solution. Most acknowledge Banyamulenge political thinkers are in favour of a negotiated political solution, but disapprove strongly of the lack of Banyamulenge representation at both parliament and senate level. In addition, prejudice against Banyamulenge interests remains entrenched in Kinshasa, including within the administration.”

[56] There can be little doubt that the Nkunda insurgency has served to inflame and perpetuate pre-existing inter-communal tensions. The ICG North Kivu report notes, at p8, that Nkunda’s attack on the Congolese National Army in late 2006 triggered a new round of violence leading to the displacement of 100,000 people between November 2006 and January 2007 and “reignited animosity” against the Tutsi community. In terms of the impact of the 2008 fighting on this situation, the IGC Peacebuilding report notes, at pp3-4, that these renewed armed clashes resulted in a new humanitarian crisis with over 250,000 additional IDPs in North Kivu. According to the report:

“The impunity enjoyed by the CNDP and the FARDC (the Congolese National Army) has been almost absolute and contributed dangerously to the tensions between communities. Massacres were often committed on the basis of ethnicity, pitting Congolese Tutsis against Hutus and the Banyarawanda against the Hundi, Nyanga or Nande.”

The report goes on to note there were 200 separate killings of civilians as a result of indiscriminate shootings and summary executions and observes:

“Widespread sexual violence was used as a weapon of war and retaliation by armed groups against enemy communities, seriously undermining the chances of local reconciliations.”

[57] The country information filed by counsel on 16 April 2010 also refers to human rights abuses being perpetuated against Banyamulenge by Congolese National Army soldiers during military operations in 2010 further evidencing that inter-communal tensions remain.

### **The campaign against the supporters of Jean-Pierre Bemba**

[58] Ms Curtis filed an extensive report by Human Rights Watch *“We will crush you”: The restriction of political space in the Democratic Republic of Congo* (25 November 2008) in support of that aspect of the claim that relates to the appellant’s late-brother. This report confirms that in August 2008 and March 2007, a brutal campaign was waged by Joseph Kabila to neutralise Jean-Pierre Bemba as a political opponent. At p4, the report states:

“The worst of the repression took place in the capital, Kinshasa, and in the province of Bas Congo, areas where Kabila failed to win an electoral majority. In Kinshasa, Kabila launched what were in effect military operations (qualifying as internal armed conflict under international law) against his electoral rival Bemba in August 2006 and again in March 2007. Soldiers and Republican Guards interviewed by Human Rights Watch who participated in the military operations said that they had received and interpreted their orders in March 2007 as needing to “eliminate Bemba”. The military operations against Bemba and his often ill-disciplined guards were brutal and sudden. The use of heavy weapons during the busy work day in central Kinshasa left hundreds of civilians dead through the indiscriminate use of force by both sides, and left many others injured.”

[59] The report goes on to observe, at p33, that on 24 May 2008, Jean-Pierre Bemba was arrested in Belgium on the basis of a warrant issued by the International Criminal Court. The warrant was issued in respect of war crimes and crimes against humanity allegedly carried out by forces under Bemba’s command and control when MLC fighters entered the Central African Republic (CAR) between 2002 and 2003 to assist the then president of the CAR to put down a coup attempt by a former army chief.

## **Application to the appellant's case**

### **As to the claim based on his ethnicity**

#### *The risk of serious physical harm*

[60] The appellant claims that simply by resembling a Banyamulenge, he will be subjected to physical violence. The Authority notes that the appellant has been stopped from time to time in various places because he looked like a Banyamulenge. However, it is significant that the appellant also stated that the fact that he:

- (a) can speak the various national languages of DRC;
- (b) can speak French without a Rwandan or Burundian accent; and
- (c) has an ethnic Congolese surname;

meant that he was not subjected to any harm on these particular occasions.

[61] It must be recalled that the appellant was living “on and off” in Kinshasa in late 1990/early 2000, a time when there was widespread targeting of those perceived as Banyamulenge – see *Refugee Appeal No 72175/2000* (14 December 2000) at [27]-[29] where the Authority noted:

“[29] The above information establishes that since the renewed conflict in August 1998 ethnic Tutsi have been specifically targeted and subject to various abuses by both government security forces and ordinary citizens who perceive them as allied with Rwanda. During the period in question, government officials and state media continued to publish and broadcast anti-Tutsi propaganda and the population extorted to seek out Tutsi in hiding. The situation in the DRC remains unstable.”

[62] Despite resembling a Banyamulenge during this period of heightened inter-communal tensions, the appellant has not claimed to have encountered any problems because he was perceived and treated as a Banyamulenge.

[63] Also, the appellant was clear that while he was from time to time stopped at checkpoints manned by the FDLR in South Kivu when travelling to the IDP camps located in conflict zones, he did not encounter any serious harm on account of his being perceived and treated as a Banyamulenge. While the appellant says that he was often verbally harassed by the FDLR soldiers because he looked like a Banyamulenge, he always denied this and when it became clear that he could not understand Kinyarwanda (the Banyamulenge language) but could speak Swahili, Lingala, Kokongo, and spoke French with a Congolese and not Rwandan accent,

he was always allowed to go on his way. The FDLR is notoriously anti-Tutsi. In its ranks are former *Interahamwe* militia members responsible for the genocide against the Tutsis in Rwanda – see Appendix D to IGC North Kivu report. Yet even these people did not effectively treat him as a Banyamulenge simply because he resembles one.

[64] The lack of problems during times of heightened anti-Banyamulenge violence or during encounters with staunchly anti-Banyamulenge militias establish that the appellant's morphology, when considered *alongside* the bundle of other characteristics he possesses (name, language) has not exposed him in the past to being persecuted.

[65] What happened to him, or rather the lack of anything happening to him, is a reliable indicator of what may happen to him in the future absent any significant change in the country conditions in the interim. While the appellant claims there has been a substantive change for the worse in the situation of Banyamulenge since October 2008, country information does not support his contention. Rather, what anti-Banyamulenge violence is taking place appears to be no more than a continuation of what existed previously in which individual Banyamulenge in villages in the eastern regions may be caught up from time to time in the fighting that periodically, if brutally, erupts.

[66] The Authority is not satisfied that the post-October 2008 fighting linked to activity by Laurent Nkunda has caused the situation to deteriorate to such an extent that, without more, his Banyamulenge morphology will expose him to a real chance of physical violence on sight, irrespective of his place of domicile in the DRC. The closest the evidence comes to this is the assertion of "one traveller" that "the facial features of the Banyamulenge is enough to expose them to fierce persecutions" contained in the article by Roger Lukunga as specified in paragraph [41(g) (iii)] above. Yet this is an extremely thin evidential basis to establish the wide proposition that the appellant advances. Had this been the position, the Authority would have expected such a statement to be reflected more fully in the country information. In any event, it does not answer the point that the appellant, while resembling a Banyamulenge, will not be exposed to such physical harm because of the combined effect of his non-Banyamulenge characteristics.

[67] While compelling evidence has been presented by CC that the appellant has been ostracised by the Congolese diaspora here in Auckland in response to the October 2008 uprising by Laurent Nkunda, these people are reacting to him in

this way because they know he is part-Banyamulenge. In contrast, the appellant has not been effectively treated as a Banyamulenge by strangers in the past. There is no reason to believe that he will be treated differently in the future.

[68] However, that is not the end of matters. As mentioned, country information clearly establishes that anti-Banyamulenge resentment and discrimination lingers in the DRC. The forward looking assessment of risk to the appellant as a result of this continuing discrimination must take into account any specific features or characteristics which the appellant possesses – in this case his condition as a diabetic who needs regular doses of insulin to manage and control his condition. It is to this issue that this decision must now turn.

*The appellant's claim based on his diabetic condition*

[69] In his evidence the appellant told the Authority that because of his Banyamulenge morphology, he would be denied insulin. CC expressed a similar view in his evidence. The appellant further added that, even if the insulin he needed was offered to him, which he doubted, he could not afford to pay for it. He would become very ill and die after his New Zealand supply ran out a few days after his return.

[70] As to the health consequences for the appellant, in a letter dated 23 March 2010 from Dr Paul Drury, Medical Director of the Auckland Diabetes Centre confirms the appellant has Type 1 diabetes and is injection phobic. Dr Drury states he will need to remain on insulin for the rest of his life with a minimum of two daily doses, to be administered by a specialist device to overcome his injection phobia. Dr Drury states that:

“...cessation of insulin would lead to serious illness and death within a period of weeks to months. Apart from issues belonging to the minority Banyamulenge tribe in Congo, insulin is not readily available in much of sub-Saharan Africa and people with Type 1 diabetes die there from its non-availability.

...

In conclusion to return him to the Congo would place his life at very substantial risk from medical reasons alone, namely the supply of insulin.”

*The right to health under international law*

[71] The right to health is recognised under a number of general and thematic international human rights instruments, in particular:

- (a) Article 25.1 of the Universal Declaration of Human Rights 1948;

- (b) Article 12 of the International Covenant on Economic, Social and Cultural Rights 1966 (ICESCR);
- (c) Article 5(e)(iv) of the International Convention on the Elimination of All Forms of Racial Discrimination 1965;
- (d) Articles 11.1(f) and 12 of the Convention on the Elimination of All Forms of Discrimination against Women of 1979; and
- (e) Article 24 of the Convention on the Rights of the Child 1989.

[72] Other regional human rights instruments such as the European Social Charter 1961, (art 11), the African Charter on Human and Peoples' Rights of 1981 (art 16) and the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights of 1988 (art 10) also contain provisions relating to the right to health.

[73] Taken together, this series of interwoven treaty provisions underscores the importance of health to leading a life of dignity and worth, the promotion of which is a core concern of human rights protection, and as a necessary precondition to the enjoyment of other rights.

[74] Of these treaty provisions, the most expansive is Article 12 ICESCR which, so far as relevant, provides:

- “1. The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.
- 2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for:
  - ...
  - (c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases;
  - (d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness.”

[75] Individual human health, being both “subjective and intangible” and intrinsically linked to other rights such as the right to life has lead to attempts to quantify its discrete normative content – see here B Toebes “The right to health” in A Eide, C Krause, and A Rosas, (eds) *Economic Social and Cultural Rights: A Textbook*, Martinus Nijhof International (2001) at 169-190. One such example is General Comment 14, *The right to the highest attainable standard of health* E/C.12/2000/4 (11 August 2000), where the Committee on Economic Social and



Cultural Rights, (CESCR) has expanded on the normative content of the right to health in order to give greater analytical rigour. The CESCR states:

- (a) The right to health is not to be understood as a right to be *healthy* – para [8];
- (b) The right to health encompasses not only to timely and appropriate health care but also to “the underlying determinants of health” such as access to safe and potable water, adequate sanitation, an adequate supply of safe food, nutrition and housing amongst others – para [11];
- (c) The content of the right is determined by individual biological factors, socio-economic preconditions as well as a state's available resources. The state cannot ensure good health nor can states provide protection against every possible cause of human ill-health. Thus, the right to health must be understood as “a right to the enjoyment of a variety of facilities, goods, services and conditions necessary for the realization of the highest attainable standard of health.” – para [9].

[76] Whatever else may be said about its normative content, it is clear that an elemental component of the right to health is the notion that it is to be enjoyed without discrimination on prohibited grounds. This is recognised in General Comment 14 where the CESCR state, at para 12(b):

“The right to health contains a number of “ interrelated and essential elements” including that health facilities, goods and services must be *accessible* to all, especially the most vulnerable or marginalized sections of the population, in law and in fact, without discrimination on any of the prohibited grounds.”

[77] At para 18 the CESCR expand on the duty of non-discrimination and equal treatment in relation to the right to health:

“By virtue of article 2.2 and article 3, the Covenant proscribes any discrimination in access to health care and underlying determinants of health, as well as to means and entitlements for their procurement, on the grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, physical or mental disability, health status (including HIV/AIDS), sexual orientation and civil, political, social or other status, which has the intention or effect of nullifying or impairing the equal enjoyment or exercise of the right to health.”

[78] Article 2.2 of the ICESCR provides:

“The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

This imperative has been recognised by the Authority. *In Refugee Appeal Nos 75221 and 75225* (23 September 2005) the Authority examined the nature of the states obligations under the ICESCR and held:

[89] State obligations under Article 2(2) differ from those under Article 2(1) in that, it requires States to guarantee that the ICESCR rights will be exercised without discrimination on the enunciated basis. This, as Craven (*supra*) at p181 observes, creates an immediately binding obligation to end discrimination; something both advocated during the drafting of the ICESCR and subsequently endorsed in the practice of the Committee. Craven notes however, correctly, that while States are capable of elimination and are obliged to eliminate *de jure* discrimination immediately by legislative measures, it is wrong to suggest the elimination of discrimination will always be capable of being achieved immediately. This reflects the operation of the Covenant on both vertical and horizontal planes between individuals and the state apparatus (vertical), and between individual citizens (horizontal).

[90] *De jure* (vertical) discrimination can and must be dealt with expeditiously by the state. *De facto* discrimination, in the form of material inequality and individual prejudice cannot however simply be legislated away and are matters that necessitate longer term social and educational programmes. As Craven observes, it is relevant to note in this context that international instruments on discrimination all imply that States are entitled to eliminate discrimination gradually. But take steps they must. In this context, immediate legislative steps eliminating *de jure* discrimination will be a necessary first step. State action cannot stop the door of legislative measures. Beyond this, affirmative action programmes will be required to address the underlying prejudices and promote equality of opportunity.”

[79] Commenting on the relationship between discrimination and health, in his draft report, *The right of everyone to the enjoyment of the highest attainable standard of physical and mental health* E/CN.4/2003/58(13 February 2003), the then Special Rapporteur on the Right to Health, Paul Hunt, observes:

“59. Discrimination on grounds of gender, race, ethnicity and other factors is a social determinant of health. Social inequalities, fuelled by discrimination and marginalization of particular groups, shape both the distribution of diseases and the course of health outcomes amongst those afflicted. As a result, the burden of ill-health is borne by vulnerable and marginalized groups in society. At the same time, discrimination and stigma associated with particular health conditions such as mental disabilities and diseases, like HIV/AIDS, tend to reinforce existing social divisions and inequalities.

...

62. The links between stigma, discrimination and denial of the right to enjoy the highest attainable standard of health are complex and multifaceted. Together, discrimination and stigma amount to a failure to respect human dignity and equality by devaluing those affected, often adding to the inequalities already experienced by vulnerable and marginalized groups. This increases vulnerability to ill health and hampers effective health interventions. The impact is compounded when an

individual suffers double or multiple discrimination on the basis of, for example, gender, race, poverty and health status.”

*Application to the appellant's case*

[80] That the Congolese health system may be so rudimentary or ineffective that it creates a real chance that the appellant will not receive the treatment or medication he needs to stay healthy or alive, even in the short term, would not bring the appellant within the scope of being persecuted. While the appellant undoubtedly enjoys the right to the highest attainable standard of physical health under article 12 ICESCR on a non-discriminatory basis and the right not to be arbitrarily deprived of his right to life under article 6 International Covenant on Civil and Political Rights 1966, the simple inability of the Congolese health system to help manage his diabetes at all, or at a cost he could afford, due to the combined effects of underdevelopment and conflict would not bring him near the scope of the Refugee Convention. Such broad humanitarian concerns are matters wholly outside the Authority's jurisdiction which, while informed by anti-discriminatory notions, is concerned with providing surrogate international protection only against serious harm arising from the sustained or systemic violation of basic human rights demonstrative of a failure of state protection – see here discussion *Refugee Appeal No 74665/03* (7 July 2004) at [41] .

[81] While Dr Drury in his letter refers to the appellant being Banyamulenge in the context of his accessing necessary health services, the Authority has not been provided with information about Dr Drury that would qualify him as an expert of how the Banyamulenge fare in accessing essential health services in the DRC. This assertion by him is no more than that – an assertion – no doubt formed by the information given to him by the appellant. In any event, even if it were to be the case, as the appellant and CC also state, that Banyamulenge are discriminated against in accessing essential health services, this would not establish the appellant's claim having regard to the particular facts of this case.

[82] The appellant has not claimed to have encountered discrimination in accessing his socio-economic rights in the past simply because of his Banyamulenge morphology. Rather he has obtained tertiary education, found professional employment, and secured access to adequate housing while possessing the same morphology and during times of ongoing quite high anti-Banyamulenge resentment. The appellant's bare morphologic resemblance to a Banyamulenge has not outweighed the host of other factors he possesses (name

and language skills) in the eyes of the Congolese population in the DRC with whom he has come into contact in the past in terms of determining their treatment of him in the social and economic sphere. There is nothing to suggest that this will be any different in the future.

[83] Viewed against his background, the submission that he will be discriminated against in the future in accessing such health care services and facilities as exist in the DRC is essentially conjecture. Conjecture has no place in the assessment of a well-founded fear of being persecuted – see *Minister for Immigration and Ethnic Affairs v Guo* (1997) 191 CLR 559, 572; (1997) 144 ALR 567, 576 (HCA); *Refugee Appeal No 76228/01* (5 April 2002) at [131].

*The claim based on denial of citizenship*

[84] The appellant also claims that, as a Banyamulenge, he will be denied citizenship. However, as with his claims in relation to discrimination in the health field, he has never been effectively treated as Banyamulenge, his morphology notwithstanding. The risk that he would be denied citizenship because of this is also mere conjecture for the same reasons.

**As to the claim based on his brother**

[85] As noted above, the Authority accepts that the appellant is the brother of BB. The appellant claims that his brother, a successful businessman in the DRC, was the “right-hand man” of Jean-Pierre Bemba and that, as a result, he will be at risk of being harmed. The Authority accepts that the appellant’s brother was killed in March 2007 and, having regard to the document submitted on 27 July 2009 regarding his brother’s name appearing on a blacklist, the Authority is prepared to accept that he may have been killed during the March 2007 clampdown on pro-Bemba supporters. Yet there is no country information to establish that simply by being related to his late brother and having met Joseph Kabila in his company, the appellant is at any risk of being persecuted as a result at the present time. The appellant’s brother has been dead for some time now and can no longer pose any threat to Joseph Kabila’s interests. The appellant has not inherited the late brother’s business. They do not even share the same surname. It is difficult to see what interest the DRC authorities would have in him even accepting the relationship to his late brother. The appellant’s claim that he would be on a blacklist and be arrested on arrival at the airport is fanciful.

[86] Insofar as the appellant seeks to add into this mix, the claim to have been a member of the MLC himself, this was not accepted by the first panel hearing his case – see *Refugee Appeal No 76207* at [34]. During his interview in respect of his second claim with the RSB, the appellant produced an MLC membership card. It is not open to the appellant to challenge the findings made by the first appeal panel – see s129P(9) of the Act. The bare production of this documentation by the appellant who has been found to be not credible in relation to this membership and who has admitted telling lies in his first hearing (albeit on different points) is an insufficient reason for the Authority to depart from the findings made by the previous panel. No credible and compelling information independent of the appellant has been provided to persuade the authority to depart from this finding. In summary, there is no objective basis upon which the appellant will be of any interest to the DRC authorities because of his late brother's association with Jean-Pierre Bemba.

*Conclusion on well-foundedness*

[87] In light of the above, the Authority finds that the risk of the appellant suffering serious assaults causing physical harm or death amounting to his being persecuted merely because he resembles a Banyamulenge is remote. Equally, the Authority is satisfied that there is no real chance that the medication he will need or nationality, will be denied to him because of his part-Banyamulenge ethnicity. No current risk derives to him from his late brother's political activities. The first principal issue is therefore answered in the negative. The need to consider the second does not, therefore, arise.

**CONCLUSION**

[88] For the above reasons, the Authority finds the appellant is not a refugee within the meaning of Article 1A(2) of the Refugee Convention. Refugee status is declined. The appeal is dismissed.

"B L Burson"

B L Burson  
Member