

1000089 [2010] RRTA 270 (12 April 2010)

DECISION RECORD

RRT CASE NUMBER: 1000089

DIAC REFERENCE(S): CLF2009/122232

COUNTRY OF REFERENCE: Congo, Democratic Republic of

TRIBUNAL MEMBER: Suzanne Leal

DATE: 12 April 2010

PLACE OF DECISION: Sydney

DECISION: The Tribunal remits the matter for reconsideration with the direction that the applicant satisfies s.36(2)(a) of the Migration Act, being a person to whom Australia has protection obligations under the Refugees Convention.

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration and Citizenship to refuse to grant the applicant a Protection (Class XA) visa under s.65 of the *Migration Act 1958* (the Act).
2. The applicant, who claims to be a citizen of the Democratic Republic of Congo, arrived in Australia [in] July 2009 and applied to the Department of Immigration and Citizenship for a Protection (Class XA) visa [in] September 2009. The delegate decided to refuse to grant the visa [in] December 2009 and notified the applicant of the decision and his review rights by letter [on the same date]
3. The delegate refused the visa application on the basis that the applicant is not a person to whom Australia has protection obligations under the Refugees Convention
4. The applicant applied to the Tribunal [in] January 2010 for review of the delegate's decision.
5. The Tribunal finds that the delegate's decision is an RRT-reviewable decision under s.411(1)(c) of the Act. The Tribunal finds that the applicant has made a valid application for review under s.412 of the Act.

RELEVANT LAW

6. Under s.65(1) a visa may be granted only if the decision maker is satisfied that the prescribed criteria for the visa have been satisfied. In general, the relevant criteria for the grant of a protection visa are those in force when the visa application was lodged although some statutory qualifications enacted since then may also be relevant.
7. Section 36(2)(a) of the Act provides that a criterion for a protection visa is that the applicant for the visa is a non-citizen in Australia to whom the Minister is satisfied Australia has protection obligations under the 1951 Convention Relating to the Status of Refugees as amended by the 1967 Protocol Relating to the Status of Refugees (together, the Refugees Convention, or the Convention).
8. Further criteria for the grant of a Protection (Class XA) visa are set out in Part 866 of Schedule 2 to the Migration Regulations 1994.

Definition of 'refugee'

9. Australia is a party to the Refugees Convention and generally speaking, has protection obligations to people who are refugees as defined in Article 1 of the Convention. Article 1A(2) relevantly defines a refugee as any 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, is unable or, owing to such fear, is unwilling to return to it.

10. The High Court has considered this definition in a number of cases, notably *Chan Yee Kin v MIEA* (1989) 169 CLR 379, *Applicant A v MIEA* (1997) 190 CLR 225, *MIEA v Guo* (1997) 191 CLR 559, *Chen Shi Hai v MIMA* (2000) 201 CLR 293, *MIMA v Haji Ibrahim* (2000) 204 CLR 1, *MIMA v Khawar* (2002) 210 CLR 1, *MIMA v Respondents S152/2003* (2004) 222 CLR 1 and *Applicant S v MIMA* (2004) 217 CLR 387.
11. Sections 91R and 91S of the Act qualify some aspects of Article 1A(2) for the purposes of the application of the Act and the regulations to a particular person.
12. There are four key elements to the Convention definition. First, an applicant must be outside his or her country.
13. Second, an applicant must fear persecution. Under s.91R(1) of the Act persecution must involve “serious harm” to the applicant (s.91R(1)(b)), and systematic and discriminatory conduct (s.91R(1)(c)). The expression “serious harm” includes, for example, a threat to life or liberty, significant physical harassment or ill-treatment, or significant economic hardship or denial of access to basic services or denial of capacity to earn a livelihood, where such hardship or denial threatens the applicant’s capacity to subsist: s.91R(2) of the Act. The High Court has explained that persecution may be directed against a person as an individual or as a member of a group. The persecution must have an official quality, in the sense that it is official, or officially tolerated or uncontrollable by the authorities of the country of nationality. However, the threat of harm need not be the product of government policy; it may be enough that the government has failed or is unable to protect the applicant from persecution.
14. Further, persecution implies an element of motivation on the part of those who persecute for the infliction of harm. People are persecuted for something perceived about them or attributed to them by their persecutors. However the motivation need not be one of enmity, malignity or other antipathy towards the victim on the part of the persecutor.
15. Third, the persecution which the applicant fears must be for one or more of the reasons enumerated in the Convention definition - race, religion, nationality, membership of a particular social group or political opinion. The phrase “for reasons of” serves to identify the motivation for the infliction of the persecution. The persecution feared need not be *solely* attributable to a Convention reason. However, persecution for multiple motivations will not satisfy the relevant test unless a Convention reason or reasons constitute at least the essential and significant motivation for the persecution feared: s.91R(1)(a) of the Act.
16. Fourth, an applicant’s fear of persecution for a Convention reason must be a “well-founded” fear. This adds an objective requirement to the requirement that an applicant must in fact hold such a fear. A person has a “well-founded fear” of persecution under the Convention if they have genuine fear founded upon a “real chance” of persecution for a Convention stipulated reason. A fear is well-founded where there is a real substantial basis for it but not if it is merely assumed or based on mere speculation. A “real chance” is one that is not remote or insubstantial or a far-fetched possibility. A person can have a well-founded fear of persecution even though the possibility of the persecution occurring is well below 50 per cent.
17. In addition, an applicant must be unable, or unwilling because of his or her fear, to avail himself or herself of the protection of his or her country or countries of nationality or, if

stateless, unable, or unwilling because of his or her fear, to return to his or her country of former habitual residence.

18. Whether an applicant is a person to whom Australia has protection obligations is to be assessed upon the facts as they exist when the decision is made and requires a consideration of the matter in relation to the reasonably foreseeable future.

CLAIMS AND EVIDENCE

19. The Tribunal has before it the Department's file relating to the applicant's claim for protection in addition to the Tribunal's own file. The Tribunal also has the Department's file in relation to the applicant's [subclass deleted: s.431(2)] visa.
20. According to his visa application form, the applicant was born in Kinshasa in the Democratic Republic of Congo on [date deleted: s.431(2)]. He states that he is a Christian and a member of [Tribe A].
21. [In] April 2009, he was granted a [subclass deleted: s.431(2)] (Student) visa which was valid until [date deleted: s.431(2)]. He arrived in Australia [in] July 2009, travelling on a Congolese passport that had been issued [in] 2003. [In] September 2009, he lodged an application for protection.
22. In his application form, the applicant stated that he was seeking protection in Australia so that he did not have to go back to the Democratic Republic of Congo.
23. He explained why he left the Democratic Republic of Congo:

In the year 2000 and 2001, the second war in my country of origin had broken out again (Democratic Republic of Congo).

My Dad had to leave the country first to escape the chaos and we later followed him. The war was more of a tribal issue than political. My Dad because of his tribe ([Tribe A]) had to escape off the eastern part of the country to come have a better life in Kinshasa. This was not helpful at all as the tribal faction he came from was just part of the Tutsi people in Rwanda. Even after Kabila arrival in 1997 with the army made up of tribes of the east, Hutus and Tutsis as well, the people of Kinshasa did not like the idea of having them as part of the society.

The actions that led to the second Congo war (expulsion of Rwandan troops) had hostile effect on our lives. My Dad lost his job because of where he was from, and the tribe he belonged to as well, we were all affected as a family, my Dad had to first to go out of the country and we were left behind staying with our grandparent, we joined him as soon as he could reach us.

I lived most my life as a temporary resident in a foreign country ([Country A], the, I believe nine years I stayed were important as I started to get more and more aware of my surroundings.)

As soon as I finish my educations or need any documents (s) renewal, i.e. passport, I will be 'forced' to go back to my country of birth (not [Country A]), I don't want that to happen, so do my parent! My parent used every savings they had to send me to Australia for good education and start my own life without fear.

Once I go back to Congo, I will be treated like an hostile alien, I will be denied every possible access and opportunities to get my plans and project finished.

I will not be able to carry on with anything including my education, I fear worst that I will and am already blacklisted as I will not be able to neither to even get a decent job. I do not want to have to waste my parent hard work and sacrifice to waste. I do not want to go back and be persecuted because of where I come from, my tribal identity and end up struggling with a nationality that does not accept me, a government that I truly fear and know that they will not be able to protect me. My country is in total chaos and I do not want to be a victim to the scene even as I ask and claim for my refugee status.

24. If he were to go back, the applicant fears that:

I will not be accepted as a proper or normal Congolese. I will be exposed to hostile attacks on every opportunities.

I'm sure I will not be able to ever leave the country if I end up there and the life conditions in my case will be unbearable and painful.

The occurring event that partially or was just the instigator of the second Congo war would and was the issues I fear.

I am scared of suffering in the middle of a chaotic tribal and political meltdown that was supposedly meant to have ended in 2003 but just does keep getting worst as far I have been keeping track of.

I already have achieved so much for someone from my particular tribe and the fact that I originally have inheritance and link with my Dad who comes from the eastern part of my country and that is where the whole war issue was sparked.

I'm aware of my identity and I fear that will not favour in anyhow if I had to go back.

25. For the following reasons, the applicant does not believe that the authorities in the Democratic Republic of Congo would protect him on his return there:

The authorities in my country will not be able to protect me whatsoever. The political instability was accompanied with total surge of corruption, and unfairness in the government system.

After the country found out and became aware of the fact that Kabila Junior (Joseph) was not fully Congolese as he became president, the fact that he also belonged to a tribe that also was found in the eastern part of my country, more hostility grew toward him and among those who were from there as well.

The country still has not changed much since Mobutu (the second president) was removed from his 32 years of iron fist ruling.

All and most government officers are mostly corrupted and up to no good and will not have the interest to come to my rescue. My country is still relying and leaning on the United Nations to help bring peace and stability while at the same time, the whole justice is filled with flaws and errors in its proceedings.

One moment I think everything is fine, the next things are not just as fine as we thought they were, I frankly do not see how I will be protected in such a place.

26. [In] December 2009, the applicant took part in an interview with a delegate from the Department of Immigration. At interview, the applicant told the delegate that his parents had been born in the east of the Democratic Republic of Congo and moved to Kinshasa to escape tribal conflict. Because he is from [Tribe A], the applicant's father experienced discrimination in Kinshasa where he was unable to find work. In 2001, the applicant and his family moved to [Country A] where his father had gained employment. The applicant described himself as a 'temporary resident' of [Country A]. The applicant told the delegate that he feared returning to the Democratic Republic of Congo because he would be discriminated against on the basis of his ethnicity, namely as a member of [Tribe A].
27. [In] December 2009, the delegate made a decision to refuse to grant a protection visa to the applicant. In her decision, the delegate found that the applicant 'has a legally enforceable right to re-enter and to reside in [Country A].' On this basis, the delegate found that the applicant does have effective protection in a third country under section 36(3) of the Migration Act and so is not a person in respect of whom Australia has protection obligations, due to his status in [Country A]. For this reason, the delegate did not proceed to consider whether the applicant has a well-founded fear of being persecuted in the Democratic Republic of Congo for any of the reasons set out in Article 1A(2) of the Refugees Convention.
28. In his application for review, the applicant attached the following statement:

NEW INFORMATIONS & ALTERATION

I have found the liberty to sent two documents as proof to support most other information that had been said by me on my first application with the DIAC office in [city], both my original passport and temporary residence permit of [Country A] have been sent.

On the [date] of September 2009 I had lodged an application for a protection visa in the DIAC office in [city] and later attended an interview on the [date] of December 2009 for the purpose of clarification of claim to being a refugee, and somehow on the [date] of December I had received a letter to notify me that my application was refused.

As your department review my application, you will observe that I stated that I cannot go back to my country of origin which is the Democratic Republic of Congo due to the fact that I belong to a tribe of the north kivu region and we have been persecuted and looked down upon for long, the DIAC office stated that I do not have a sufficient claim but I still say I do because, first of all; I belong to the [Tribe A] of north Kivu, there are number of tribes in the same region that have been persecuted in all kind of ways including [Tribe B] as well, my Dad was the only child of the family to have survived the tribal conflict in the region, both my grand father and mother who I have never meant died in the chaotic region so did my uncle, as a [Tribe A] we are [location deleted: s.431(2)], we have the banyamulenge tribe of the Tutsi of Rwanda to blame for the conflict that are happening in that area, we also share the same language that is Swahili with them but yet we are minority and control over the region lead to my people being killed, tortured in all kind of ways until today- the DIAC only mentioned a particular tribe in the south region of kivu (batwa) who also are under great persecution with the escalated conflict in that region which I do not see how its concerns me as I come from a different region.

My family was hoping to avoid the conflict by moving to the capital city in Kinshasa but things turned out worst for us because we were [information deleted: s.431(2)]

close to the banyamulenge (spoke the same language as well-Swahili), came from the same region and most of the other issues were tribal dominance and belonging and as young as I was I had reluctance in getting involved in the matters, my Dad could not get a job because of where he came from and his tribe, we struggle financially, received all kind of threat to get out of the place and this did not work out for us at all. The only way we could get out of the country was through Zimbabwe which I also said in my previous claim, the diplomatic relations were fairly fine between the nations, my dad left the country first and we were left behind to live my mum's family, my dad ended up in a foreign country jobless and struggling to make a living, with only papers to keep him there for a year or two before he was sent off the country; therefore he finally got a job in [Country A] We barely made it out Congo safely but with a few help we were able to. Once again the DIAC office stated that I had Zimbabwe as a third country to go back to which is wrong as I have no ties to the country, its only out of all the state in southern Africa which makes Zimbabwe an easier to access to get through from Congo and besides the ongoing violence and political issues forces most people in Zimbabwe to pledge allegiance to the ruling government whether they like it or not , foreigners or locals, refusing to do so lead to serious beating by the law enforces- I know this for a fact [information deleted: s.431(2)] and I do not want to live in a country where I am certain I will be exposed to such things and being in fear of harm.

I spent the last nine years of my life in [Country A] as a temporary resident- this is the only reason that we were living there (I have attached my permit as well), my dad was on a contract and had to have a temporary permit to live in the country and once expired and his job is over, he has to leave the country as this is part of the condition. I reckon I was very reluctant during the interview and the written claim in responding to questions on the subject to the state of [Country A] and why I do not want to return. I was a temporary resident and not recognized as a refugee as the DIAC case officer stated I had claimed which is not fair to me and I have no intentions of going back either- I used words such as "good life" and "tried hard" and "part of the plan and first" to make a living back in [Country A] during my interview which most probably i believe did raise doubt and not specific enough but to be honest the fact that my family and I are living under a temporary permit allowing my dad to work and once the contract is not renewed he will be sent back in Congo raises fear for us, I am scared that this might happen to me and worst my family, that is why I said that I was helping out my family but making sure that I am safe in this country and gain protection as soon as possible, I fear for my life and as that of my family- I might have been living in [Country A] but this did not mean I was safe, there is uncertainty and life is hard in a foreign country In Africa where everyone assume you taking away the best in their land and I did not want to be exposed to xenophobic feelings the people had.

Things I already hard for me, I wish there were much easier, because as you will see my passport is to expire this year on the [date] of February 2010 and although we tried hard to extend it before my visa application to Australia, my government refused to do so and I do not know what might happen next and hoping my application can be considered somehow. This is my life I am talking about and so far my parents have used their life savings to send me here for education and also to gain protection as soon as possible- this was my choice and theirs and I had stated in my interview, this was a plan my parents wanted so much and not to a specific country! They just want us to be away and safe from danger.

This is every thing else I can add up to my review because I do reckon that I was not detailed and clear enough on my previous claim explanation and both written and spoken statement.

29. The applicant also attached his residence permit from [Country A] which states, in part:
- This permit authorizes [name] to reside in [Country A] for the purpose of being a dependant child of a resident and is valid for the period from [date] October 2008 to [date] October 2010 subject to compliance with the provisions of the Immigration Act and the following residence conditions: there shall be no change of employment or occupation nor business during the validity of this permit.
30. The applicant appeared before the Tribunal [in] March 2010 to give evidence and present arguments. The Tribunal also received oral evidence by telephone from the applicant's father, [name deleted: s.431(2)]
31. The applicant told the Tribunal that if he were forced to return to the Democratic Republic of the Congo (DRC), he would be persecuted because of his tribe, [Tribe A]. Because members of the [Tribe A] have similar attributes to the Banyamulenge people, they are mistaken for Banyamulenge and are persecuted accordingly.
32. According to the applicant, the [Tribe A] was, it is said, at one point a breakaway tribe from the Banyamulenge. The applicant told the Tribunal, 'the rumour is that we came from the Banyamulenge'
33. According to the applicant, both the people of the [Tribe A] (called [alternate name deleted: s.431(2)]) and the Banyamulenge come from the same area, namely the area of the Democratic Republic of Congo bordering Rwanda. Both the [Tribe A] and the Banyamulenge speak Swahili. When speaking French, they have a similar accent which, according to the applicant, distinguishes them from other Congolese. At hearing, the applicant demonstrated the difference in accent.'
34. The applicant's father also spoke about differences in the way people from the east speak French. He told the Tribunal that people from the east are influenced by Swahili in the way they pronounce French words while a Congolese person from Kinshasa will be influenced by Lingala when speaking French.
35. The applicant described the common physical attributes of the [Tribe A] and Banyamulenge people. [Details deleted: s.431(2)]
36. The applicant told the Tribunal:
- To be honest, the Congolese have this raging hate against Rwanda and the surrounding areas. As far as I know, it started when help was provided from Rwanda to overthrow Mobutu. Then the Congolese killed off other Rwandans and that's when the war intensified. Because of that, there was a bad feeling against all Rwandan people. When I am talking about Rwandans, I am talking about Banyamulenge people. I could call them brothers and sisters because we share so much in common and we are being persecuted for it. Kabila is part Rwandan and this it partly why they don't like it.
37. Because of his physical appearance, the applicant claimed that a Congolese person would readily place him as being from North Kivu and a member of the Banyamulenge tribe.
38. The applicant's father gave separate evidence about the family's tribal background:
- We, [Tribe A] are [close to] the Banyamulenge. We were eliminated, all the parents and grandparents. We are a tribe both in Congo and Rwanda because we are next to

the border. We are in the country next to each other with the same language of Swahili. The problem is that there is now no security. We are like Banyamulenge. We are not welcome in Congo so they consider us as foreigners. We are in the same danger as the Banyamulenge: we are not secured. We are the same as the Banyamulenge – they can't differentiate between us. We look the same.

39. The applicant's father explained that [Tribe A] people have different accents when speaking French – when they speak French it is clear that they are from the Kivu rather than from somewhere like Kinshasa.
40. The applicant told the Tribunal that he was born in Kinshasa but that both his mother and father were born in North Kivu. His father's home town is [Town A] His mother is also from that area. Both his paternal grandmother and paternal grandfather died in what the applicant described as the 1998 genocide.
41. The applicant's maternal grandmother and aunt still live in Kinshasa where they experience difficulties. The applicant told the Tribunal that despite her [qualifications deleted: s.431(2)], his aunt has been unable to find work in Kinshasa while his grandmother relies on her children to support her.
42. In 2000, the applicant's father left the Democratic Republic of Congo to look for work in [Country A]. Despite being qualified as a [profession deleted: s.431(2)], he was unable to find work in the Democratic Republic of Congo. According to the applicant:

He couldn't get a job. Whenever he got it, it was bad pay and he was looked down upon at work. He struggled to support the family.
43. In [Country A], however, the applicant's father was able to get a job without a problem.
44. The applicant holds a dependent child work permit allowing him to stay in [Country A] until [a date in] October 2010. The visa is contingent upon the applicant's father having work in [Country A]. The applicant was unsure whether he would remain eligible to hold a dependent child visa when he turns twenty-one.
45. The applicant's father told the Tribunal that there is little certainty for him and his family in [Country A] given that he is employed on a contractual basis and if his contract is not renewed in October this year, he and his family will no longer have the right to stay in [Country A].
46. To enable the applicant to come to Australia, his father saved some money towards the applicant's university fees. His father's friends also supplied some money to towards the fees.
47. The applicant told the Tribunal that he had experienced problems in having his passport renewed following its expiry in February this year This passport is non-magnetised. The applicant is under the impression that Democratic Republic of Congo have refused to send new magnetised passports to consulates and have instead required citizens to return to Democratic Republic of Congo to be fingerprinted prior to being issued with a magnetised passport. Expired passports may be renewed at consulates. The applicant's father has sent the applicant's expired visa to the consulate in [City 1] to request that it be extended. The applicant's father told the Tribunal that he was under the impression that an extension of the passport would be given.

48. The applicant told the Tribunal that if he were to return to the Democratic Republic of Congo, he fears xenophobic attacks and bullying because he is a member of a minority tribe and because he fears being mistaken for a member of the Banyamulenge people and being persecuted on that basis.
49. The applicant is enrolled in the [course and education provider deleted: s.431(2)] and is currently studying the subjects of [subjects deleted: s.431(2)].
50. The Tribunal contacted the [Country A] High Commission in order to obtain information about the type of residence permit held by the applicant. According to the [Country A] High Commission, refugees are granted [permits] which have the word [word deleted: s.431(2)] indicated [on] a residence permit.
51. The representative of the High Commission confirmed that as a dependent child, the applicant was not the main holder or applicant of the permit but was dependant on the main holder. The representative stated that the fact that an applicant is no longer studying may affect his or her ability to renew a residence permit. An applicant's age might also affect his or her ability to renew a dependent child residence permit. According to the representative:

A dependant child should be 18 years and below, if the applicant was not raised in [Country A] but 25 and below if an applicant was raised in [Country A]. A dependant can also be an elderly person from the age of 65 and above.
52. According to the representative, another factor that might affect the applicant's ability to renew his dependent child resident permit is if it is found to be 'no longer in the interest of the country for the applicant to be given a residence permit.'
53. In answer to the question as to whether the holder of such a residence permit would be certain to gain entrance into [Country A], the representative replied:

It's not a guarantee that if you have a residence permit you will be allowed to enter this country. There can be some other reasons that may block one's entrance to [Country A] even if the person has been issued a residence permit.

INDEPENDENT INFORMATION

The political situation in DRC

54. According to the 2009 World Report by Human Rights Watch:

Violence, impunity, and horrific human rights abuses continue in the Democratic Republic of Congo, two years after historic elections were expected to bring stability. Early in 2008 a peace agreement brought hope to eastern Congo, but combat between government and rebel forces resumed in August. During the year, hundreds of civilians were killed, thousands of women and girls were raped, and a further 400,000 people fled their homes, pushing the total number of displaced persons in North and South Kivu to over 1.2 million.
55. The 2008 Country Reports on Human Rights Practices (U.S Department of State, Bureau of Democracy, Human Rights and Labor, released 25 February 2009) described the situation in DRC as follows:

In all areas of the country the government's human rights record remained poor, and security forces continued to act with impunity throughout the year, committing many serious abuses including unlawful killings, disappearances, torture, and rape. Security forces also engaged in arbitrary arrests and detention. Harsh and life-threatening conditions in prison and detention facilities, prolonged pretrial detention, lack of an independent and effective judiciary, and arbitrary interference with privacy, family, and home also remained serious problems. Security forces retained child soldiers and compelled forced labor by civilians. Members of the security forces also continued to abuse and threaten journalists, contributing to a decline in freedom of the press. Government corruption remained pervasive. Security forces at times beat and threatened local human rights advocates and harassed UN human rights investigators. Discrimination against women and ethnic minorities, trafficking in persons, child labor, and lack of protection of workers' rights continued to be pervasive throughout the country. Enslavement of Pygmies occurred.

56. Fighting between militia groups and Congolese armed forces supported by the UN, as well as attacks and violence against civilians, caused the displacement of around a million people in the east of the Democratic Republic of the Congo (DRC) in 2009. As a result of these and earlier episodes, over 2.1 million people were displaced in North and South Kivu and Orientale Province as of the end of 2009. Many internally displaced people (IDPs) have not received assistance from international agencies, whose access has been blocked by the insecurity. Tens of thousands of IDPs have sought shelter in camps and spontaneous settlements, as the resident population's capacity to host them has declined. Since the mid-1990s, millions of Congolese have fled their homes to escape fighting between rebel groups and the government, in a complex conflict which has also involved neighbouring states. The International Rescue Committee estimated in January 2008 that some 5.4 million had died as a result of the conflict. Displacement peaked in 2003, with an estimated 3.4 million people forced from their homes, most of them in eastern DRC. As of early 2010, the killing and rape of civilians was continuing at a horrifying rate in eastern DRC, and the protection of IDPs and other civilians there remained an urgent concern. In the context of the illegal exploitation of DRC's vast natural resources by members of the army and militia groups, of military operations against rebel groups, and of vicious attacks against the civilian population, and in the absence of a disciplined and integrated army, prospects for any improvement of the situation remained dim.

Internal Displacement Monitoring Centre & Norwegian Refugee Council 2010, *Democratic Republic of the Congo: Over 2.1 million IDPs in the context of deteriorating humanitarian conditions*, 24 February <http://www.unhcr.org/refworld/pdfid/4b8794d12.pdf>- Accessed 5 March 2010.

The Banyamulenge people

57. There is historical evidence that Rwandan agricultural colonies were established in the islands of Lake Kivu in the 18th century. In addition to this, a group of ethnic Tutsis claim to have settled during the 17th century in the hills they named "Mulenge" between Lakes Kivu and Tanganyika or between Bukavu and Uvira in South Kivu Province. Accordingly, they called themselves Banyamulenge. Congolese Tutsis are often described as Banyamulenge or "Rwandans" by Congolese from other ethnic groups.
58. In 2003, the UK Home Office, Immigration and Nationality Directorate, Asylum Assessments DRC, provided the following commentary on discrimination against Congolese Tutsis:

Since the start of the conflict between the rebel forces and the Government in 1998, Tutsis have been subjected to serious human rights abuses, both in Kinshasa and elsewhere, by government security forces and by some citizens for perceived or potential disloyalty to the regime. In August and September 1998, an undetermined number of people who were not Tutsis but looked like Tutsis were subjected to indiscriminate human right abuses simply because of their appearance. The Tutsis are recognised by other Congolese by their great height, their pointed noses and their oval faces. Despite being subject to human rights abuses by the security forces and the civilian population since 1998, the Government has allowed international agencies to resettle thousands of Tutsis in other countries. Human rights abuses committed against Tutsis significantly decreased during 2002 but human rights groups have complained that discrimination against persons perceived to be of Tutsi ethnicity and their supporters continued in that year.

59. According to Human Rights Watch:

The Banyamulenge are Congolese people whose ancestors migrated from Rwanda and Burundi generations ago to the high plateau area in South Kivu and are often referred to as Congolese Tutsi. Relations between the Banyamulenge and other Congolese groups have been strained and are frequently manipulated by politicians in both Rwanda and the DRC. The past six years of war have contributed to hostility against them as they are increasingly identified as "Rwandan" by other Congolese. Rwanda has often justified its presence in DRC in part as an effort to protect the Banyamulenge people, though this was challenged in 2002 when they attacked the Banyamulenge homelands killing scores of Banyamulenge civilians, shooting some of them from Rwandan helicopters. (Human Rights Watch, DR Congo: War Crimes in Bukavu, Human Rights Watch Briefing Paper, June 2004)

60. In its Operational Guidance Note on the DRC dated 23 December 2008, the UK Home Office recognised hostility within the country towards Banyamulenge people:

If the applicant's fear is of ill-treatment/persecution by the state authorities, they cannot apply to those authorities for protection. If the ill-treatment/persecution is at the hands of non-state agents, the hostile and suspicious view of Banyamulenge by the state authorities means that such individuals are unlikely to be able to receive adequate protection from the authorities.

61. According to Freedom House:

Societal discrimination based on ethnicity is practiced widely among the country's 200 ethnic groups, particularly against the various indigenous Pygmy tribes and the Congolese Banyamulenge Tutsis. The ongoing fighting in the eastern Kivu region is driven in part by ethnic rivalries. The ubiquity of firearms and deep mutual resentment over land security has helped to harden ethnic identities. (Freedom House (2 July 2008) Freedom in the World 2008 – Congo)

62. The Immigration and Refugee Board of Canada reports that:

Congolese citizens of Rwandan origin, particularly Tutsis, are perceived by other Congolese citizens as being responsible for the last two wars (1996-1997 and 1998-2002) in the Democratic Republic of Congo (DRC). The members of other ethnic groups have always associated them with "aggressor nations," more specifically, with Rwanda. 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 Rwandans. For that reason, most Congolese citizens of Rwandan origin who lived 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. Even today, members of other ethnic groups are distrustful of Congolese citizens of Rwandan origin, particularly Tutsis. (8 Dec. 2005). (Immigration and Refugee Board of Canada (12 December 2005) *COD100781.FE Democratic Republic of Congo: Treatment of Congolese Tutsis (Banyamulenge) from the East in the western and southern parts of the country .)*

[Tribe A]

63. According to information from [source deleted: s.431(2)] , [Tribe A] are one of the ethnic groups found in the ‘Grand Kivu’ area, comprising North Kivu, South Kivu and Maniema. Reports suggest that there are approximately [number deleted: s.431(2)] [Tribe A people] in the DRC. [Information about Tribe A deleted: s.431(2)] Reports indicate that there is societal discrimination between ethnic groups in the DRC The US Department of State (USDOS) has also reported that security forces have targeted some ethnic groups in Equateur, North Kivu and South Kivu provinces. A 2009 report by Freedom House similarly states that the “the ongoing fighting in the eastern Kivu region is driven in part by ethnic rivalries”.

FINDINGS AND REASONS

64. Although the applicant was not able to present his passport to the Tribunal at hearing as it had been sent to the applicant’s father in [Country A] to be extended, there is a copy of the applicant’s passport contained on the Departmental file. On this basis, the Tribunal accepts that the applicant is a citizen of the Democratic Republic of Congo.
65. The Tribunal found the applicant to be an honest, credible and intelligent witness. His evidence was given in a forthright and open manner. In separate evidence by telephone from [Country A], the applicant’s father corroborated much of his son’s evidence. It is unlikely that the applicant and his father would have concocted this information together, given that the Tribunal gave no warning to the applicant that his father would be asked to give evidence at the Tribunal hearing.
66. The applicant claims that as a member of the [Tribe A], he resembles both physically and linguistically the Banyamulenge people, who are the subject of discrimination and persecution in the Democratic Republic of Congo. The applicant’s claim is that he has a well-founded fear of persecution on the basis of his race.
67. In *Calado v MIMA* (1998) 81 FCR 450, the Court gave the following commentary on the expression ‘race’:
- When considering the meaning of the expression ‘race’ in a case such as the present, it is appropriate to take into account the ‘popular’ understanding of the term which accords importance to physical appearance, skin colour and ethnic origin. There can be no single test for the meaning of the expression ‘race’ but the term connotes considerations such as whether the individuals or the group regard themselves and are regarded by others in the community as having a particular historical identity in terms of colour, and national or ethnic origins. Another consideration is whether the characteristics of members of the group are those with which a person is born and which he or she cannot change.
68. To assess the applicant’s claim, the Tribunal attempted to locate research material on the [Tribe A], including its origins and the physical and linguistic characteristics of its members

Efforts to locate such material have been, for the most part, unsuccessful. The information found has been limited to confirming that the [Tribe A] is one of the ethnic groups found in the 'Grand Kivu' area, comprising North Kiva, South Kiva and Maniema and that there are approximately [number deleted: s.431(2)] people from [Tribe A] in the Democratic Republic of Congo.

69. This information is of limited assistance in corroborating the evidence given by the applicant as to the physical and cultural and linguistic similarities between members of the [Tribe A] and the Banyamulenge people. It does, however, confirm the applicant's evidence that like the Banyamulenge people, members of the [Tribe A] come from the Grand Kivu area of the Democratic Republic of Congo that borders Rwanda.
70. Research conducted by the Tribunal confirms that the conflict in the Democratic Republic of Congo remains horrific; that the Banyamulenge are widely held to be responsible for the ongoing violence and for this reason, are discriminated against and persecuted throughout the country. The research also states that discrimination against all ethnic minorities with DRC is widespread.
71. On the basis of his evidence, the Tribunal is satisfied that the applicant is a member of [Tribe A]. In the absence of any information to the contrary, the Tribunal accepts the applicant's description of members of [Tribe A] [information deleted: s.431(2)] The Tribunal also accepts the evidence of the applicant's father that because both the Banyamulenge people and members of the [Tribe A] come from the Kivu area where Swahili is a dominant language they all speak French with a different accent to those Congolese who come from other areas of the Democratic Republic of the Congo where Lingala is the dominant language. The Tribunal is satisfied from the research that, like members of the [Tribe A], the Bangamulenge people tend to be tall.
72. Having spoken to the applicant face to face at hearing and viewed photographs of the applicant on both Departmental and Tribunal files, the Tribunal is satisfied that there are physical similarities between the applicant and photographs on the internet of Banyamulenge people. In light of these physical similarities in addition to the linguistic similarities described by the applicant, the Tribunal is satisfied that there is a real risk of the applicant being mistaken for a Banyamulenge person.
73. The Tribunal accepts the evidence of the applicant's father that it is because of his tribal background and his resemblance to the Bangamulenge people that he was unable to find work in the Democratic Republic of Congo despite his education. The Tribunal also accepts the evidence of the applicant and his father that their relatives remaining in Kinshasa have similarly experienced discrimination due to their ethnicity.
74. The Tribunal is satisfied that the political situation in the Democratic Republic of Congo remains highly volatile and that resentment remains high against the Banyamulenge people, who are held responsible by many Congolese for the ongoing conflict. Although the applicant is not a Banyamulenge man, the Tribunal is satisfied that as a member of the [Tribe A], the applicant has such physical, linguistic and geographic links to the Banyamulenge people that there is a real chance that, if he were to return to the Democratic Republic of Congo now or in the reasonably foreseeable future, he would be mistaken for a Banyamulenge person and subjected to persecution for this reason. The Tribunal considers that the persecution which the applicant fears involves 'serious harm' as required by section 91R(1)(b) of the Migration Act in that it involves a threat to his life or liberty or significant physical harassment or ill-

treatment. The Tribunal considers that the applicant's race, in that he is part of the [Tribe A] whose people run the risk of being mistaken for Bangamalenge people, is the essential and significant reason for the persecution which he fears, and that the persecution which he fears involves systematic and discriminatory conduct, as required by s91R(1)(c) in that it is deliberate or intentional and involves his selective harassment for a convention reason, namely his race.

75. The Tribunal accepts that what is required of the state in these circumstances is not an absolute guarantee of protection. However, the state is obliged 'to take reasonable measures to protect the lives and safety of its citizens and those measures would include an appropriate criminal law, and the provision of a reasonably effective and impartial police force and judicial system' (per Gleeson CJ, Hayne and Heydon JJ in *Minister for Immigration and Multicultural Affairs v Respondent S152/2003* (2004) 205 ALR at [26].) The independent evidence suggests that elements of the government of the DRC are directly or indirectly responsible for inciting hatred against the Bangamalenge people. On the evidence before it, the Tribunal does not accept that the protection provided by the government of the Democratic Republic of Congo to the Bangamalenge people, or by extension to members of [Tribe A] such as the applicant who have a real risk of being mistaken for a Bangamalenge person, meets the standards of protection required by international standards as referred to in *S152/2003*.
76. The Tribunal has considered whether it would be reasonable and safe for the applicant to relocate to another part of the Democratic Republic of Congo. According to the independent evidence, however, the prejudice against Banyamulenge extends throughout the Democratic Republic of Congo. Accordingly, the Tribunal does not consider that there is any part of the Democratic Republic of Congo to which the applicant could reasonably be expected to relocate where he would be safe from the persecution which he fears.
77. The delegate found that the applicant had a right to reside and remain in [Country A]. The Tribunal disagrees with the delegate's finding in this regard.
78. Section 36(3) of the Act provides that Australia is taken not to have protection obligations to a non-citizen who has a right to enter and reside in any other country, whether permanently or temporarily.
79. The question that arises in this case, then, is whether the applicant has a right to enter and reside in [Country A].
80. In *WAGH v MIMIA* (2003) 131 FCR 269, Justice Lee held that that 'the right to enter and reside in s.36(3) is a right which a person may exercise pursuant to a prior acceptance or acknowledgement by the relevant country, to enter and reside and, implicitly, to receive protection equivalent to that to be provided to that person by a contracting state under the Convention. While the right to reside may not be permanent, it must be co-extensive with the period in which protection equivalent to that to be provided by Australia as a contracting state would be required.'
81. In *Applicants in V722 of 2000 v MIMA* [2002] FCA 1059, the Court held that the Tribunal's understanding of a particular law in question and its effect on any current entry permit held by an applicant were questions of fact for the Tribunal to decide.

82. In this case, the applicant holds a residence permit issued by the Republic of [Country A], authorising the applicant to reside in [Country A] ‘for the purpose of being a dependant child of a resident’ and is valid for the ‘period from [date] October 2008 to [date] October 2010 subject to compliance with the provisions of the Immigration Act.’ In her decision, the delegate found that the applicant had been recognised as a refugee in [Country A] and for this reason had the right to enter and reside in [Country A]. On the basis of the information provided by the [Country A] High Commission, the Tribunal finds that this is not the case. According to the [Country A] High Commission, refugees are given a [permit], with the word [word deleted: s.431(2)] indicated [on] a residence permit. As there is no word [word deleted: s.421(2)] on the applicant’s permit, the Tribunal finds that the applicant has not been granted refugee status in [Country A].
83. The Tribunal accepts the evidence received from the [Country A] High Commission that the applicant holds a (temporary) residence permit in [Country A] on the basis that he is the dependent of his father. In evidence, the applicant’s father told the Tribunal that he has contract work in [Country A] and that should his contract be revoked or not extended, he would no longer retain a right to remain in [Country A]. The applicant’s visa is contingent on his father’s retention of employment in [Country A]. Furthermore, the applicant’s passport has now expired and while the applicant’s father has received information that an extension for the passport will be given, there is no evidence before the Tribunal at time of decision that the applicant’s passport has been extended and so would be valid for re-entry to [Country A].
84. According to evidence provided by the [Country A] High Commission, if the applicant is not viewed as having been raised in [Country A], he will no longer qualify as a dependent child of his father as he will be over the age of 18 years when his permit is up for renewal. This would mean that he would not be eligible for a renewal of his currently held residence permit. In addition, information received from the [Country A] High Commission could not confirm that the applicant would be certain to gain re-entrance into [Country A] in any case.
85. In light of all of the above information, the Tribunal cannot be satisfied that the applicant has a right to enter and reside in [Country A]. For this reason, the Tribunal finds that the applicant is not excluded from Australia’s protections by subsection 36(3) of the Act.

CONCLUSIONS

86. The Tribunal finds that the applicant is outside his country of nationality, the Democratic Republic of Congo. As set out above, the Tribunal finds that he has a well-founded fear of being persecuted for reasons of his race if he returns to the Democratic Republic of Congo now or in the reasonably foreseeable future. The Tribunal finds that the applicant is unwilling, due to his fear of persecution, to avail himself of the protection of the government of the Democratic Republic of Congo. The Tribunal is not satisfied that the applicant has a legally enforceable right to enter and reside in any country other than his country of nationality, the Democratic Republic of Congo. The Tribunal finds that the applicant is not excluded from Australia’s protections by subsection 36(3) of the Act.
87. For these reasons, the Tribunal is satisfied that the applicant is a person to whom Australia has protection obligations under the Refugees Convention. Therefore the applicant satisfies the criterion set out in s.36(2)(a) for a protection visa.

DECISION

88. The Tribunal remits the matter for reconsideration with the direction that the applicant satisfies s.36(2)(a) of the Migration Act, being a person to whom Australia has protection obligations under the Refugees Convention.

I certify that this decision contains no information which might identify the applicant or any relative or dependant of the applicant or that is the subject of a direction pursuant to section 440 of the *Migration Act 1958*.

Sealing Officer's I.D. AGIBSO