

TC (Mixed ethnicity – Rwandan) Democratic Republic of Congo CG  
[2004] UKIAT OO238

**IMMIGRATION APPEAL TRIBUNAL**

Date Determination notified:

20 August 2004

**Before:**

**Dr H.H. Storey (Vice President)**  
**Mr Andrew Jordan (Vice President)**  
**Mr A.G. Jeevanjee**

Between

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

**APPELLANT**

and

**RESPONDENT**

Representation

For the appellant/Secretary of State: Mr A. Sheikh, Home Office  
Presenting Officer

For the respondent/Claimant: Mr H. Kannangara, Counsel  
instructed by Shanthy & Co.,  
Solicitors

**DETERMINATION AND REASONS**

1. The Secretary of State appeals against the decision of an Adjudicator, Mr C. C. Wright, promulgated on 9 December 2003 allowing the Claimant's appeal against the decision of the Secretary of State to refuse the Claimant's asylum and human rights claims.
2. The Claimant is a citizen of the Democratic Republic of Congo (DRC) and was born on 6 May 1986. Although the Secretary of

State took issue with the Claimant upon his age, on the Claimant's own case he has now reached adulthood. Mr Sheikh, who appeared on behalf of the Secretary of State, accepted that nothing now turns on his disputed age. Although in paragraph 2 of the grounds of appeal, it is said that the Adjudicator failed to make any finding on the Claimant's age, this ground was no longer pursued before the Tribunal. In any event, it was not apparent what bearing it had on the issues before the Adjudicator.

3. The Claimant stated that he arrived in the United Kingdom using a passport that was not his own and that had been provided for his benefit. Accordingly, he entered without leave. He applied for asylum on 6 January 2003. The Secretary of State refused his claim and made a decision on 5 March 2003 to issue directions for his removal to the DRC. This gave rise to a right of appeal under section 69 (5) of the Immigration and Asylum Act 1999. The Claimant appealed within time on 21 March 2003.

4. The nature of the Claimant's case was set out in the application (the SEF) that the Claimant signed on 17 January 2003. In answer to question 1 of the form, found at C4, the Claimant stated:

"My life was in real danger in my country, not because I was an opponent to the regime, but simply, my mother is from Rwanda. All the family collapses now on this arbitrary reason."

5. From the very outset of the claim, the principal reason advanced by the Claimant for his claimed fear of return was his mixed ethnicity resulting from his mother coming from Rwanda. The same point is made in answer to question 5:

"Yes. My mother has been killed. The circumstances of her death is unknown by the family. I was just informed that she had been killed due to her Rwandese citizenship. My father who is 100% Congolese has received the same treatment."

6. For the sake of completeness, the same reason is advanced in answers to questions 7 and 9 and at C2, question 1 and at C4, question 7. The statement, annexed to the application, raises the same ground.

7. Part of the Claimant's account was that on 14 May 2002 a group of young people, members of the BYEU, came to the Claimant's home in order to kill his mother because she was Rwandan. The

BYEU, although not referred to in the objective evidence, is said to form part of the RCD. When approached, the Claimant denied that he was Rwandese but refused to assist them. As a result, he claimed that he was taken by force and later engaged in a conflict with Rwandese troops who captured him. He stated that he was detained, tortured and only managed to escape in December 2002 when he was recognised by a Rwandese army officer who assisted him to escape. Eventually, he claimed that he was helped by priests with whom he travelled when he left the country.

8. The Adjudicator decisively rejected much of the Claimant's account. See paragraphs 12 and 13 at the determination. In paragraphs 17 and 18 of the determination, however, the Adjudicator stated:

"17. In the Tribunal's determination in **Kaninda [2002] UKIAT 5899** there is a reference to an expert report dated 22 October 2002 from a Dr E. Kennes. In that appeal, Counsel for Mr Kaninda submitted that there was clear evidence based on ethnicity that Tutsis and persons perceived to be Tutsis including ethnically-mixed Tutsis fell into one of the categories identified by UNHCR as being subject to harassment and persecution on return to the DRC. The Tribunal accepted this proposition, and allowed Mr Kaninda's appeal.

"18. I have come to the conclusion that, as the appellant has satisfied me that he is of mixed ethnicity, there is a serious possibility of a real risk that on his return to DRC at the date of the rehearing of the appeal he will be identified as the son of a Tutsi Rwandese mother and, accordingly, is within one of the categories identified by the UNHCR as at risk."

9. Accordingly, the Adjudicator allowed both the Claimant's asylum and human rights appeal. The Secretary of State's grounds of appeal begin by challenging the Adjudicator's finding that the Claimant is an ethnically mixed Tutsi because, it is said, the Adjudicator failed to give adequate reasons. We do not consider that this challenge is well-founded. It is our view that the Adjudicator was justified in finding that the Claimant was of mixed ethnicity. As we have set out above, the Claimant's consistent and detailed account was based upon his mother's ethnicity. His application, his statement and his interview were each based upon this element. In the Refusal letter, the Secretary of State set out the claim in paragraph 7:

"You claim that being of mixed Congolese/Rwandan ethnic origin, you will be at risk of persecution in the area under government control. It is accepted that people of Tutsi ethnic origin have been viewed by the DRC Government as a potential threat and are generally resented and viewed with suspicion by other tribal groups who make up the civilian population of the country."

10. In paragraph 8 of the Secretary of State's letter reference is made to intermarriage and to the fact that a large proportion of the population is of mixed ethnic origin. In our judgment, it is clear that the Secretary of State was not making any specific adverse credibility finding upon the Claimant's case to be of mixed ethnicity. Although in paragraph 11 of the letter, the Secretary of State reaches a global conclusion that the Claimant's account was a fabrication, this central element was not expressly touched upon.
11. As far as we know, the claim put forward by the Claimant that his mother was a Rwandan national and that he was of mixed ethnicity was not challenged during the course of the hearing before the Adjudicator. Mr Kannangara, who appeared before us and before the Adjudicator, told us that it was not and there is nothing to indicate he was incorrect on this score. In these circumstances, we do not consider that the assertion in the grounds of appeal that the Adjudicator reached his conclusion without sufficient justification or reasoning is well-founded. It was not an issue in the appeal before him and that is sufficient to justify his conclusion that the Claimant was and is of mixed ethnicity.
12. The central issue, in our judgment, both before the Adjudicator and before us, is whether the Claimant is at risk of persecution simply because of his mixed ethnicity. The Adjudicator found that the Claimant had not been persecuted in the DRC and there is no respondent's notice disagreeing with that finding. In any event, the acts upon which the Claimant based his claim of persecution took place in that area of the DRC occupied by rebel forces. According to the Claimant, he was held in Kisangani, outside the area of government control. Since the Claimant will be returned to Kinshasa, there is no possibility, far less a reasonable likelihood, of such events repeating themselves there.
13. The Adjudicator reached his conclusion on the basis of a consideration of the Tribunal's decision in **Kaninda [2002] UKIAT**

**5899** (HH Judge Slinger, Chairman) promulgated in January 2003. The Tribunal had before it material from the UNHCR to the effect that Tutsis, including ethnically mixed Tutsis, fell into one of the categories identified by the UNHCR as being subject to harassment and persecution on return to the DRC. As is apparent from paragraph 10 of the determination, the HOPO conceded the strength of the case in favour of the appellant and conceded that the appeal should be allowed. Accordingly, the risk of return was not fully explored. The Adjudicator, however, was provided with a number of other cases, including that of **Mozupa [2002] UKIAT 08145** (Mr H. J. E. Latter, Chairman) promulgated some months after **Kaninda** in April 2003. We are not satisfied that this case was brought to the attention of the Adjudicator. In paragraph 2 of his determination, the Adjudicator expressly refers to three decisions of the Tribunal but omits reference to **Mozupa**.

14. The appellant in **Mozupa** was a DRC national. His father was Congolese and his mother was a Rwandan Tutsi. In paragraph 10 of the determination, the Tribunal deals with the conflict of evidence as to the risk faced by Tutsis in the DRC. Reference was made to the CIPU report for October 2002 and the UNHCR letter of 10 October 2002. It had been reported that persons of Tutsi ethnic origin were known to be among the targets of extreme human rights abuses. The problem was described as being equally applicable to ethnically mixed Tutsis. However, the Tribunal noted that the Operational Guidance Notes (December 2001) recorded that those of mixed Congolese/Tutsi ethnic origin were not now likely to risk persecution. The Tribunal stated in paragraph 11 of the determination:

"The Adjudicator specifically considered the issue of whether the appellant would be at risk due to his physical appearance and the loss of his family. He said that he did not find such a claim to be credible. He had no reason to believe that the family were not alive and living in the DRC. He was not satisfied that simply due to the physical traits of the appellant he would be anything other than able to live without being persecuted or ill-treated by the authorities. There was no evidence before the Adjudicator or indeed before the Tribunal to support the contention that the Claimant looks like a Tutsi or would be regarded as one by reason of his physical appearance alone."

As a result, the Tribunal upheld the Adjudicator's determination dismissing the appeal.

15. In more recent times and since the Adjudicator decided the appeal, **[2004] UKIAT 00007 L (DRC)** (Dr HH Storey, Chairman) has considered the general issue of a risk on return. In addition, the risk faced by the Tutsi community in Kinshasa was specifically considered in **[2004] UKIAT 00075 M (DRC)** (Dr HH Storey, Chairman).

16. In **[2004] UKIAT 00007 L (DRC)** the categories of continuing risk were set out in paragraph 93 of the determination as being firstly cases where a nationality or perceived nationality of a state regarded as hostile to the DRC, in particular those who have or are presumed to have Rwandan connections or are of Rwandan origin. Secondly, there are those who have or are perceived as having an adverse military or political profile or background. In paragraph 95 of the determination, however, reference was made to other possible categories including those from rebel held areas, those of a family of mixed ethnicity and those of Tutsi origin or being perceived to be Tutsis. The Tribunal concluded that the evidence in relation to these latter categories was not clear cut and the Tribunal did not find they were currently effective risk categories.

17. In **[2004] UKIAT 00075 M (DRC)**, the Tribunal stated:

"15. Firstly, we note that both confirm that as a result of 1998 pogroms against Tutsis the authorities in conjunction with the ICRC took specific steps to protect the Tutsi community in Kinshasa. Secondly, even though the Belgian source does not describe the level of protection as complete, neither source identifies any significant level of civilian violence against Tutsis since specific protection steps were taken.

"16. Secondly, both sources are dated 2002. They do not deal with the situation since August 2002. As already noted, the CIPU Report, which deals with developments since, identifies a significant improvement beginning in 2001.

"17. Thirdly, we do not quite understand Mr Khan's contention that Tutsis fall into a separate risk category by virtue of being confused with Rwandans. It is clear that the authorities now protect Tutsis in Kinshasa. If there is a failure to make a distinction sometimes between Tutsis and Rwandans, it is made by civilian Kinshasans, not by the authorities. The latter, to repeat, are described as affording protection to Tutsis against civilian actions.

"18. We also consider that the argument advanced by Mr Khan does not in any event easily fit the particular facts relating to this Claimant. On his own account, his mother was a Congolese, not a non-Congolese Tutsi. It appears from the background sources that suspicion and hostility against Tutsis is primarily directed against non-Congolese Tutsis.

"19. Since returns from the UK to the DRC are to Kinshasa and there is no evidence to indicate that Tutsis who originate from other areas are prevented from remaining in that city, it is not necessary for us to address the evidence relating to the treatment of Tutsis in other areas, particularly those in rebel-held areas, although we note that the CIPU refers to continuing discrimination against them, not to any significant levels of violence or other forms of serious harm."

18. In our judgment, the Tribunal's reasoning in **[2004] UKIAT 00075 M (DRC)** properly addresses the risk faced by citizens of the DRC of mixed Rwandan/Tutsi ethnicity.

19. Adopting this approach, we think it is unnecessary to consider whether the Claimant will be identified as a Tutsi by reason of his physical appearance. We have, nevertheless, considered in some detail the Claimant's account set out in the SEF. It omits any reference to the Claimant being recognisable as a Tutsi or of mixed ethnicity. The accompanying statement does not refer to the Claimant being at risk by reason of his physical appearance alone. The Record of Proceedings (as far as we can tell) makes no reference to the Claimant being physically identifiable as a Tutsi. It was argued before us that this omission was because the Secretary of State never raised the issue that the Claimant would not be recognised as a Tutsi. For our part, we consider the starting-point must be that it is for the Claimant to establish his case and that, if he expressly wished to claim that his physical appearance would alone put him at risk, it was necessary to adduce evidence to that effect. It would not be sufficient for the Claimant himself to claim that his appearance placed him at risk because such a contention should normally be dealt with by expert evidence. It is conceded that there was no such expert evidence.

20. We were referred to paragraph 6.58 of the Country Report prepared by CIPU in October 2003. It is there said that Tutsis are recognised by other Congolese by their great height, their pointed noses and their oval faces. The Claimant appeared

before the Tribunal and exactly matched that description. We do not, of course, make any finding as to the Claimant's ethnicity by reason of that short passage in the Country Report. Far less do we set ourselves up as experts and base our conclusion on the Claimant's appearance. We are satisfied that the Claimant himself failed to adduce sufficient evidence to satisfy the Adjudicator that his appearance renders him recognisable as a Tutsi. Irrespective of this, we cannot but note the close resemblance the Claimant bears to the description of a Tutsi as described in the CIPU report. Even if we are unable, on the state of the evidence, to accept that the Claimant will be regarded as Tutsi by appearance alone, we are prepared to consider his case on the basis he is of Tutsi or mixed Tutsi ethnicity and would be perceived as such on return.

21. Some of the material passages to be found in the October 2003 Country Report are found in paragraphs 6.54 to 6.61:

**6.55** Societal discrimination on the basis of ethnicity is widely practiced by members of virtually all ethnic groups and is evident in private hiring and buying patterns and in patterns of de facto ethnic segregation in some cities. In large cities, however, intermarriage across ethnic and regional divides is common.

**6.57** Immigration and settlement in the eastern part of the country by the Banyarwanda people, who are Twas, Tutsis and Hutus of Rwandan origin, occurred at different periods and for a variety of reasons. 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.

**6.58** 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.

22. During the course of his submissions, Mr Kinnangara did not establish that there were any features of the Claimant's appeal that distinguished his client's case from that of **[2004] UKIAT 00075 M (DRC)**. Although he sought to extend his argument to claim that the Claimant was a risk because of his father's military profile, we are satisfied that this was not open to him. The Adjudicator made no such findings. Indeed, he rejected most of the Claimant's account. Secondly, the Claimant had made no attempt to issue a respondent's notice within the time required by the Rules or at all.

23. For these reasons, we consider that the Adjudicator was wrong to place reliance upon the decision of the Tribunal in **Kaninda**. Having considered **Mozupa [2002] UKIAT 08145**, **[2004] UKIAT 00007 L (DRC)** and **[2004] UKIAT 00075 M (DRC)**, the Tribunal considers that the Claimant has failed to establish that his return to Kinshasa will result in persecution or a violation of his human rights by reason of his mother's ethnicity as a Rwandan/Tutsi. Accordingly, the appeal is allowed.

Decision: The appeal of the Secretary of State is allowed.