

# IN THE IMMIGRATION APPEAL TRIBUNAL

SS (Adan – sexual violence – UNHCR letter) Burundi CG [2004]  
UKIAT 00290

Heard at: Field House Decision number:  
Heard on: 21 September 2004 Appeal number:  
Date typed: 21 September 2004  
Date promulgated: 29.10.2004

Before:

MS. D. K. GILL (VICE PRESIDENT)  
MR. P. R. LANE (VICE PRESIDENT)  
MR. M. L. JAMES

Between:

Appellant

And

The Secretary of State for the Home Department

Respondent

## DETERMINATION AND REASONS

### Representation:

For the Appellant: Ms. M. C. Benitez, of Counsel, instructed by Stanley & Co. Solicitors.  
For the Respondent: Mr. P. Deller, Senior Home Office Presenting Officer.

1. The Appellant is a national of Burundi, born on 1 September 1973. She entered the United Kingdom on 8 April 2003 and claimed asylum on the same day. She has appealed, with permission, against the determination of Mr. M. Hemingway, an Adjudicator, who (following a hearing on 9 January 2004 at Birmingham) dismissed her appeal on asylum and human rights grounds against the Respondent's decision of 7 October 2003 to give directions for her removal from the United Kingdom as an illegal entrant. The Appellant's appeal to the Adjudicator was brought under Section 82(1) of the Nationality, Immigration and Asylum Act 2002 (the 2002 Act).
2. **The grounds of application** for permission to appeal assert:
  - (a) (Ground 1) that the Adjudicator had erroneously required the Appellant to show that she was at risk of ill-treatment over and above the risk in a civil war situation. It is asserted in the grounds of application that the test in Secretary of State for the Home Department v. Adan [1999] 1AC 293 is only applicable during a civil war and that, once the civil war is over, a claimant no longer

needs to show that s/he is at risk over and above that emanating from the civil war.

- (b) (Ground 2) In the event that the test in the Adan case applies, that the Adjudicator erred in his application of it. It is asserted that the Adjudicator's finding (at paragraphs 53 and 55) that the Appellant is not at specific risk is perverse in that the Appellant did show a "differential impact" as compared to civilians exposed to the ordinary incidents of civil war. It is asserted that, given the particular circumstances in Burundi, membership of the Hutu ethnic group is in itself sufficient ground to fear persecution.
- (c) (Ground 3) Having accepted the Appellant's account of past persecution on grounds of ethnicity, the Adjudicator erred in concluding that she was not at real risk of future persecution. It is asserted that the Adjudicator had failed to take into account the past persecution and that past persecution is relevant to the "differential impact" test. Relying on the Court of Appeal's judgement in Demirkaya v. The Secretary of State for the Home Department [1999] Imm AR 498, it is asserted that past maltreatment is an excellent indicator of the future and that the background evidence discloses no major change of circumstances in Burundi.

3. **The real issue:** We consider the three grounds in paragraphs 14.1 and 14.2 below. At the hearing before us, it became evident that the real issue before us is whether the Appellant is at real risk of being raped in Burundi on account of her race and/or gender. We did not understand Ms. Benitez to assert that the Appellant was at risk of persecution on account only of her Hutu ethnicity.

4.1 **Basis of claim (summary):** The Appellant is a Hutu. She is a Swahili speaker. She gives an account of the following:

- (a) In 1993, some of her family members, including her husband, were killed or went missing in action. In November 1993, she was attacked and kicked whilst pregnant. In March 1994, she and her family were attacked by Tutsi militiamen. Her sister and her father were captured but she and her mother managed to escape.
- (b) The Appellant and her mother then went to the DRC (Democratic Republic of the Congo, formerly Zaire), where they stayed in a camp in Uvira. Whilst there, the Appellant was attacked and gang-raped by three military men who were employed to look after camp security.
- (c) In April 1994, the Appellant and her mother returned to Burundi. They were detained because they did not have any identification documentation. They were kept in a jail, where they were beaten. They were able to escape from the jail when Hutu rebels attacked the jail. The Appellant and her mother were again attacked by Tutsi militia and her mother shot and injured. They decided to cross the border into Tanzania.
- (d) In Tanzania, villagers told the Appellant and her mother about a refugee camp, where they arrived in December 1994. In September or October 1997, the camp was attacked by rebels. The Appellant received injuries, sustained by an axe. Her mother was stabbed and killed. The Appellant remained in the camp. On 19 March 2004, she was raped again. She fled the camp with the help of a Catholic missionary. She stayed in the missionary house until April 2003, when

a person by the name of Father John helped her to escape Tanzania with the services of an agent.

- 4.2 Since arriving in the United Kingdom, the Appellant has been diagnosed as being HIV positive.
5. The Respondent was not represented before the Adjudicator. In the refusal letter, the Respondent disputed the Appellant's nationality. This was the sole challenge to the Appellant's credibility.
- 6.1 **The Adjudicator's Determination (summary):** The Adjudicator accepted that the Appellant is a Burundian national. He found the Appellant to be an honest and credible witness. He accepted that she had given an account of past events which was factually accurate. He also accepted that, since arriving in the United Kingdom, she has been diagnosed as HIV positive and was also pregnant.
- 6.2 The Adjudicator then considered whether there was a real risk of persecution in Burundi on account of the Appellant's race (as a Hutu). He noted, inter alia, that the CIPU report for Burundi of October 2003 states that the civil war in Burundi continues (paragraph 51 of the Determination). He also considered whether the Appellant would be at real risk of persecution or Article 3 ill-treatment, on account of being returned as a single woman. He noted that the CIPU Report states that members of the security forces and armed rebels were repeatedly accused of sexual violence against women and young girls.
- 6.3 The Adjudicator's conclusions as to the risk of ill-treatment on account of the Appellant's race and gender are set out at paragraphs 53, 54 and 55, which we now quote:
53. I consider, in fact, that any risk to the Appellant would be stemming from the effects of the ongoing civil war in Burundi. I do not feel there is **any particular risk of persecution for reasons of race which is faced specifically** by the Appellant who is a member of the ethnic majority in Burundi. On this basis I find myself unable to allow her asylum appeal.
54. As to matters relating to Article 3, I remind myself that ill-treatment must attain a minimum level of severity in order to fall within Article 3 (**Ireland v. UK**). The mere fact that there will be a return to hardship resulting from the ravages of Civil War cannot produce a breach of human rights (**SK [2002] UKIAT 05613**). I remind myself that the standards of the ECHR cannot be imposed on all states. Regard must be had to circumstances in individual states and to standards accepted and expected in those states (**Fazilat [2002] UKIAT 00973**).
55. Adopting this approach I consider that there is nothing specific in relation to the Appellant's individual circumstances which would suggest she would face any risk of persecution or treatment contrary to Article 3 over and above what is felt by the normal population in Burundi.
- (our emphasis to paragraph 53).
- 6.4 The Adjudicator then considered the Appellant's Article 3 and 8 claims, to the extent that they are based solely on the fact that she has been diagnosed as HIV positive and the availability of otherwise of adequate treatment in Burundi. He concluded that her removal would not be in breach of Article 3 and/or 8 on account of her medical condition. His conclusions on this aspect of the Appellant's human rights claim are not before us.

**Documents:**

7. We have before us the following documents:

**(Served on behalf of the Appellant):**

- (a) U.S. State Department (USSD) Report on Burundi for the year 2003, dated 25 February 2004 (Annex B of the Appellant's bundle);
- (b) Human Rights Watch (HRW), "Overview of human rights developments 2003: Burundi", dated 1 January 2004 (Annex C of the Appellant's bundle);
- (c) US Committee for Refugees, "World Refugee Survey 2004: Burundi", dated 25 May 2004 (Annex D of the Appellant's bundle);
- (d) Amnesty International, "Amnesty International Report 2004: Burundi", dated 26 May 2004 (Annex E of the Appellant's bundle);
- (e) Amnesty International, extract from the "Amnesty International Report 2003: Burundi", dated 28 May 2005 (pages I.1 to I.4 of the Appellant's bundle);
- (f) USSD Report on Burundi for the year 2002, dated 31 March 2003 (pages I.4 to I.21 of the Appellant's bundle);
- (g) Letter dated 13 February 2004 from UNHCR's office in London addressed to Ms. Benitez, entitled: "Return of Hutus to Burundi", issued under the UNHCR's code: PRL23.1/BURUNDI/CM/0030;
- (h) Amnesty International Report, "Burundi: Rape – the hidden human rights abuse". This report is dated 24 February 2004, according to Item 5(n) of Annex D on page 70 of the CIPU report dated April 2003. It is based, in part, on research conducted by Amnesty International during a visit to Burundi in September 2003 (see the fifth paragraph of the report).
- (i) An article downloaded from the website of IRIN (United Nations Integrated Regional Information Network), entitled: "Our bodies - their battle ground: Gender-based violence in conflict zones". It is not clear when this document was issued by IRIN.

**(Served on behalf of the Respondent):**

- (j) CIPU report on Burundi dated April 2004.

**Submissions:**

8. Ms. Benitez confirmed that the medical report on the Appellant dated 27 May 2004 at pages A1 to A2 of the Appellant's behalf is not relevant because the Adjudicator's conclusion on the Appellant's human rights claim based on her medical condition has not been challenged. Ms. Benitez informed us that a child has been born to the Appellant.
- 9.1 In opening her submissions, Ms. Benitez informed us that she relied on the grounds of application. In her submission, the Adjudicator had applied the Adan test and was wrong to have done so because the civil war had ended. In Fred Alex Kitosi (01/TH/02608), the Tribunal accepted that, although there continued to be serious human rights abuses and civilian deaths, the civil war had ended. The first paragraph of the HRW Report dated 1 January 1993 on page C1 of the Appellant's bundle states that civil war ended in most of Burundi in late 2003 after the government concluded several agreements with the major rebel group, the FDD (the Forces for the Defence of Democracy). The second paragraph of the Amnesty International report dated 26 May 2004 on page E1 states that a new inclusive government came to power in late November 2003. The first paragraph of the USSD report for 2003 at page B1 of the Appellant's bundle states that the transitional government was established in 2001, and refers to a "low-intensity civil

conflict” in Burundi for most of 2003. In Ms. Benitez’s submission, the evidence shows that, as at the date of hearing before the Adjudicator, the civil war had ended, although there was still fighting. Mr. Deller agreed that, as at the date of hearing before the Adjudicator, the civil war had ended in Burundi.

- 9.2 The UNHCR’s position as at 13 February 2004 was that the situation remained dangerous in Burundi and that its position paper of April 2002 should still be applied by caseworkers. On the day of the hearing before us, Ms. Benitez had telephoned the UNHCR and confirmed with UNHCR’s Policy Officer, Ms. Nicole Masri, that legal representatives and decision-makers should continue to be guided by the UNHCR’s formal position of April 2002 – in other words, that UNHCR still held to its advice as contained in the letter dated 13 February 2004. We pointed out to Ms. Benitez that the UNHCR do not appear to be saying that Hutus are at risk of persecution but that the entire population is. We were also of the view that the reference to “July this year” in the second full paragraph on the second page of the UNHCR letter appeared to be incorrect – it could not be a reference to July 2004, and therefore had to be a reference to July 2003 or July 2002 or July 2001. Ms. Benitez agreed that the UNHCR could not have been referring to July 2004, and that she had assumed that the writer had meant to refer to July 2002. Ms. Benitez agreed that the writer could not have been referring to any period after July 2002.
- 9.3 Ms. Benitez submitted that the Appellant would be at real risk under the Refugee Convention of sexual violence and rape, due to her gender and ethnicity. In Ms. Benitez’s submission, the Appellant does not need to show that she is at particular risk on account of her ethnicity, nor does it matter that she is at the same risk as many other women, although Ms. Benitez accepted that, in the event that the risk of rape is a general one faced by women in Burundi, then the Appellant would have to meet the real risk test as set out in the Court of Appeal’s judgement in Hariri v. The Secretary of State for the Home Department [2003] EWCA Civ 807. Ethnic minorities are still being targeted. Women are vulnerable. Ms. Benitez referred us to pages B1, B2, B7, E1, E2 and the IRIN article. In Ms. Benitez’s submission, this shows that the incidence of rape in Burundi is conflict-related. It is used as a weapon of war. It is perpetrated in a climate of impunity. Rape is now an entrenched feature in Burundian society. It was systematically perpetrated by soldiers and rebels during 2003, as the USSD report states at page B8 of the Appellant’s bundle. This is also reflected in the IRIN article. There is under-reporting of sexual violence; no one knows what the true numbers are. However, even the reported cases are high in number. Ms. Benitez relied on paragraphs 6.95 to 6.97 of the CIPU report.
- 10.1 Mr. Deller accepted that the Adjudicator appeared to apply the Adan test, especially at paragraph 53 of the Determination. Furthermore, he erred in suggesting (as he appeared to) that the Appellant has to show that she is at particular risk when compared to other Hutus. In other words, Mr. Deller’s submission was that, if all Hutus are persecuted by Tutsis in Burundi because of their race, then the Appellant is entitled to succeed under the Refugee Convention even if her situation is no different to other Hutus. Accordingly, Mr. Deller submitted that the Adjudicator had misdirected himself in this regard, even if he had not in fact applied the Adan test. In civil war situations to which the Adan test applied, one needs to consider the issue of causation. If an ethnic group is not targeted but simply caught up in the middle, then they cannot be said to be persecuted on account of their ethnic origin. It would be otherwise if they are targeted on account of their race.

- 10.2 In Mr. Deller's submission, Ground 3 is misconceived. Not only has there been a major change of circumstances in Burundi since the Appellant last experienced problems in Burundi, her experiences in the DRC and Tanzania were irrelevant to considering whether she is now at real risk of persecution in Burundi. In Mr. Deller's submission, the ethnic conflict has ceased in Burundi. Mr. Deller relied on paragraphs 6.76 to 6.80 of the CIPU report. Violence by soldiers and rebels must have diminished now, with the end of the conflict. In Mr. Deller's submission, the objective evidence does not show that the Appellant is at real risk of rape. Any information as to the prevalence of rape in Burundi must be inflated why the fact that the information was gathered at a time when the conflict was still on-going. If rape was used, even in part, as a weapon of war, then the fact that the conflict has diminished must mean that the likelihood of the Appellant being at risk of conflict-related rape amounts to no more than a theoretical possibility. It cannot be said that there is a real risk of rape for any woman in Burundi.
- 10.3 Even if there was such a real risk (which Mr. Deller did not accept), it would still have to be shown that the Appellant's ethnicity is reasonably likely to be a factor in the mind of the persecutor and that there is insufficient protection. The mere fact that the Appellant is a Hutu does not establish the causal link.
11. In response, Ms. Benitez submitted that the risk of rape was not a mere theoretical possibility but reached the low standard of a reasonable likelihood. This is because all the reports before us indicate that sexual violence is an endemic problem. It is an entrenched problem. It is systematically perpetrated. In Ms. Benitez's submission, it was not the case that the information relating to the prevalence of rape was gathered whilst the conflict was on-going. This is because the Amnesty International Report mentioned at paragraph 6.95 of the CIPU report is dated February 2004; the report of the UN Special Rapporteur to Burundi mentioned at paragraph 6.96 of the CIPU report is dated 20 October 2003. The USSD Report for 2003 (at page B8 of the Appellant's bundle) states that there was systematic rape by soldiers and rebels during 2003 and that the number of rapes increased when compared with the previous year. An NGO attributed the increase in rape to the conflict. The Amnesty International Report dated February 2004 referred to at paragraph 6.95 of the CIPU report refers to rape being exacerbated by widespread discrimination – that is, it mentions rape in a context other than conflict-related. It states that, in 2003, there was an alarming increase in the number of rape cases in the context of Burundi's armed conflict, that the perpetrators are largely members of the Burundian armed forces and armed political groups as well as armed criminal gangs, that rape generally appears to be on the increase in Burundi, and that rape is not confined to the areas most affected by the conflict. The present tense in which the Amnesty International Report is written indicates that the situation is on-going as at the date of the report.
12. We reserved our determination.

### **DETERMINATION**

13. We have decided to dismiss this appeal, for reasons which we now give.
- 14.1 We can deal with the grounds of application for permission to appeal fairly briefly. It was agreed between the parties before us that, at least by the date of the hearing before the Adjudicator, the civil war in Burundi had ended (see paragraph 9.1 above). Mr. Deller accepted that the Adjudicator appeared (at paragraph 53 of the

Determination) to apply the test in Adan and that, in doing so, he had erred in law. We agree. Mr. Deller acknowledged that, in any event, the Adjudicator misapplied the Adan test. We agree. At paragraph 53 of the Determination, the Adjudicator appears to have conflated the differential impact test with the question whether there is a real risk of persecution on account of the Appellant's race – see the words in paragraph 53 of the Determination which we have emboldened in our paragraph 6.3 above. The real question before him – namely, whether the Appellant was at real risk of persecution on account of her ethnic origin – was not the one he considered. Instead, he considered whether the Appellant was at particular risk of persecution on account of her race which was not faced by other Hutus in Burundi. Even if the Adan test had been applicable (and we stress that it was not, because the civil war has ended), the Adjudicator misapplied the test. When applying the Adan test, one needs to focus on the issue of causation. If ethnic origin is a reason for any persecutory ill-treatment, then it does not matter if all persons of that ethnic origin are also being persecuted. However, if ethnic origin plays no part in the ill-treatment and one is simply caught up in the crossfire between other groups in a civil war situation, the differential impact test has to be satisfied.

- 14.2 However, Ground 3 is misconceived for two reasons. In the first place, the Appellant's experiences in the DRC and in Tanzania (see paragraph 3.1(b) and (d) above) do not have any relevance to the risk of ill-treatment in Burundi now. We recognise that she did suffer problems in Burundi. However, these problems occurred some time ago – in 1993 and in 1994. The assertion in the grounds that there has been no major change in the objective situation in Burundi now has to be seen in the light of Ms. Benitez's contention at the hearing before us (with which we agree) that the civil war has ended. That is a major change of circumstances in Burundi. Accordingly, we reject Ground 3.
15. Although it is asserted in the grounds that the Appellant is at risk of persecution on account of her ethnicity alone, Ms. Benitez did not put the Appellant's claim to us on that basis – that is to say, she did not assert that the Appellant is at real risk of general ill-treatment amounting to persecution on account of her ethnicity alone. The USSD Report for 2003 makes clear that Hutus are discriminated against in Burundi. State discrimination against Hutus remained a serious problem. Societal discrimination between the Hutus and Tutsis continued. We are satisfied, on the objective evidence before us, that, whilst Hutus face discrimination in Burundi, they are not reasonably likely to be subjected to treatment which amounts to persecution by state or non-state agents on account of their ethnicity.
16. The Appellant's case, as put before us, is that she is at real risk of rape or sexual violence in Burundi on account of her race and gender. It is not disputed that rape amounts to persecution or Article 3 ill-treatment. If there is a real risk of rape for a Refugee Convention reason, her appeal succeeds on asylum and human rights grounds. If there is a real risk of rape but it is not shown that there is a Refugee Convention reason, then her appeal on asylum grounds fails but her appeal on human rights grounds (Article 3) succeeds.
- 17.1 In order to appreciate the significance of the objective material relating to the occurrence of rape and sexual violence in Burundi, it is necessary in our view to have an understanding of the current situation in the peace process. This, in turn, requires an understanding of the history of Burundi and the roles which various parties / associations / groupings referred to in the objective material have had in events in Burundi.

- 17.2 Accordingly, we approach our consideration of the issue before us in the following way:
- (a) (paragraphs 18.1 and 18.2) we briefly summarise the main events in Burundi's history since independence from Belgium on 1 July 1962.
  - (b) (paragraphs 19.1 to 19.4) we briefly describe the various associations, groupings, parties and rebel movements which one encounters on any perusal of the objective evidence;
  - (c) (paragraphs 20.1 and 20.2) we briefly describe the main features of the transitional period in Burundi;
  - (d) (paragraphs 21.1 to 21.4) we describe the current state of the peace process;
  - (e) (paragraphs 22.1 to 22.8) we assess the evidence as to the incidence of sexual violence and rape in Burundi, over the year 2003; and
  - (f) (paragraphs 23.1 to 23.4) we assess the UNHCR's letter dated 13 February 2004 in the light of the objective evidence.

### **Snapshot of Burundi's history since independence:**

- 18.1 As most people are aware, the underlying cause for the civil war and the conflict in Burundi is the ethnic tension between the majority Hutu population and the dominant but minority Tutsis. Tension between these two groups have characterised much of Burundi's history since independence. Violence, inter-ethnic massacres and an attempted coup by Hutus preceded the presidential and legislative elections in June 1993. These elections were won by the predominantly Hutu-party, FRODEBU (see below), whilst the Tutsi-based UPRONA (see below) won 16 of the 81 seats in the national assembly (paragraphs 4.1 to 4.4 of the CIPU Report). Melchior Ndadaye (FRODEBU) became the first democratically elected President.
- 18.2 Civil war broke out on 23 October 1993 when President Ndadaye was killed. This was followed by coups, inter-ethnic violence and massacres. There was a bloodless military coup in July 1996, which saw former President Buyoya reinstated as the Interim President of a new transitional republic (paragraph 4.8 of the CIPU report and Section 3 of the USSD Report for 2003). In 1998, multi-party talks to end the civil conflict began. On 28 August 2000, the Arusha Peace and Reconciliation Agreement (Arusha Peace Accord) was signed (paragraphs 4.14 to 4.15 of the CIPU Report). This provides for a 3-year transitional period of government, which commenced on 1 November 2001 and which is supposed to be followed by elections.

### **The various associations, movements etc.**

- 19.1 We now describe briefly the various associations, groupings, parties and rebel movements. There is a plethora of associations formed along ethnic groupings in Burundi, as well as a number of rebel armed movements. Splinter groups have also emerged from some of them (Annex B of the CPU report). These groups have taken part in the peace process to varying degrees; at least one (the Rwas-led



Palipehutu-FNL – see below) has not participated (paragraphs 4.14 to 4.53 of the CIPU Report).

## 19.2 The two mainstream governing parties are:

- (a) **FRODEBU** (Front pour la démocratie au Burundi). This is a Hutu-dominated grouping of organisations.
- (b) **UPRONA** (Union pour le progrès national). This is a Tutsi-dominated grouping of parties.

## 19.3 Other political parties and organisations include:

- (a) G10 (formerly known as G8) - a grouping of 10 Tutsi-dominated parties;
- (b) G7 – a grouping of 7 Hutu-dominated organisations.

Both G10 and G7 have participated in the peace process.

The CNDD (Conseil national pour la défense de la démocratie) was originally the military-wing of FRODEBU, led by Leonard Nyangoma. In early 1998, a faction led by Jean-Bosco Ndayikengurukiye broke away from the CNDD and became an armed rebel group. Ndayikengurukiye's faction itself subsequently split into two (see below). What is now left of the original group formed by Leonard Nyagoma is not a rebel armed group, and should not be confused with the rebel groups. The (original) CNDD is Hutu-dominated and was one of the G7 group of parties during the peace process.

19.4 **The armed rebel groups:** We list below the main armed rebels groups active in Burundi. Our source for this information is mainly Annex B of the CIPU Report. The armed wing of the (original) CNDD was the FDD (Forces pour la défense de la démocratie), whose commander was Jean-Bosco Ndayikengurukiye. As stated above, Ndayikengurukiye broke away from the original group in early 1998. However, in October 2001, the Ndayikengurukiye group itself split into two factions, one led by Ndayikengurukiye and the other led by Pierre Nkurunziza, and so we have:

- (a) the **CNDD-FDD (Ndayikengurukiye)**, the rebel armed group led by Ndayikengurukiye, estimated in 2003 to have about 3,000 combatants.
- (b) the **CNDD-FDD (Nkurunziza)**, the rebel armed group, led by Nkurunziza. This is by far the largest armed group in Burundi, estimated in 2003 to have about 25,000 combatants.

The **Palipehutu-FNL** (commonly referred to simply as the FNL) is a rebel armed group. In 2001, Agathon Rwaswa replaced Kossan Kabura as leader. In August 2002, the Palipehutu-FNL split into the following two factions:

- (c) the **FNL (Rwaswa)**, under the leadership of Agathon Rwaswa. It is the larger and the more powerful of the two FNL rebel armed factions, estimated in 2003 to have about 3,000 combatants.

(d) **FNL (Mugabarabona)**, led by Alain Mugabarabona.

There is one more armed rebel movement, called the “Front for Democracy and the Nation in Burundi-FRODEBU-Mparaniragihugu”. It is referred to at the end of Annex B of the CIPU report and does not appear to have much, if any, impact on the peace process, or its prospects.

**The transitional period:**

20.1 Burundi’s 3-year transitional period began on 1 November 2001. The transitional period itself has two phases, as follows:

- (a) In the first phase of 18 months, President Buyoya (a Tutsi) and Vice President Domitien Ndayizeye (a Hutu, the then secretary general of the main opposition pro-Hutu FRODEBU party) were sworn in (paragraphs 4.17 to 4.21 and 4.25 of the CIPU report and section 3 of the USSD Report for 2003).
- (b) In the second phase of 18 months (which commenced on 30 April 2003), Domitien Ndayizeye succeeded Buyoya as President, and the Burundian Parliament confirmed Alphonse Kadege of the Tutsi-based UPRONA political party as the second Vice President (first [paragraph of the USSD report for 2003 and paragraph 4.41 and 4.42 of the CIPU report]).

20.2 The second transitional phase will end on 31 October 2004. This should be followed by elections (on 1 November 2004) to the National assembly which will, in turn, lead to the election of a new President. However, as at 16 March 2004, a legal framework for the elections (which would include an electoral code, a law on political parties etc.) had not yet been adopted (paragraph 4.58 of the CIPU report).

**The current state of the peace process**

21.1 Three of the four rebel armed movements have signed agreements with the Transitional Government. They are:

- (a) **The CNDD-FDD (Nkurunziza) faction** – that is, the largest of the two CNDD-FDD factions - signed a cease-fire agreement on 3 December 2002 (which was due to take effect on 30 December 2002 but which was in fact delayed – see below) and a power-sharing agreement (the Pretoria Protocol) on 8 October 2003. In November 2003, it entered the Transitional Government, assuming four cabinet posts and other posts (the first paragraph of the USSD Report for 2003, paragraph 4.45 and Annex B (page 64) of the CIPU report). The agreement also provides for the CNDD-FDD (Nkurunziza) to have an agreed share of Burundi’s armed forces, police force etc. There is provision for combatants of the CNDD-FDD (Nkurunziza) to move to sites designated by the Joint Cease-fire Commission (a process known as ‘cantonment’), while elements of the Burundi Armed Forces would be confined to agreed zones (paragraph 4.45 of the CIPU report). Most combatants are expected to be integrated into the Burundian Armed Forces; those unsuitable will be demobilised (Annex B of the CIPU report).

The cease-fire agreements had also called for the deployment of an international peace force and the establishment of a Joint Cease-fire Commission to assist the parties in implementing the agreements. By February

2004, there were 2,523 troops of the peace-keeping force (known as the Africa Mission in Burundi (AMIB)) in place in Burundi as well as 43 international military observers (paragraph 4.47 of the CIPU report). Cantonment and demobilisation of former rebel fighters began at the end of June 2003 (paragraph 4.48 of the CIPU Report).

Clearly, there are problems with the cantonment process – for example, who falls within the definition of a “fighter” (and therefore who can benefit from the cantonment process) and the hygiene conditions in the camps (see paragraphs 4.49 and 4.50 of the CIPU report). The cantonment process has been referred to as being currently “stalled” (see paragraphs 4.51 and 4.58 of the CIPU report). Nevertheless, it is clear that the CNDD-FDD (Nkurunziza) is very much part of the peace process now.

- (b) **The CNDD-FDD (Ndayikengurukiye) faction** signed a cease-fire agreement with the Transitional Government in October 2002 and now has one member in the Cabinet of Ministers announced on 23 November 2003 (see Annex B of the CIPU report, page 64).
- (c) **The FNL (Mugabarabona) faction** entered into peace negotiations with the Transitional Government in August 2002 and signed a cease-fire agreement in October 2002 (Annex B of the CIPU Report on page 64). It has taken part in the cantonment process (58 fighters were cantoned in June 2003: paragraph 4.48 of the CIPU report). On 20 December 2003, it announced that it had transformed itself into a political party known as Front national de liberation Icanzo (FNL Icanzo) and would apply to the Interior Ministry for registration (Annex B on page 65 and paragraph 4.54 of the CIPU Report).

21.2 **The FNL (Rwasa) faction** is the only one of the main armed rebel movements groups to have remained outside of the peace process. This was the position as at the end of the year 2003, as the first paragraph of the USSD report for 2003 states (page B1 of the Appellant's bundle) and as at March 2004 (first sentence of paragraph 4.53 of the CIPU report). The second paragraph of the HRW report dated 1 January 2004 (on page C1 of the Appellant's bundle) states that “the FNL” agreed to talks with the President in early 2004. We assume that this is a reference to the FNL (Rwasa) faction, since the FNL (Mugabarabona) faction had already been involved in the peace process well before January 2004 and the FNL (Rwasa) faction is the only FNL faction to whom this sentence in the HRW report can refer.

21.3 We know from our own experience in dealing with asylum and human rights appeals that, whilst it is important to have regard to whether cease-fire agreements have been signed, it is also important to consider whether hostilities have actually ceased on the ground and whether any cease-fire is holding. We can summarise our review in this regard of the objective material as follows:

- (a) Although the cease-fire agreed between the CNDD-FDD (Nkurunziza) and the Transitional Government (due to take effect on 30 December 2002) was delayed, hostilities between the CNDD-FDD (Nkurunziza) and government forces ceased following the signing of the Pretoria Agreement on 8 October 2003 (paragraph 6.1 of the CIPU Report, attributed to an IRIN report of 7 January 2004);
- (b) There is no indication in the objective evidence before us of any fighting by the other CNDD-FDD faction (the Ndayikengurukiye) against government forces or by the FNL (Mugabarabona) against government forces, at least

not after 8 October 2003. Accordingly, the evidence is that hostilities between the CNDD-FDD faction (the Ndayikengurukiye) and government forces and between the FNL (Mugabarabona) and government forces have ceased, at least from 8 October 2003 onwards.

- (c) Up until 8 October 2003, the CNDD-FDD (Nkurunziza) was not only engaged in fighting against government forces, the conflict between them escalated (see the Amnesty International Report dated 26 January 2004, second sentence of the penultimate paragraph on page E1 of the Appellant's bundle).
- (d) In the run-up to the signing of the Pretoria Protocol in October 2003, the FNL (Rwasa) faction attempted to derail the negotiations between the CNDD-FDD (Nkurunziza) rebels and the government by increasing its attacks in early September 2003 – see, for example, the fifth paragraph on the second page of the US Committee for Refugee, “World Refugee Survey 2004: Burundi” (page D2 of the Appellant's bundle), which states:

Attempting to derail renewed negotiations between FDD rebels and the government, FNL rebels increased attacks in early September [2003].

- (e) Following the cessation of hostilities between the CNDD-FDD (Nkurunziza) and government forces, any fighting by the CNDD-FDD (Nkurunziza) forces has been directed against the FNL (Rwasa) faction with (it seems) the active co-operation or tacit acceptance of government forces. See, for example:

- the USSD Report for 2003 (page B1 of the Appellant's bundle), which states:

..... the country remained engaged in a **low-intensity civil conflict** and **for most of the year, the conflict involved two armed oppositions groups, the [CNDD-FDD (Nkurunziza)] faction and the [Palipehutu-FNL (Rwasa) faction]**. The FNL [Rwasa faction] ..... launched attacks on Bujumbura and its environs throughout the year. Although the security situation in most parts of the country improved, in Bujumbura Rural Province, which surrounds the capital, fighting continued throughout the year..... fighting reached the capital city of Bujumbura in April, July and November 2003.

**Following the signing of the November power-sharing protocol, the Transitional Government allowed the CNDD-FDD to conduct military operations against the FNL [Rwasa faction]**. In December, outside of Bujumbura, the Transitional Government reportedly allowed CNDD-FDD [Nkurunziza] forces to operate an armed police force parallel to that of the Transitional Government.

(our emphasis)

- the first and the third paragraphs of the HRW Report dated 1 January 2004 (page C1 of the Appellant's bundle), which state:

“By the end of 2003, government forces, aided by their new FDD allies, continued the war against the FNL, particularly in and around Bujumbura, the national capital”;

and

“The arrangements between government soldiers and former FDD combatants fighting the FNL at the end of 2003 were often informal, making it difficult to attribute responsibility for the conduct of their forces.”

21.4 Drawing these strands together, the picture which emerges of the year 2003 is that there was, indeed, an escalation of the conflict in Burundi over the year. The CNDD-FDD (Nkurunziza) escalated its conflict with government forces, perhaps in order to improve its bargaining position at the negotiating table. The FNL (Rwasa) faction escalated its conflict with government forces in an attempt to derail the negotiations between the CNDD-FDD (Nkurunziza) and the government – perhaps to avoid being the only faction (and not even the largest at that) being left out of the peace process. After 8 October 2003, three of the four main rebel armed movements (including the largest) had ceased hostilities against the government forces. The government forces (now being “assisted” by the CNDD-FDD (Nkurunziza) faction)) continued to be engaged in conflict with the FNL (Rwasa) faction. This explains why the HRW states (its report dated 1 January 2004 on page C1 of the Appellant’s bundle):

“civil war ended in most of Burundi in late 2003 as the government concluded several agreements with the major rebel group, ..... the FDD”.

(Clearly, the reference to the FDD can only be to the CNDD-FDD (Nkurunziza) faction).

### **Rape and sexual violence in Burundi**

22.1 Ms. Benitez submitted that the objective evidence shows that there was a significant increase in the incidence of sexual violence and rape over the year 2003, that rape and sexual violence occurred within the context of the conflict and is used as a weapon of war and that it was systematically perpetrated by soldiers and rebels during 2003. She asked us to bear in mind that there was under-reporting of rape. Ms. Benitez submitted that the Appellant was at real risk of rape or sexual violence on account of her ethnic origin and gender. Mr. Deller submitted that, if rape was used, even in part, as a weapon of war, then the fact that the conflict has diminished must mean that the likelihood of the Appellant being at risk of conflict-related rape is no more than a theoretical possibility. In response, Ms. Benitez submitted that the objective evidence shows that rape also occurs outside the conflict and is exacerbated by widespread discrimination. In her submission, the present tense in which the report of Amnesty International of 24 February 2004 is phrased shows that the information was up-to-date at the time the report was published. We can dispense with this last point by simply referring to the fifth paragraph of the report which makes it clear that the report is based “in part” on research conducted during a visit to Burundi in September 2003. We do not know what else Amnesty International’s report was based on, but it is clear that any anecdotal evidence on which the report is based was collected in September 2003 which, as we have seen from our analysis above, was at about the time of the height of the conflict during the year 2003.

22.2 Before we turn to deal with the parties’ submissions as summarised in the preceding paragraph, we set out various relevant parts of the objective evidence. It is not our intention to set out every relevant piece of the evidence, but we stress that we have had regard to the totality of the evidence. We have supplied some headings to our collection of quotes, but we stress that these headings bear no relevance to the analysis and merely provide a structure to our selection of quotes. It is important to have regard to the text under each heading, rather than the headings themselves. We have supplied any emphasis to any quotes:

Level of sexual violence and rape over 2003:

- (a) Amnesty International (in its report of 24 February 2004) and the UN Special Rapporteur (in a report published on 20 October 2003) noted a significant increase in the incidence of rape in 2003, the victims being women, girls and boys. The perpetrators include soldiers of the regular army, members of armed rebel groups, armed criminal gangs and private individuals (paragraph 6.6 of the CIPU Report). In her report of 20 October 2003, the United Nations Special Rapporteur states:

Mass rapes, often gang rapes, perpetrated by members of the armed groups and soldiers of the regular army, and also by unknown persons or deserters from both types of forces, have **recently increased** considerably. (paragraph 6.24 of the CIPU report)

- (b) The USSD report for 2003 states:

In November and December [2003], in Bujumbura Rural Province, there were reports of a significant increase in the killing and rape of civilians and the destruction of homes by FAB [Burundi Armed Forces] soldiers following their relocation to the province (section 1.g).

During the year, soldiers and rebels systematically raped women and girls, and the number of rapes increased compared with that of the previous year, according to U.N. and NGO information. .... (section 1.g)

Whether sexual violence and rape occurs in the “context of the conflict”:

- (c) The USSD report for 2003 states:

The NGO attributed the increase in rape to the conflict. .... (section 1.g)

- (d) Amnesty International (in its report of 24 February 2004, page 1) stated:

Like all human rights abuses in Burundi, **rape has become an entrenched feature of the crisis** because the perpetrators - whether government soldiers, members of armed political groups, or private individuals - have largely not been brought to justice. .... Rape has, however, also been exacerbated by widespread discrimination against women ..... (page 1)

**In 2003**, national and international non-governmental human rights and humanitarian organizations, international agencies, and government authorities **reported an alarming increase in the number of cases of rape in the context of Burundi's armed conflict**. .... Accurate statistical comparisons are in fact impossible as it is only recently that information on rape began to be recorded, despite its endemic nature. .... (page 1)

- (e) On the other hand, the IRIN article states that the perpetrators are “sometimes” combatants and that, “in many cases”, they were not combatants but civilians, including family members. This suggests that most sexual violence is not conflict-related.

Whether sexual violence and rape are used as weapons of war:

- (f) Amnesty International (in its report of 24 February 2004) states:

The perpetrators are largely members of the Burundian armed forces and armed political groups, as well as armed criminal gangs who not only rob but also rape... Even from the limited evidence available, **the scale of rape indicates a deliberate strategy** in some parts of the country by belligerents to use rape and other forms of sexual violence against women as a weapon of war to instil terror among the civilian population and to degrade and humiliate it. (page 1)

- (g) However, it should be noted that Amnesty International also stated in the same report:

While **many cases** of rape and sexual violence appear to be indiscriminate and due to lack of discipline and accountability among troops, **in some instances** it appears that rape is used more systematically to ill-treat, humiliate and degrade the population as well as to promote the dominance of the perpetrating group, be it government or opposition. Both national and international organizations in particular expressed concern that during 2003 and government armed forces and the CNDD-FDD (Nkurunziza) committed scores of rapes in Ruyigi province, as well as human rights abuses and looting, **in a pattern of reprisal and counter-reprisal.** (page 5)

- (h) The USSD Report for 2003 (first paragraph of section 1.g) refers to reprisals by the FAB (Burundian Armed Forces) against civilians, in reprisal for rebel attacks, and for suspected collaboration with rebels. Such reprisals included rape.

Whether race is a factor:

- (i) The USSD report for 2003 states (section 1.g):

Rebels killed, beat, kidnapped, and stole from civilians, and raped women (see Section 1.b.). On occasion, Hutu rebels deliberately targeted Tutsi citizens.

- (j) In its report of 24 February 2004, Amnesty International stated:

Scores of rape of Tutsi women were for example, committed by the CNDD-FDD (Nkurunziza) in Ruhwago, Ruyigo province in February and March 2003, in reprisal for rape or other abuses committed by government forces in Hutu areas of the province. (page 5)

Rape outwith the context of the conflict:

- (k) Amnesty International suggests that rape, more generally, is on the increase in Burundi – see page 1 of its report of 24 February 2004.

Evidence which attributes the increase in rape to non-conflict related reasons (domestic rape):

- (l) The USSD report for 2003 states (section 1.g):

According to AI, **domestic rape (outside the context of the conflict) was common**, including rape of young girls, **committed with the belief that it would prevent or cure HIV/AIDS. According to an NGO, this belief may explain why the majority of rapes committed during the year involved victims younger than 18 years old**, and in one case, involved a 2-year-old girl. However, information on rape has only recently begun to be recorded. Few cases of rape were reported to the authorities,.....

Whether the increase in rape is due to non-conflict related reasons (criminality):

- (m) Amnesty International (in its report of 26 May 2004, first paragraph, see page E1 of the Appellant's bundle) states that armed robbery by criminal gangs also increased dramatically over 2003 and that this was often accompanied by rape.

- (n) Amnesty International in its report of 13 January 2004 also referred to the increase in violent crime, stating:

The proliferation of small arms contributed to dramatic rise in violent armed crime in 2003. Armed criminal gangs multiplied. (paragraph 6.122 of the CIPU report)

- (o) The UN Secretary General, in his report of 16 March 2004, stated:

While hostilities have generally eased, **criminality appears to have increased**, aided by the thousands of weapons of [sic] in circulation. Attacks, ambushes and harassment of individuals and groups along the main road are commonplace ..... Refugees and

internally displaced persons have also reported cases of rape and general insecurity ..... (see paragraphs 6.120 and 6.121 of the CIPU report).

Since the 2003 report of the Special Rapporteur on human rights in Burundi, there has been **little improvement in the human rights situation** in the country..... The civilian population, especially the elderly, women and children, are the primary targets of the acts of violence, which are committed with impunity. (paragraph 6.2 of the CIPU report).

- 22.3 There is very little evidence that race is a factor in rape. The evidence above (see sub-paragraphs (i) and (j) above) relates to rape of Tutsi women (the Appellant is a Hutu). The fact that there is very little mention in the objective evidence of race being a factor in rape incidents suggests that, even in the case of Tutsi women, it is not reasonably likely that race is a factor. We are satisfied that, if the Appellant is at risk of rape or sexual violence in Burundi, her Hutu ethnicity is not reasonably likely to be a factor in the mind of any would-be persecutor. This means that any risk of rape or sexual violence she faces is the general one, faced by women in general in Burundi.
- 22.4 We agree that the evidence does suggest that rape and sexual violence increased over 2003 (see sub-paragraphs (a) and (b) above). We agree that, where rape or sexual violence is committed by soldiers or combatants, the impunity they appear to have enjoyed has been a key factor in allowing the abuse to continue or reach the proportions it did in 2003. We agree that discrimination against women exacerbates the problem. We note that the USSD Report refers to an NGO attributing the increase in rape to the conflict (sub-paragraph (c) above) and that Amnesty International refers to an alarming increase in rape in the context of the armed conflict (sub-paragraph (d) above). Although Amnesty International refers to a deliberate strategy to use rape as a weapon of war (sub-paragraph (e) above), it also states, in the same report (sub-paragraph (e) above) that “many cases” of rape and sexual violence appear to be “indiscriminate and due to lack of discipline and accountability” and that, “in some instances”, it appears to be used “more systematically” to ill-treat, humiliate and degrade the population. On the other hand, IRIN states that the perpetrators are “sometimes” combatants and “in many cases” not combatants but civilians (sub-paragraph (h) above). Furthermore, the USSD Report for 2003 (sub-paragraph (l) above) refers to the majority of rapes committed during 2003 involving victims younger than 18 years old and that an NGO attributes this to the belief that intercourse with a young girl would prevent or cure HIV/AIDS. The evidence is that criminality (in the form of violent crime and armed robbery, ambushes and attacks etc) has also increased and that such increase in criminality has “often” been accompanied by rape (see sub-paragraphs (m), (n) and (o) above). The evidence is that rape generally appears to be on the increase in Burundi (sub-paragraph (k) above). Viewing the evidence as a whole, we are not persuaded that the incidence of sexual violence and rape in Burundi over 2003 is explained by its use as a weapon of war or by way of reprisal, although we accept that this accounts for some incidents. On the whole of the evidence, we are drawn to the conclusion that the main and overwhelming reason for the incidence of rape and sexual violence in 2003 is simply because the fighting created the chaos and the conditions in which undisciplined soldiers abused their position and power and criminals/civilians took advantage of the general chaos in order to rob, rape etc.
- 22.5 Our conclusions in paragraphs 22.3 and 22.4 above mean that there is nothing personal to the Appellant which exposes her to a risk of rape or sexual violence in Burundi. Her asylum claim cannot succeed, although we still need to consider Article 3. It is clear, from the Court of Appeal’s judgement in Hariri v. The Secretary



of State for the Home Department [2003] EWCA Civ 807, that absent anything personal to a claimant which puts him / her at real risk of serious ill-treatment, it is not enough to show that the ill-treatment feared occurs frequently or routinely. In order to satisfy the “real risk” standard, it must be shown that there is a consistent pattern of gross and systematic violation of fundamental human rights in Burundi (see paragraphs 4, 8 and 9 of the judgement). We bear this in mind in deciding whether the Appellant is at real risk of any ill-treatment by way of rape or sexual violence which women in general in Burundi may face.

22.6 In the first place, the evidence shows that the conflict in Burundi has diminished. In this regard, we noted that:

- (a) In December 2003, the UN Secretary-General reported in December 2003 that FNL (Rwasa) has been “considerably weakened and isolated” since its attacks on Bujumbura in July 2003 and that, consequently, its ability to hinder the peace process was considered to be limited (paragraph 4.53 of the CIPU Report).
- (b) In its report of 13 January 2004, Amnesty International stated: “Though numerically quite small, [FNL (Rwasa)] has shown it is capable of maintaining low-level action as well as launching its operations relatively easily (paragraph 4.53 of the CIPU report).
- (c) By March 2004, fighting by FNL (Rwasa) was mainly concentrated in the Bujumbura area (see the final sentence of paragraph 6.1 of the CIPU report).
- (d) The UN Secretary-General, in his report of 16 March 2004, stated:

While **the cease-fire is generally holding** and major military operations have ceased throughout most of the country ..... joint operations conducted by [the government armed forces] and the CNDD-FDD (Nkurunziza) continue.  
(the final sentence of paragraph 5.35 of the CIPU report);

..... the **security situation has dramatically improved and calm has returned to most provinces**. This is a major change from the volatile situation experienced until recently, when daily attacks were still the norm. **Nevertheless** ..... **continued hostilities** between the joint [government armed forced]/CNDD-FDD (Nkurunziza) forces and the FNL (Rwasa) **in Bujumbura** continue to seriously affect security in those areas..... While hostilities have generally eased,..... (paragraph 6.2 of the CIPU Report).

- (e) On 21 April 2003, FNL (Rwasa) announced that it had decided to suspend hostilities against the Transitional Government. Its spokesman said: “We have decided to stop fighting immediately but if attacked we will defend ourselves”. The Government communication minister reacted by saying that there would be no military offensive by government forces if the FNL stopped attacks. However, the next day (22 April) there was a clash between government and the FNL (Rwasa) forces in Bujumbura Rural, each side blaming the other for an unprovoked attack. It was speculated that the clash may have resulted from news of the truce not yet being communicated down the lines on one or both sides (paragraph 4.53 of the CIPU report).

22.7 The objective material before us does not extend to the situation post the above announcement by the FNL and the clash on 22 April 2004. Accordingly, we do not have the benefit of objective material which indicates whether the FNL (Rwasa) faction has honoured its announcement to suspend hostilities. However, even before their announcement, the objective evidence shows that their operations were

mainly confined to the Bujumbura and the Bujumbura Rural areas. Even before their announcement, the UN Secretary-General's stated in his report of 16 March 2004 that "the cease-fire is generally holding ..... the security situation has dramatically improved ..... calm has returned to most provinces". Accordingly, even if the FNL (Rwasa) faction does not honour its announcement to suspend hostilities, we see no reason to suppose, even on the low standard of a reasonable likelihood, that the situation would be any different (or materially different) to that described by the UN Secretary-General in his report of 16 March 2004. This refers to a situation of calm in most provinces, although security concerns remained for the Bujumbura area.

- 22.8 The reduction in the conflict, as clearly show above, ought to lead to a reduction in the general conditions (of chaos etc) which are conducive to would-be perpetrators. However, criminality has increased. Whilst we bear in mind the evidence that criminality is accompanied by rape, we are satisfied, having regard to the guidance in Hariri, that the Appellant is not at real risk of rape or sexual violence in Burundi.

### **The UNHCR's letter**

- 23.1 We turn now to the UNHCR letter dated 13 February 2004, the body of which states (paragraph numbering is ours):

- (a) You will note from UNHCR's position on Burundi which is set out below, that we do, ....., have protection concerns about returning asylum seekers to Burundi.
- (b) Our last formal comment on the situation in this country was issued in April 2002 and we are yet to receive a current update. In April 2002, UNHCR noted that the ratification by the Burundian National Assembly of the Arusha Peace Accord in August 2000 and the inauguration of a transitional government in November 2001 were important steps towards the achievement of peace and reconciliation in Burundi. Notwithstanding these important developments, the absence of a cease-fire agreement between that the army and the various rebel factions meant that the security situation remained volatile and dangerous, resulting in the continued flow of refugees from Burundi.
- (c) UNHCR's view was that Burundians of both ethnic groups continued to be susceptible and vulnerable to persecution or violence perpetrated by both State and non-state actors. Whilst politically active individuals were in this respect most at risk, other prominent members of society and those related to them were also at risk. Given that the civil war in Burundi was based on political and ethnic differences between the warring parties, ordinary civilians repeatedly fell victim to ethnically motivated violence. In light of all the above, UNHCR counselled States to exercise caution before making any decision to remove an individual to Burundi.
- (d) Pending a formal UNHCR Headquarters update on Burundi, we are advising that legal representatives and decision-makers should continue to be guided by the April 2002 position. This is because it remains valid in its material particulars, especially as regards the risks of persecution for reasons of ethnicity or political opinion, real or imputed; the fact that the continuing conflict is left open by the absence of a cease-fire agreement; and the fact that widespread violence and abuse warrants caution in decisions to return unsuccessful asylum seekers.
- (e) The continuing validity of our April 2002 position is further affirmed by credible publicly available information about current developments in Burundi. Useful sources include Human Rights Watch, Amnesty International, the European Country of Origin Network, The World Health Organisation and the BBC Online news service.
- (f) These and other sources confirm that intense armed conflict continues to rage between government and rebel forces. The Forces for the Defence of Democracy, the largest Hutu rebel group led by Pierre Nkurunziza, signed a cease-fire with the government in December 2002 under which the old army was to be dismantled and a new one created. This crucial transition is, however, yet to be carried out. The cease-fire fell through and the Forces for the Defence for Democracy has led attacks in major cities this year. In July

this year, 300 rebels and 15 government troops were killed, and thousands fled, during a major assault on the capital Bujumbura by the smallest but oldest Hutu rebel group, the PALIPEHUTU-FNL, also known as the National Liberation Front. This group refuses to hold talks with the government without the presence of Mr Mandela as negotiator.

- (g) The precarious security and protection situation continues despite the appointment of a Hutu president, President Domitien Ndayizeye, who succeeded Pierre Buyoya, the Tutsi who headed the transitional government mentioned above. President Ndayizeye worked under President Buyoya as vice president for 18 months. The rebel groups see the new President as window dressing as the army continues to be dominated by Tutsis. They demand a sharp reduction in the Tutsi presence in the army, and the dismantling of 'regroupment camps' which currently have a capacity to hold more than 800,000 Hutus.
- (h) The political instability in Burundi is worsened by the extreme humanitarian crisis facing the country. Approximately 10,000 persons are displaced each month by the violence. Health and other basic services have been fractured as a result of the insecurity and resultant inaccessibility of certain areas, including Bujumbura rural provinces. Health and sanitary conditions are very severe, the malaria situation in Burundi remains alarming, and the incidence of HIV/AIDS is also on the rise. Thus, the political and humanitarian crisis in Burundi combine to create a very unstable and unsafe atmosphere for civilians caught in the middle of the conflict.

23.2 At paragraph (d), UNHCR states that its April 2002 position remains valid in its "material particulars". Paragraph (d) goes on to mention the absence of a cease-fire agreement as one of the "material particulars". Paragraph (f) is misleading. The assertion that the cease-fire agreement between the government and the CNDD-FDD (Nkurunziza) fell through is immediately followed by a reference to attacks by the CNDD-FDD (Nkurunziza). The impression given, which is a misleading one, is that the CNDD-FDD (Nkurunziza) – the largest rebel group – is still engaged in conflict with government forces as at February 2004. This is simply not so. This misleading impression is compounded by paragraph (d) which states that the continuing conflict is left open by the absence of a cease-fire agreement. Paragraph (d) makes no mention of the fact that a cease-fire between the government and the largest of the rebel groups had been agreed, that hostilities between them had in fact ceased and that only the FNL (Rwasa) faction remained outside the peace process.

23.3 Paragraph (f) goes on to refer to attacks in July "this year", which cannot be a reference to July 2004, because the letter was written in February 2004. Paragraph (f), when read as a whole, especially in the context of the first sentence which expressly refers to "intense armed conflict" continuing to rage between the government and rebel forces, gives the impression that, as at February 2004, the government forces were still engaged in conflict against the CNDD-FDD (Nkurunziza) and the FNL (Rwasa) factions. Whilst it is correct that conflict continued in February 2004 between the government forces and the FNL (Rwasa) faction, it is incorrect to imply (as we are satisfied the paragraph does) that fighting continued as at February 2004 between the government forces and the CNDD-FDD (Nkurunziza). Finally, we note that, according to the Memo of Ms. Benitez attached to the UNHCR's letter, UNHCR's policy officer (Ms. N. Masri) confirmed by telephone to Ms. Benitez on 21 September 2004 that legal representatives and decision-makers should continue to be guided by the UNHCR's formal position of April 2002. If the Memo from Ms. Benitez is an accurate reflection of the conversation between Ms. Benitez and UNHCR's policy officer, we take into account the fact that UNHCR continues to stand by its April 2002 position even as at 21 September 2004. However, we also take note of the fact that, since the letter from the UNHCR of 13 February 2004, the report of the UN Secretary-General of 16 March 2004 has been issued. In that report, the UN Secretary-General stated that

the cease-fire is generally holding and that calm has returned to most provinces (see paragraph 22.6 above).

- 23.4 For all of these reasons, we place very little weight on UNHCR's letter of 13 February 2004 and the advice of its policy officer in September 2004 that its position of April 2002 still holds. We stress that we have not reached this position lightly and it is precisely for this reason that we have set out our analysis of the objective situation in some considerable detail. It has been our experience that UNHCR has, especially in more recent times, cautioned Signatory States to the Refugee Convention against returning failed asylum seekers to countries in circumstances where it is evident that, in reality, UNHCR's concerns go beyond any issue of Refugee Convention persecution and extend to general humanitarian conditions, general lack of security and the orderly management of returns. We can understand UNHCR's desire to have regard to these considerations but there is a very real concern that these considerations are being conflated with the criteria for refugee status. They should not be.
24. For all the reasons we have given above, we are satisfied that the Adjudicator reached the right conclusions on the Appellant's asylum and human rights claims. It is not reasonably likely that the Appellant would be subjected to ill-treatment amounting to persecution or in breach of Article 3 in Burundi on account of her race and/or gender. Accordingly, her removal to Burundi would not be in breach of the United Kingdom's obligations under the Refugee Convention or her human rights.

#### **Summary of conclusions**

25. In summary, our conclusions are:
- (a) The civil war in Burundi has ended. Accordingly, the guidance in the Secretary of State for the Home Department v. Adan should not be applied in determining the risk of future persecution in Burundi.
  - (b) Hutus are not, in general, at real risk of treatment amounting to persecution in Burundi.
  - (c) A Hutu or a Tutsi woman is not, in general, at real risk of rape or sexual violence in Burundi on account of her race / gender.

#### **Decision**

**The appeal is DISMISSED.**

Ms. D. K. GILL  
Vice President

Date: 21 October 2004

Approved for electronic distribution