

**0907445 [2010] RRTA 123 (25 February 2010)**

**DECISION RECORD**

**RRT CASE NUMBER:** 0907445

**DIAC REFERENCE(S):** CLF2009/93251

**COUNTRY OF REFERENCE:** Congo, Democratic Republic of

**TRIBUNAL MEMBER:** Sydelle Muling

**DATE:** 25 February 2010

**PLACE OF DECISION:** Melbourne

**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 Democratic Republic of Congo, arrived in Australia [in] June 2009 and applied to the Department of Immigration and Citizenship for a Protection (Class XA) visa [in] July 2009. The delegate decided to refuse to grant the visa [in] September 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] September 2009 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. The Tribunal also has had regard to the material referred to in the delegate's decision, and other material available to it from a range of sources.
20. According to the protection visa application, the applicant is an ethnic Bantu male of the Christian faith born on [date deleted: s.431(2)] in [Village A], in the Democratic Republic of Congo (DRC) . He lived in [City 1] from 1987 to 2006 and in Kinshasa from 2006 to 2007. From 2007 he lived in [village deleted: s.431(2)] in Angola and from 2008 he was living in [City 2] Angola. The applicant received 11 years education and is fluent in French, Lingala, [dialect deleted: s.431(2)] and basic English. He was never officially employed in the past. The applicant departed DRC [in] May 2007, crossing the border of Angola at [Village B] illegally His de facto wife, [children's details deleted: s.431(2)] were residing in DRC, as well as his [family details deleted s.431(2)]
21. In a statutory declaration made by the applicant, he claimed that he was Congolese by birth, born in the province of Equator in [Village A]. The applicant claimed that he was employed as a security guard [information deleted: s.431(2)] of the opposition leader Mr Jean-Pierre Bemba (JPB) after the presidential election in 2006. He claimed that there was a conflict with the government forces in Kinshasa and on 22 March 2007 many of them were arrested and ten of his colleagues were burnt to death amongst burning car tyres. Others were thrown in the river with cords around their necks.
22. The applicant claimed that he was imprisoned and tortured Each morning he was beaten and forced to eat his own excrement. He was stabbed [details deleted: s.431(2)] by one soldier and [details deleted: s.431(2)] injured by another one. He was tortured for information about the whereabouts of other soldiers and workers of JPB [details deleted: s.431(2)]
23. The applicant claimed that every night they were made to go to the river to collect water for the meal and one night he escaped with another prisoner. He claimed that after fleeing by crossing the river full of crocodiles, he went to see a friend who advised him to go to [Province 1] and escape into Angola as the soldiers would be searching for him. The applicant claimed that when he arrived in [Province 1] he went to the border town of [Village B] and paid money to an Angolan soldier, who told him the way through the forest, to [Town 1], which was [distance deleted: s.431(2)] kilometres away. When he arrived there he looked for a friend of his maternal aunt and stayed with her for nine or ten months. His aunt's friend then told him he should not stay there any longer because many photos had been posted up at the border and his may possibly be there.

24. The applicant claimed that a friend of his aunt told him that she would arrange for documents to be sent to Luanda for a passport for him. The passport was an Angolan one, containing his photo and date of birth and a Portuguese version of his name. The same person told him that she knew of someone in Luanda, a businessman who travelled all over the world, who could help him to get out of Angola. She arranged for him to go to Luanda in a container on a truck and there he met the businessman. The businessman advised him that his only option was to go to Australia and that he would pay for his accommodation and food and he would arrive in Perth as a student at [Organisation A]
25. The applicant claimed that when he arrived in Perth he did not understand English and knew no-one. He spent three months in [details deleted: s.431(2)] classes and then went to [Countries A and B] on an outreach program, returning to Perth where he was told his training was finished and he would have to return to Angola. He asked to stay but was told he would have to work unpaid and pay twelve dollars a day board and meals. That same week he met [Person 1], who gave him his business card. When he called [Person 1] he was told that he lived in Melbourne so the applicant claimed that he travelled to Melbourne. He was advised to go to the Red Cross for assistance and when he did he told them that he was afraid to return to Angola because there was a risk he could be killed and he did not want to return to DRC to be executed by the soldiers. He also did not want to go back to Perth because he believed the [Organisation A] people would send him back by force so he tore up his passport but kept a photocopy as proof of his arrival in Australia.
26. The applicant claimed that he was afraid to return to his country because those in power were capable of anything and could kill him because he escaped from prison and because he worked for the JPB. He claimed that the government soldiers would mistreat him because they want to govern the Congo. Many supporters of JPB were mistreated, killed or forced to leave the country for this reason. The applicant claimed that he did not believe the Congolese authorities would protect him because they were responsible for putting him in prison and they would kill him.
27. Also provided with the protection visa application was a copy of the applicant's Angolan passport which he travelled to Australia on, a certified copy of a letter from [Organisation A] and certified copies of the applicant's [certificates deleted: s.431(2)] and sections of the UK Home Office *Country of Origin Information Report: The Democratic Republic of Congo*, 30 June 2009.
28. [In] September 2009, a delegate of the Minister for Immigration and Citizenship refused to grant the applicant a protection (Class XA) visa. The applicant subsequently applied to the Tribunal for review of this decision [in] September 2009.
29. [In] October 2009, the Tribunal received a submission from the applicant's adviser reiterating the applicant's claims as provided by him in his statutory declaration. The adviser submitted that the applicant could not return to Congo because there was a real chance that he would be arrested, tortured and executed by the Congolese soldiers because he escaped from prison and worked for JPB. In regard to the applicant's nationality, the adviser submitted he was a Congolese citizen and not an Angolan citizen and the documentary evidence of his identity was only recently received and therefore not available to the Department.

30. Attached to the submission were the following supporting documents:
- Certified statutory declaration made by the applicant summarising his claims as provided in his detailed statutory declaration submitted to the Department;
  - Certified copy of the applicant's birth certificate, with translation;
  - Copy of an Attestation Confirming the Bearing of Witness dated [in] August 2009 from the Service Coordination of Information and Security for the MLC, attesting that the applicant was a member of the movement and had been subjected to bullying, harassment and repeated arbitrary arrests;
  - Copy of an Attestation Confirming the Bearing of Witness dated [in] September 2009 from the Service Coordination of Information and Security for the MLC, stating that the applicant was arrested during the events of 22 and 23 March 2007 and escaped [in] May 2007;
  - Certified copy of Notice of Whereabouts of the applicant, with translation;
  - Certified copy of the Movement Liberation of Congo (MLC) membership card;
  - Certified copy of Proof of Loss of Identity Papers;
  - Letter from [service deleted: s.431(2)];
  - Letter from Australia Red Cross Crisis Care Commitment;
  - Sections of the UK Home Office 2008 *Country of Origin Information Report; Democratic Republic of Congo*, 30 June 2009 and Amnesty International Annual Report 2008, covering the events of 2007.
31. The applicant appeared before the Tribunal [in] November 2009 to give evidence and present arguments. The Tribunal hearing was conducted with the assistance of an interpreter in the French and English languages.
32. The applicant was represented in relation to the review by his registered migration agent.
33. The applicant stated that he was born on [date deleted: s.431(2)] in [Village A], a village in the province of Equator in the Democratic Republic of Congo (DRC) He lived in the city of [City 1] more or less since birth until 2006 when he moved to Kinshasa, however he could not remember which month in 2006 he moved. He completed primary and secondary schooling and after he finished studying he was in training to be a [occupation deleted: s.431(2)]. He commenced training in 1999 and after completing the [duration deleted: s.431(2)] training he worked as a [occupation deleted: s.431(2)] from 2000, for about six years, until 2006. The applicant stated that he departed DRC [in] May 2007. He made his way to [Province 1] which was located in the lower region of the DRC and then he crossed the border into Angola. When he left [City 1] his mother was alive but he does not know if she was still living. His father is deceased. He has [siblings details deleted: s.431(2)] in the DRC, as well as his wife and [details deleted: s.431(2)] children. His siblings were living in [City 1] and his wife

and children in Kinshasa. He was married in a customary or tribal marriage and did not have a civil marriage. His children are aged [ages deleted: s.431(2)]. The applicant stated that the last time he had contact with his wife and children was before he was arrested [in] March 2007. He told them he was going to do service. The last time he was in contact with his mother and siblings was before he was arrested when he called them from Kinshasa and talked to them.

34. The Tribunal asked the applicant why he feared returning to the DRC. The applicant stated that he was frightened of returning for the reason of torture because he was in the service of Jean Pierre Bemba and also because he had escaped from prison and did not have the right to freely express his political opinion. The Tribunal noted that he claimed he was in the service of Jean Pierre Bemba and asked the applicant if he could explain. The applicant stated that he participated in the security [duties deleted: s.431(2)]. He explained there were [security details deleted:s.431(2)]. The applicant confirmed that he worked for Bemba as a security guard from sometime in 2006 but he could not remember when in 2006. The Tribunal noted that he had claimed in his protection visa application that he was employed as a security guard [details deleted: s.431(2)] after the Presidential election in 2006. The applicant stated that this was not correct. He explained the first round of elections was held on 30 July 2006 and the second round of elections was on 29 October 2006. He was employed by Bemba before the elections.
35. The Tribunal asked the applicant how he came to work as a security guard when he had previously been working as a [occupation deleted: s.431(2)]. He stated the reason was because he was absolutely passionate and committed to his political party and wanted to assist in the interest and well being of his country. The Tribunal asked the applicant if he was a member of the MLC. He stated he was. He became a member in 1998 He clarified that in 1998 he was already a member. He was a member while living in [City 1] but he did not have a membership card. When he went to Kinshasa he was issued with a membership card. The Tribunal queried whether MLC was a political party in 1998. The applicant stated that MLC was created when Bemba came out of the forest. Initially the party was not recognised but in 2003 it was legally recognised as a political party. The Tribunal asked the applicant who came together to form MLC. He stated that the founder of MLC was Jean Pierre Bemba Gombo. He was the President and the one who created it. The Tribunal noted that there were others who joined to form the party, and who came from particular groups and asked the applicant if he knew who these people were. He stated that if he remembered correctly there was Bemba and Unga Barn Ouzi who came from Guadalete which was a region found in the province of Equator and was where the headquarters of the party was based.
36. The applicant stated that he supported the MLC because their platform was based on clear concepts. There were a lot of things not clear in his country and a lot of corruption. He stated that he was an active member of the party. He was involved in [party activities deleted: s. 431(2)]. The Tribunal asked the applicant if he engaged in these activities from 1998 onwards. He stated that because there was quite a bit of disorder and chaos at the time, he [activity deleted: s.431(2)] and participated in rallies when he was in Kinshasa. However, in [City 1] it was not really recognised because there was conflict between Bemba and Kabila and for that reason they were frightened of organising protest rallies and marches because they were frightened of being killed. He explained that at that time Bemba was not in [City 1] but in the forest of Equator

province. The Tribunal asked the applicant if he was more active in [City 1] once Bemba came out of the forest. He stated not really. He was active when Bemba took over the office of Vice President of the Republic Around 2004 and 2005 in [City 1] they started to organise rallies and demonstration marches because by that time MLC had been recognised as a political party. The Tribunal asked the applicant when Bemba was sworn in as Vice President. He explained that there were four Vice Presidents and they were sworn in sometime between 2004 and 2005.

37. [Details relating to the applicant's duties as a security guard deleted: s.431(2)]
38. The Tribunal asked the applicant about the conflict with government forces in Kinshasa in 2007. The applicant stated that they were not happy with the election because they could see it was corrupt and also the government was asking Bemba to hand his guards over so the government forces could use them. He claimed that they were intimidated by the government forces. The Tribunal asked the applicant how many guards Bemba had. He stated lots. When the Tribunal put to the applicant that it had read that Bemba had over one thousand guards, he stated that he could not tell the exact number but there were many.
39. The Tribunal asked the applicant about what happened on 22 March 2007 and the days leading up to that particular day. The applicant stated that there was a terrible confrontation at that time People were killed in Kinshasa because gun fire was exchanged between the government forces and Bemba's guards. A lot of Bemba's guards were arrested at that time, including him. He was on duty at the base on 22 March 2007. The government forces came to the base looking for Bemba's guards. They tried to look for a way to escape but could not get away. Eleven people were arrested and around ten of his colleagues were killed; they were burnt to death and others were thrown into the river. The applicant claimed that he was put in prison and tortured every day. [Details deleted: s.431(2)] The applicant stated that he was imprisoned at [location deleted: s.431(2)] for [duration deleted: s431(2)].
40. The Tribunal asked the applicant how he managed to escape from detention. The applicant explained that the water in the prison had been cut off for three or four days so two prisoners would be sent to the river to collect water, with a soldier accompanying them. One night when he was down at the river getting water he told the other prisoner he was going to escape because if he stayed he would be killed anyway and although there were crocodiles in the river, he preferred to be eaten by crocodiles rather than get a bullet in the head. He claimed that he dived into the river and the soldier came running over but it was too late because he went under the surface and came up again several metres along. After he escaped, he went and saw one of his friends and his friend advised him to go to the [Province 1] and try to escape into Angola The Tribunal asked the applicant which river he escaped from. He stated the river [deleted: s.431(2)]. He remained under the water because he was frightened the soldier was going to shot at him. He crossed the river but a bit further downstream. The river was not all that wide. It took him about fifteen to twenty minutes to cross the river. The river was in [location deleted: s.431(2)] His friend who he went to see lived in [village details deleted: s.431(2)].
41. The applicant confirmed his friend gave him the idea of going to the lower Congo or [Province 1]. The Tribunal noted that in his statement he had mentioned a place called [City 3]. The applicant stated that [City 3] was in [Province 1] but he did not actually



get to [City 3] because it was too far away. Also, there were a lot of government soldiers in [City 3]. The Tribunal asked the applicant how he got to [Province 1] The applicant stated that he went to a station called [location deleted: s.431(2)], which was a depot for trucks making their way to [Province 1]. He went by truck, at night. It took him a whole night to get to [Province 1] as it was [distance deleted: s.431(2)] kilometres. Once he got to [Province 1], he went to a place called [Village B] and stayed there for four days. He stayed in truck stations where people went through when travelling in the area. He was looking for some way to get over the border in to Angola.

42. The Tribunal asked the applicant how he managed to go to Angola. The applicant explained that there was a market located between DRC and Angola which people from Angola came into [Province 1] for supplies and people from DRC crossed into Angola. He waited until market day and went into Angola but he did not know what to do. He met an Angolan soldier who spoke a bit of broken Lingala and told him he wanted to go to [Town 1] because there was a friend of his aunt who lived there. The soldier asked him for a small amount of money in exchange for directions to [Town 1]. The applicant stated that his friend had given him twenty thousand Congolese francs, which was worth about sixty dollars at the time. He had spent twenty dollars to take the truck to [Village B] and then spent about ten dollars on food and other things he needed to keep him going for the four days, so all he had left was three thousand Congolese francs or thirty dollars and that was what he gave the soldier. The soldier pointed out the track through the forest and told him to be very careful because it was planted with mines. The applicant stated that it took him about one day to get to [Town 1]. He left in the morning and arrived in the evening. It was very difficult walking all that way but he explained that there were little signs which assisted him in sticking to the track.
43. The applicant stated that when he got to [Town 1] he met an older lady who was carrying a bundle of firewood sticks and he spoke to her in French but she did not understand. He spoke to her in Lingala but she did not understand that either. He told her that he needed to find Madame [A] and because it was a fairly small village and everybody knew each other, she took him to Madame [A]'s home. He stated that he had met Madame [A] once when she came to Kinshasa and she was a friend of his maternal aunt. The applicant claimed that he explained his situation to her and the fact that his life was in danger. He told her about the conflict in Kinshasa and the fact he had escaped from prison and showed her the wounds [details deleted: s.431(2)]. Madam [A] kept him at her home for nine or ten months. During that period he did absolutely nothing because he was in agony and suffering badly from the injuries he sustained when he was tortured in prison. He was in a lot of pain and could not get around much at all because he did not have any medical treatment. He claimed it was only when he arrived in Australia that he had received medical assistance for the injuries associated with [details deleted: s.431(2)].
44. The Tribunal asked the applicant what happened after the nine or ten months he was staying with Madam [A]. The applicant stated that Madam [A] told him he should not remain there much longer because the DRC authorities had posted up photos at the border at [Village B] and possibly his photo was amongst those. He claimed the Angolan soldiers had been warned that Bemba's men were trying to flee into Angola. The applicant stated that he was extremely anxious and frightened as a result. Madame [A] told him that she would organise the documents required for a passport so he could escape but he did not know what sort of passport it would be. The Tribunal asked the

applicant if he knew what Madam [A] did to get him a passport. He stated that he remembered that night a man came to Madam [A]'s house and took his photo and date of birth. The man also had a little box with him and took his finger and put it on the box and then put it on a piece of paper. He claimed he had no idea what was happening and asked Madame [A] and she told him the man was going to Luanda to try and get a passport for him. The applicant stated that he did not have to sign anything.

45. The Tribunal asked the applicant what he did once he received his passport. The applicant stated that he did not do anything. He was totally dependent on Madame [A]. He stated that she was frightened that if the soldiers in the village found out that he was a supporter of Bemba, she would be persecuted as well. Madame [A] told him that she knew a businessman in Luanda with whom she was going to organise his escape from Angola. The applicant stated that it was difficult to get him out of [Town 1] to Luanda because there were a lot of road blocks and armed soldiers. Madame [A] organised with a container truck driver for him to be put into the container and taken to Luanda.
46. He arrived in [location deleted: s431(2)] in Luanda called [market deleted: s.431(2)] and that was where he met the businessman. He arrived in Luanda in April 2008. When he met the businessman, the businessman put him up in a house under construction but which had one room completed and told him that he would help him to escape. The Tribunal asked the applicant why this businessman agreed to help him. He stated that he did not know what the relationship or ties were between the businessman and Madame [A]. Also the businessman was a Christian. The Tribunal asked the applicant what sort of assistance the businessman gave him. He stated that every Saturday the businessman would bring him food as he had a little fridge in his room. He also brought him lots of books because he spoke a number of languages including French, English and Portuguese; he remembered once he brought him a Bible. The Tribunal asked the applicant what arrangements the businessman made for him to leave the country. The applicant stated that he did not know exactly because when he made all the arrangements he was not there. The Tribunal noted that it would have cost the businessman a lot of money to send him to Australia and asked the why a person would do all this for a virtual stranger. The applicant stated that it was Madame [A] who organised this with the businessman because he did not know him at all. Madame [A] said she knew someone who was a friend of hers and it was she who organised with the businessman to help him escape. He knew nothing about the money that was spent or changed hands.
47. The applicant stated that he left Angola [in] January 2009. When he arrived at the airport in Perth he saw his name on a placard. The businessman had told him that he would be arriving in Perth as a student at [Organisation A] and that he would be well looked after and would not have to worry about food or lodgings. The Tribunal asked the applicant if he ever tried to contact his family once he got to [Town 1] or to Luanda. The applicant stated that he did not know where his family were. He only recently made a request through the Red Cross in Australia to help him find his wife and children. With regard to his mother, he did not know because his mother did not even know that he was alive.
48. The Tribunal noted that he arrived in Australia in January 2009 but did not apply for protection until July 2009 and asked the applicant why he waited six months before seeking protection. The applicant stated that firstly he did not know what to do to become a refugee. He was also well looked after at the school and felt protected and

safe there. He felt he had been taken in by a family who were going to look after him. The Tribunal asked the applicant how he became aware that he could apply for protection. He stated that it got to a point that he did not feel safe and comfortable at the school anymore. The people at the school were trying to push him back to Angola because the [course details deleted: s.431(2)] had come to an end. He stated that he asked the school if he could stay there and they told him if he wanted to stay he would have to work at the school without pay. In addition, he would have to pay twelve dollars a day for his food. The applicant stated that the same week he went to [location deleted: s.431(2)] and there was [Person 1's details deleted: s.431(2)]. He received [Person 1]'s business card and rang him the next day. [Person 1] told him he did not live in Perth but came from Melbourne so he decided for himself to go to Melbourne. The Tribunal asked the applicant how he managed to make the arrangements to come to Melbourne. The applicant stated that there was an old man at the school who was from [Country C], who was there to do the same course as him. He told this man that he was going to see [Person 1] in Melbourne and asked for his help to buy the ticket. The applicant stated that the man started typing on the computer and a few hours later he presented him with a return ticket. The Tribunal asked the applicant how he paid for the ticket. He stated the old man who helped him paid for his ticket. When asked if this man asked him to repay him for the ticket, the applicant stated that he did not ask him for anything at all. The man did it for him out of his heart or goodwill because he had told him that it was very important he go to Melbourne to meet [Person 1]. The applicant stated that he asked for permission from his leaders at the school to go to Melbourne to meet [Person 1] and they allowed him but said that he had to return to Perth because he had to go back to Angola.

49. The Tribunal asked the applicant why he destroyed the passport he travelled to Australia on. The applicant stated that he destroyed it because he was frightened of going back to Angola because the Angolan government believed the political party he belonged to is a party of rebels. He stated that when John Pierre Bemba gave a speech as Vice President of the country, he made a plea for the Angolan government to respect the Congolese people and territory, therefore the Angolans believed if Bemba came to power he may have some influence on political parties in Angola and so he and all his supporters were considered rebels.
50. The Tribunal put to the applicant country information regarding the procedures involved in obtaining an Angolan passport. Specifically, the information about the procedures for acquiring an Angolan passport provided that an individual must submit a passport application along with their Angolan identification card and birth certificate to the Migration and Foreigners Service office. Men of military service age must also present their military service registration card. Applicants are fingerprinted when they apply for and receive their passport and because of the fingerprinting requirement no one is allowed to receive the passport on behalf of an applicant. An applicant is required to apply for and pick up the passport in person. The Tribunal put to the applicant given the information regarding the stringent requirements for obtaining a passport, it raised doubts about his claims that his aunt's friend could have arranged for an Angolan passport for him and suggested that this passport was in fact genuine. The applicant stated if he remembered correctly, as he explained before, there was some kind of arrangement between his aunt's friend and the man who came to the house. The man filled in all the forms, took his photo, asked his date of birth and had a small box with him which he took his finger and placed on and then put on a piece of paper. He

stated that when the man went away, his aunt's friend told him that he worked in Luanda and was going to organise a passport for him but he did not know where this man worked.

51. The Tribunal asked the applicant when he received the documentary evidence of his DRC nationality, which was submitted to the Tribunal. The applicant stated that he got them after the Department had refused his application. He explained that it was at this time he remembered the MLC had a website and through that website he got in contact with them. He contacted the coordinator and told him he was alive but they had difficulty believing this. He told the coordinator he needed evidence. The Tribunal asked the applicant who obtained the documents for him. He stated that it was the coordinator and secretary of his party. The documents were in his country. He explained when he went to Kinshasa in 2006, in order to be recognised as a member of the party, they needed to know who the person was so he had to provide identity documents and establish his credentials. The applicant had the original documents present in the hearing and presented them to the Tribunal for its perusal. The Tribunal asked the applicant who obtained his birth certificate. He stated that a friend from his political party. It was his friend who gave him the idea of escaping via [Province 1]. The applicant confirmed that his friend only recently obtained this document.
52. The Tribunal asked the applicant if he had assistance when he completed his protection visa application form. The applicant stated that his migration agent helped him. The Tribunal noted that in all the identification documents he had provided the Tribunal his occupation was listed as [occupation deleted: s431(2)] However, in his protection visa application it was stated that he had never been officially employed. The applicant stated that when it asked for official employment, he thought it related to his employment with Bemba and not his past employment as a [occupation deleted: s.431(2)] The Tribunal noted that it was also mentioned in his identity paper and MLC membership, his civil status was recorded as married. The applicant stated he was married. Although there was no official civil ceremony but he is considered to be legally married. He explained in the province he was from, if girl became pregnant, the boy had to marry her.
53. The Tribunal asked the applicant where he obtained the wanted list from the police. The applicant stated that his political party gave it to him. He explained that when he escaped from prison, the police posted photos of people who were wanted and the political party kept these posters in their archives. The applicant stated that he did not know that people were looking for him. It was only when he contacted his political party that they told him that there was a wanted notice for him relating to his escape from prison, so he asked them to send him a copy of the notice.
54. The Tribunal put to the applicant that in the letter from the Red Cross discussing the efforts made to trace his family it stated that when he escaped from prison he fled to his hometown of [Village A] and visited his mother and siblings. However, this was not what he had claimed happened after he escaped detention, in the statement attached to his protection visa application. The applicant stated the person at the Red Cross who wrote the letter made a few errors. When he received the letter from the Red Cross he saw that there were a number of mistakes and he went back to the Red Cross and told the author that there were errors that did not correspond to the information he had given. The applicant stated that it was corrected and he submitted the Tribunal with an

updated version of the letter but with the same date as the previous letter they had issued.

55. The Tribunal asked the applicant about the two letters from [Person 2], particularly why he provided two letters. The applicant stated that it was to prove he was Congolese and a supporter of Bemba. The Tribunal put to the applicant that it found it odd that in the first letter written by [Person 2] it was claimed that he had had been subjected to bullying and all types of harassment and arbitrary arrest but there was no mention of the fact he had been detained during the conflict on 22 March 2007, tortured whilst in detention and had escaped from detention and was wanted by the authorities and it was only in the second letter that this was mentioned. The applicant stated that if the Tribunal read the letter closely, [Person 2] was talking about the arrests in general terms because there was a lot of them and not specifically about his individual case.
56. The Tribunal asked the applicant what he feared would happen if he returned to DRC. The applicant stated that he was frightened of being tortured, being sent to prison and death. The Tribunal asked the applicant why he believed this would happen. He stated the political party in power was capable of doing whatever they want, one way or another, including arrest him, torture him and throw him into prison. The Tribunal asked the applicant why they would want to do these things to him. He stated that it was because he was a supporter of Bemba and he had escaped from prison.
57. The Tribunal noted that it had been over two years since he departed DRC, and given there were hundreds of people arrested at that time and there had been changes in the country since then, including the release of a number of people who were detained at the time of these incidents, developments in the country in terms of the ability of opposition parties to function such as a law passed in 2007 recognising opposition parties and giving them the right to function without restrictions and outside interference (although there were exceptions such as the political party BDK and targeting of this party) and particularly changes in relation to Bemba and the MLC. The Tribunal put to the applicant in light of the passage of time and changes in the country, the fact he was arrested and escaped detention may not necessarily result in him being targeted by the government if he returned to DRC. The applicant stated that he was not aware of the information put to him. All he did know was that human rights are not respected in his country. Even if he were to learn that there was peace, he was not sure the Congolese authorities would protect him. He believed that the authorities would treat him badly; if they did not kill him, he would surely be put in prison because they would remember everything that happened on 22 and 23 March and he believed he would be very badly treated. For this reason he begged the Australian government protect him because he could not trust the Congolese government as he knew the reality of the situation in his country. He stated everything that was published publicly was not the practicality or reality of what happens. While he was in prison he was treated as an animal and he does not have any trust or confidence at all. He is frightened.
58. The Tribunal asked the applicant if he knew what had happened to Bemba since 2007. The applicant stated that Bemba fled to the South African embassy and the UN forces escorted him out of the country. He was trying to find a way to get back to DRC but he was arrested and was in prison in Europe.
59. [In] December 2009, the Tribunal submitted a request to the DIAC Victorian Document Examination Unit concerning the authenticity of the Democratic Republic of Congo

Identity Card and the Avis De Recherche or wanted list submitted by the applicant to the Tribunal. [In] January 2010, the Tribunal received a response from the Document Examination Unit which provided that the result of the examination was inconclusive.

## COUNTRY INFORMATION

### *Movement for the Liberation of the Congo and the conflict in March 2007*

60. The Movement for the Liberation of the Congo (Mouvement de libération du Congo or Mouvement de Liberation Congolais) was formed in 1998 from troops from the former Zairian Armed Forces (FAZ) and the Special Presidential Unit (DSP) of the late dictator Mobutu Sese Seko's regime, some Congolese soldiers from the Republic of Congo and other recruits from the northwest (Equateur Province) (ISS, 'Democratic Republic of Congo – Security Information 2005, <http://www.iss.co.za/Af/profiles/DR Congo/SecInfo.html>).
61. The group was originally backed by support from Uganda and led by a former businessman Jean-Pierre Bemba. According to the entry in the *Political Handbook of the World*, some initial successes resulted in its affiliation with one of the Rwandan factions of the Congolese Rally for Democracy (RCD) in 1999. Resulting conflict between Rwanda and Uganda ended that alliance and as a consequence of the peace accord of December 2002 in Pretoria it became a member of the transitional government (see e.g. 'Democratic Republic of the Congo: Timeline: Democratic Republic of Congo 2008, *BBC*, 30 April).

Like the other major rebel groups, the MLC participated in the Inter-Congolese National Dialogue and signed the Pretoria Accord. MLC fighters were subsequently integrated into the national security forces, and the party became a member of the transitional government. MLC leader Bemba was sworn in as one of four vice presidents for the DRC on July 17, 2003, and the MLC was given equal representation with the RCD-Goma and the opposition alliance in the cabinet and the transitional legislature ('Democratic Republic of the Congo' *Political Handbook of the World*, 2009, [http://library.cqpress.com/phw/document.php?id=phw2009\\_DemocraticRepublicoftheCongo&type=toc&num=13](http://library.cqpress.com/phw/document.php?id=phw2009_DemocraticRepublicoftheCongo&type=toc&num=13)).
62. It became a political party on 7 April 2003 and is purportedly a socialist organisation, advocating social justice and nationalism (H. Kabungulu Ngoy-Kangoy 2006, *Parties and Political Transition in the Democratic Republic of Congo*, EISA, Richmond, Johannesburg, p. 51 – <http://www.eisa.org.za/EISA/publications/caterr.htm>).
63. In the lead up to the first democratic elections since independence which were held in July and October 2006, a number of violent incidents involving police and Republican Guards and the MLC occurred. More comprehensive details and analyses of these conflicts, their causes and the alliances which were formed during that year are provided in reports by numerous agencies including International Crisis Group and Human Rights Watch (International Crisis Group 2007, *Congo – Consolidating the Peace*, 5 July; Human Rights Watch 2008, *We Will Crush You. The Restriction of Public Space in the Democratic Republic of Congo*, November). As reported by the Human Rights Watch report, the two leaders did not themselves publicly campaign 'during the runoff because each feared the possibility of assassination by the other side. Both candidates stayed away from rallies and other public functions, providing for

minimal debate or scrutiny of their policies' (p. 20). The run-off election produced a clear result, with Kabila winning 58.05% and Bemba 41.95% of the presidential vote respectively. The National Assembly election for 500 seats in July of that year had resulted in MLC winning 64 seats and Kabila's People's Party for Reconstruction and Democracy 111 ('Elections in Congo-Kinshasa [Democratic Republic of the Congo]' 2007, African Elections Database, <http://africanelections.tripod.com/cd.html>).

64. On 13<sup>th</sup> November 2006, Kabila decreed that the vice-presidents (i.e. including Bemba) would be required to have their guards integrated into the army 'while allowing each an escort of only twelve police' (ICG op cit. p 11). An *IRIN News* report of 24 November 2006 described a degree of tension in Kinshasa as a result of both the presidential order to reduce the number of guards and the incident at the Supreme Court earlier that week which had seen a protest about alleged electoral fraud:

Residents have remained near their homes; those going to work or the market in the city have hurried home earlier than usual. Police and army units manned strategic locations in this city of about seven million as an army truck begun on Thursday to take Bemba's guards to his other stronghold at Maluku, 80 kms northeast of Kinshasa.

"It is the first truck but the movement will continue," Lt-Gen Kisempia Sungilanga, commander of the Congolese armed forces, said.

Vice-President Azarias Ruberwa, in charge of the government's Political Affairs and Defence Committee, said: "If such action would help restore peace in this city, it must be applied."

Bemba's spokesman, Moise Musangana, said the removal of some guards was merely "a routine rotation".

News agencies reported that Kabila had written to Bemba asking him to remove troublesome elements among his guards from the capital. This followed the partial burning of the Supreme Court and shooting on Tuesday between the police and Bemba's supporters. The riot halted a hearing into an allegation of electoral fraud filed by Bemba and his Union pour la Nation coalition.

"We cannot tolerate armed people in civilian clothes parading around town. We will not tolerate an insurrection," Admiral Liwanga Mata Nyamunobu, the Kinshasa City governor, said ('DRC: Tension rises after Bemba told to remove guards' 2006, *IRIN News*, 24 November <http://www.irinnews.org/Report.aspx?ReportId=61645>).

65. The article referred to Bemba aides claiming he had about 1,000 guards, compared with the President's 15,000. The standoff continued into 2007, as a *Reuters* report from 21 March described;

U.N. forces deployed armoured vehicles and hundreds of peacekeepers near Bemba's residence in Democratic Republic of Congo's riverside capital Kinshasa on Tuesday to try to prevent clashes between government soldiers and armed Bemba loyalists.

President Joseph Kabila's government last week ordered Bemba's forces to begin integrating into the national army or disband after landmark elections in 2006 ended a three-year transition during which he served as a vice-president.

"Our troops will not move until measures are taken to assure his security," Fidel Babala, a top advisor to Bemba, told journalists. "There have been several attempts to kill him."

Dozens died last year when Bemba's forces and government soldiers twice clashed during presidential elections eventually won by Kabila in the vast, mineral-rich central African country.

The polls were meant to herald a new era in the former Belgian colony following a devastating 1998-2003 war that killed an estimated four million people through conflict related violence, hunger and disease.

66. The Bemba adviser who is quoted in the report made comments which turned out to be prescient, given the level of violence and the hundreds of deaths (the precise number is not known) which occurred immediately afterwards;

Babala said Bemba has the right to an 'appropriate personal guard' according to a previous UN-brokered deal signed in October, which was meant to avoid further violence between supporters of the two candidates then.

"In this same street 47 years ago a prime minister was kidnapped," said Babala, referring to the disappearance and murder of Congolese independence icon Patrice Lumumba.

"The UN was there at the time. We are not going to allow history to repeat itself," he said.

Peacekeepers from Congo's U.N. mission, known by its French acronym MONUC, remained in place Wednesday as diplomats attempted to push the two sides to end the standoff peacefully ('Congo ex-rebel leader's forces defy order to disarm' 2007, *Reuters*, 21 March, [http://uk.reuters.com/article/idUKL21502910.\\_CH\\_.242020070321](http://uk.reuters.com/article/idUKL21502910._CH_.242020070321)).

67. The ICG report referred to above summarised the events as follows:

Hardliners on both sides were left free to operate, leading to a two-day military confrontation in the streets that produced some of the worst fighting in Kinshasa's history. Although official figures remain unavailable, at least 400 soldiers and civilians were probably killed and 250 injured,61 while thousands of children were trapped in schools, before Bemba's troops surrendered, and he took refuge in the South African embassy. The government accused the opposition of planning to destabilise the state and refused to acknowledge any responsibility of its own,62 though the Presidential Guard used very violent means to quash resistance, including shelling and attacking several diplomatic premises (International Crisis Group 2007, *Congo – Consolidating the Peace*, 5 July, p. 11).

68. The fighting began on 22<sup>nd</sup> March;

Around midday on March 22, 2007, Bemba's guards and government soldiers exchanged fire. It is not clear who fired the first shot. Within an hour a full-scale battle erupted on Kinshasa's main avenue, the Boulevard de 30 Juin, and raged for three days, engulfing other parts of central Kinshasa and trapping tens of thousands of people at their workplaces, schools, and homes. MONUC military officers estimated that some 2,600 soldiers, including some in tanks, fought Bemba's 400 to 500 guards, who were assisted by several hundred family members and untrained supporters (Human Rights Watch 2008, *We Will Crush You. The Restriction of Public Space in the Democratic Republic of Congo*, November, p. 24 - Attachment 9).

69. ICG provides a summary of the subsequent events, leading up to the Bemba's departure for Portugal where he remained until the following year ;



Immediately after the end of fighting, the government began to intimidate and arrest opposition figures,<sup>64</sup> as well as Kinshasa residents from Equateur province. According to human rights organisations, at least 80 people were harassed or arrested.<sup>65</sup> Presidential Guards ransacked the houses of Francois Mwamba, Omer Egwake and Jose Makila, all leading opposition figures. MLC headquarters in Kinshasa was looted and occupied. Bemba's television and radio stations<sup>66</sup> were taken off the air shortly before the fighting began, and security forces looted them.<sup>67</sup> Various security services were involved in the crackdown but the special police services – whose head, Raus Chalwe, reported directly to the presidency – was responsible for most arrests, a majority of which were warrantless.<sup>68</sup> Military courts charged most suspects with insurrection, treason and illegal possession of firearms.<sup>69</sup> On 11 April, after difficult negotiations, Bemba left the South African embassy with a UN escort and flew to Portugal, officially for medical reasons. That day, the public prosecutor asked the Senate to lift his immunity so he could be charged with high treason as the “main instigator” of the clashes (p. 11).

70. Bemba was arrested in Brussels in May 2008 on the basis of an International Criminal Court arrest warrant relating to crimes committed by troops in his control in the Central African Republic during 2002-2003 ('Democratic Republic of the Congo: Congo's former vice-president arrested' 2008, Human Rights Watch, 30 May). He was subsequently transferred to the Hague and following a number of pre-trial appearances and hearings in 2009, will face trial at the ICC on 27 April 2010 (Coalition for the International Criminal Court website 2009, Bemba case summary, <http://www.iccnw.org/?mod=bemba>). He received a conditional bail release on 14<sup>th</sup> August 2009, pending negotiation of a host country ('Bamba gets bail ahead of ICC war crimes trial' 2009, *France 24*, 14 August, <http://www.france24.com/en/20090814-jean-pierre-bemba-gets-parole-ahead-icc-war-crimes-trial-central-african-republic-dr-congo>).
71. *IRIN* News reported a few days after the violence that UN officials had stated that 200 Bemba militias had been 'integrated into the national army in Equateur province'. Another 140 were expected to follow soon after. A disused Coca-Cola factory used for storing weapons had been secured, along with associated arms, ammunition and vehicles ('DRC: Opposition militias join army in Equateur province' 2007, *IRIN*, 29 March, <http://www.irinnews.org/Report.aspx?ReportId=71075>).
72. A September 2007 report by the UN High Commissioner for Human Rights referred to the MONUC Special Investigations Team findings on the unjustified use of heavy weapons in the city centre during the March 2007 conflict and the consequent high level of civilian casualties;

At least 40 civilians and surrendered DPP soldiers were allegedly summarily executed, mainly by the RG, during or in the wake of these operations. Reports of mass burial sites and evidence of bodies of unidentified victims (civilians and military) recovered in the Congo River (some tied up and blindfolded) indicate that there may have been a significantly higher number of summary executions committed during and in the aftermath of these events. Over 200 persons were arrested by the security forces during and after the fighting, in many cases without the correct legal procedures being followed and often on the sole basis that the arrested person hailed from the Equateur province. A significant number of victims suffered cruel, inhuman and degrading treatments during detention. Most of these persons remain in detention to this date. The Team concluded that around 300 persons lost their lives during the hostilities and in their aftermath. However, the exact figure, which could be significantly higher, was impossible to ascertain due, in large part, to the lack of cooperation from the authorities throughout the course of the

investigation (US Department of State 2009, *Country Reports on Human Rights Practices – Democratic Republic of the Congo*, 25 February, Section 3).

73. In the major Human Rights Watch (HRW) report on the March 2007 violence, the agency concluded that the Republican Guard was one of the main groups responsible for the killings and torture which occurred;

Republican Guards arbitrarily arrested over 600 persons and subjected many of those in their custody to torture and inhuman treatment. Most of these persons were arrested during or shortly after the March 2007 military operation and were either guards or supporters of Bemba. A smaller number of people were swept up by the Republican Guards merely because they were from Bemba's ethnic group, the Ngwaka, or his region of origin, Equateur.

74. HRW also concluded that the Republican Guards arrested and detained some hundreds of people, and some were executed at the main barracks at Camp Tshatshi, which overlooks the Congo River. Bodies of over 30 people were found blindfolded and with their hands tied, some with tape over their mouths, in the river near Kinsuka (pp. 27-31).

#### *Events since March 2007*

75. There are many reports available on the political, security and human rights situation in the country. Important developments since March 2007 include the signing of the peace agreement between the government and more than 20 armed groups in the eastern DRC, but did not include the Democratic Liberation Forces of Rwanda (FDLR). In its 2009 annual report on the country Freedom House noted that:

Heavy fighting broke out in August 2008 between government troops and the ethnic Tutsi rebel leader Laurent Nkunda's National Congress for the Defense of the People (CNDP). In October, the government accused Rwanda of cross-border incursions to support the CNDP, while the Rwandan government alleged official DRC tolerance of the FDLR and its deployment against the Congolese Tutsi minority. These developments sparked fear that the fighting would again escalate into a wider regional war, and in November, it was reported that Angolan and Zimbabwean troops had joined the conflict to support the ineffective DRC army. As a result of increased violence since August, civilian displacement and human rights abuses have been increasing. Doctors Without Borders (MSF) reported treating 6,700 victims of sexual violence in North and South Kivu in 2008, and the recent conflict has displaced at least 250,000 people, adding to the one million people already displaced in this area. In addition, the Lord's Resistance Army (LRA) carried out a series of attacks in northern DRC in late December, resulting in the deaths of 865 civilians and the abduction of at least 160 children.

...

In July 2008, MLC politician Daniel Botethi was killed in Kinshasa. Suspicions about the involvement of the Republican Guard led the MLC to suspend its participation in the parliament for one week and call for an investigation. In September, a military tribunal sentenced three soldiers and two civilians to death for Botethi's murder. One of the soldiers claimed that the Kinshasa governor, Andre Kimbuta, had ordered the killing, though he later retracted this allegation. That same month, the leader of a small opposition party was arrested and charged with "threatening state security" after he suggested that government members were involved in the Botethi murder (Freedom House, *Freedom in the World 2009 - Congo, Democratic Republic of (Kinshasa)*, 16 July).

76. The country passed a law in 2007 which recognised opposition parties and these have been able to function, as the US State Department reported;

The country's 11 new provincial assemblies chose 108 candidates for five-year terms in the national Senate in January 2007. The elections took place peacefully but were marred by credible allegations of vote-buying.

A 2007 law on the status and rights of the political opposition recognizes opposition parties represented in parliament as well as those outside it and guarantees their right to participate in political activities without fear of retribution. During the year political parties were able to operate most of the time without restriction or outside interference; however, there were notable exceptions. Opposition members were sometimes harassed (see section 2.a.), and in February and March police killed numerous supporters of the BDK during violent clashes in Bas-Congo Province and systematically destroyed BDK meeting places (US Department of State 2009, *Country Reports on Human Rights Practices – Democratic Republic of the Congo*, 25 February, Section 3).

77. Angola and DRC have each expelled significant numbers of the other's citizens from the end of 2008, causing major humanitarian concerns, with insufficient tents, food and other facilities available to them. According to an *IRIN News* report of 20<sup>th</sup> October 2009, the numbers included 32,000 Angolans sent home and almost 19,000 Congolese deported from Angola ('Angola-DRC: Humanitarian crisis now unfolding' 2009, *IRIN News*, 20 October, <http://www.irinnews.org/Report.aspx?ReportId=86659>). A meeting to finalise a temporary agreement suspending the expulsions was due to take place in mid-November ('Throwing out the Neighbours' 2009, *Africa Confidential*, Vol. 50. No. 22, <http://www.africa-confidential.com/index.aspx?pageid=7&articleid=3315>). According to the latter report the expulsions, ostensibly in response to the problem of illegal immigration, may be related to disputed territory near the border of Bandundu Province in DRC and Uige, Malanje and Lunda Norte provinces of Angola, or to territorial waters where large oil deposits exist.

78. The US Department of State reported in its most recent human rights report that in July 2008, following the identification by the vice human rights minister that some individuals arrested after the March 2007 confrontations in Kinshasa were being detained illegally, 107 of the 187 people still detained at that time were released:

Authorities took no action against those responsible for summarily executing and otherwise killing approximately 300 persons in March 2007 during armed confrontations in Kinshasa between forces loyal to President Kabila and rival forces loyal to former vice president Jean-Pierre Bemba. Authorities also took no action against FARDC and GR officers who arrested more than 200 persons following the confrontations and subjected many of them to cruel, inhuman, and degrading treatment. By July 25, after the vice minister of human rights identified several individuals being detained illegally, authorities had released more than half (107) of the 187 individuals who were still in detention at the beginning of the year as a result of the March 2007 Kinshasa fighting. According to the UN peacekeeping mission in the country (MONUC), by year's end authorities released the remaining 80, all former militia members of Bemba's protection force, and transferred them to Kamina, Katanga Province, to be integrated into the FARDC (US Department of State 2009, *Country Reports on Human Rights Practices – Democratic Republic of the Congo*, 25 February, Section 1a).

#### *Returnees to DRC including failed asylum seekers*

79. The question of the safety or not of the return of failed asylum seekers to the Democratic Republic of Congo has been the subject of considerable interest and debate in recent years. The United Kingdom in particular has seen high levels of opposition to

the government's contention that returned asylum seekers *per se* are not at risk of persecution.

80. In 2005, the UK Immigration Appeal Tribunal concluded that returned failed asylum seekers were not at risk of persecution 'for that reason alone'. The Tribunal accepted that returnees may be required to pay a fine (essentially a bribe). Only those asylum seekers with other characteristics or risk factors were seen to be of interest to the authorities, including those with a nationality or perceived nationality of a state regarded as hostile to the DRC, Rwanda in particular, those who were Tutsi or perceived to be Tutsi or Banyamulenge; and those who had or were perceived to have 'a military or political profile in opposition to the government' (UK Immigration Appeal Tribunal 2005, *AB and DM (Risk categories reviewed – Tutsis added) DRC v. Secretary of State for the Home Department* CG [2005] UKAIT 000118, 21 July, 47, 51)
81. In response to a BBC program aired in December 2005 the UNHCR issued a statement in view of the program's allegations that failed asylum seekers returned to the DRC were subject to ill-treatment. The UNHCR believed that such individuals would be questioned at the Kinshasa airport on arrival, as would any person travelling without full documentation, or who had been absent for a long period of time. They may be released after perhaps 1 to 3 hours, or they may be transferred to a city detention facility where further verification checks may be carried out (Jenny Cuffe 2005, 'Asylum questions for DR Congo, *BBC*, 1 December, <http://news.bbc.co.uk/2/low/africa/4483364.stm>) The NGO 'Voix des Sans Voix' (VSV – 'Voice of the Voiceless') had provided information to suggest that Western countries were returning failed asylum seekers to DRC but had no reports that such persons were detained or tortured on arrival. Some individuals had claimed having to pay amounts of US\$5-10. The UNHCR report stated that the IOM Kinshasa, MONUC and NGO ASADOH (Association Africain de Defense des Droits de l'Homme) had no reports at that time of ill-treatment of failed asylum seekers (UNHCR 2006, 'Response to Information Request – DRC – Treatment of rejected asylum seekers', 19 April).
82. In 2007, the UK Home Office was forced to suspend deportations of failed asylum seekers to the DRC in August of that year at the instruction of the High Court, pending a hearing by the Asylum and Immigration Tribunal (AIT) to be held the following month. The hearing was to be a country guidance case involving testimony by a number of witnesses, including Congo immigration and security staff. The action to prevent deportations was launched by 10 asylum seekers (Judge halts DR Congo deportations' 2007, *BBC*, 23 August, [http://news.bbc.co.uk/2/hi/uk\\_news/6960801.stm](http://news.bbc.co.uk/2/hi/uk_news/6960801.stm)) The decision was eventually made and published in a judgement of over 140 pages, in which the Tribunal found against the applicant, and that 'DRC failed asylum seekers do not per se face a real risk of persecution or serious harm or treatment contrary to Article 3 ECHR' (UK Asylum and Immigration Tribunal 2007, *BK (Failed Asylum Seekers) Democratic Republic of Congo v. Secretary of State for the Home Department*, CG [2007] UKAIT 00098, 18 December)
83. In a decision made on 3<sup>rd</sup> December 2008, the Court of Appeal upheld the Tribunal's finding (United Kingdom: Court of Appeal (England and Wales) 2008, *BK (Democratic Republic of Congo) v. Secretary of State for the Home Department*, [2008] EWCA Civ 1322, 3 December).

84. In early 2009, the BBC reported that deportations were set to re-commence in early February. The decision was criticised by the Congolese community in the UK and others (Campaigners fight DR Congo removals' 2009, *BBC*, 29 January, [http://news.bbc.co.uk/1/hi/newsid\\_7857000/7857857.stm](http://news.bbc.co.uk/1/hi/newsid_7857000/7857857.stm)).
85. The *Guardian* claimed in an article in May 2009 that a charter flight had flown to Kinshasa with 24 Congolese aboard, and other individuals had also been deported in March on other flights. The report claimed that one of those returned earlier had been taken to the police headquarters Kin Maziere, the general directorate of intelligence and special services in Kinshasa, where he had been tortured for three weeks ('Britain sending refused Congo asylum seekers back to threat of torture' 2009, *The Guardian*, 27 May, <http://www.guardian.co.uk/world/2009/may/27/drc-congo-deport-torture>).
86. A Teesside Member of Parliament wrote to the Immigration Minister (Home Office) Phil Woolas after one of his constituents was deported – and subsequently imprisoned. According to one news report, the man deported had been looking after two younger sisters, who had been allowed to remain in the UK ('Stockton North MP challenges Government Immigration Minister' 2009, *Evening Gazette*, 30 May, <http://www.gazettelive.co.uk/news/teesside-news/2009/05/30/stockton-north-mp-challenges-government-immigration-minister-84229-23744519/2/>) No further information on the fate of the man deported was found.
87. The UK's current position, is outlined in the UK *Operational Guidance Note – Democratic Republic of Congo* (December, 2008). This advice relies on the previous UK AIT judgement to conclude that membership of an opposition party alone does not provide risk of persecution. The advice states that;

Cases in which the applicant has a record of political activity and of ill-treatment amounting to persecution, and establishes a well-founded fear of future persecution are therefore likely to be very rare...Members of political parties who have in the past encountered ill-treatment by the authorities will not necessarily have a well-founded fear of persecution in the future. Former rebel group forces are represented in the recently elected National Assembly and the Senate having stood in the DRC's first peacetime democratic elections. (UK Home Office 2008, *Operational Guidance Note – Democratic Republic of Congo*, 23 December, 3.6.11, p. 5)

88. In lengthy discussion of expert and applicant witness evidence presented in the BK (AIT) case, the issue of the payment of bribes is discussed. The Tribunal noted in relation to this issue the very important difference between those returnees who were likely to be in a position to be able to leave the airport having paid some kind of bribe, any level of which would be 'modest by Western European standards' and those with other risk factors;
322. We would emphasise that in reaching the above conclusions we have taken into account that there were items of (or parts of) the evidence before us indicating that bribes demanded can be prohibitively large sums and that returnees can be detained because they have no money, but taken as a whole we did not find those items (or parts of the evidence) reliable. Whilst we are prepared to accept that in rare cases prohibitive sums may be demanded and/or persons are detained because they cannot pay, the evidence as a whole does not demonstrate that this is generally happening or that it happens sufficiently to give rise to a real risk of it happening to returned failed asylum seekers as such.

323. Accordingly we are not persuaded that for deportees or failed asylum seekers the difficulties they commonly face in being expected and required to pay a bribe amounts to treatment contrary to Article 3 ECHR or to serious harm.

324. The same cannot be said, however, for the nature of the requests/demands for bribes once a person is transferred to detention facilities elsewhere. We of course have not found that failed asylum seekers will be transferred in this way, but for individuals who will face such transfer because of specific risk factors (e.g. those who are on a wanted list), the preponderance of the evidence, at least as presented to us in this appeal and (with express concession by Miss Giovannetti for the purposes of this appeal), is that, once in detention away from the airport, they will be in an extremely vulnerable situation characterised by physical and verbal abuse of a serious kind. They are no longer involved in a process which can normally be negotiated by paying a bribe in circumstances which are not oppressive. They have lost their liberty and face targeted ill treatment. (UK Asylum and Immigration Tribunal 2007, *BK (Failed Asylum Seekers) Democratic Republic of Congo v. Secretary of State for the Home Department*, CG [2007] UKAIT 00098)

89. In a report published in June 2009 as part of a project funded by the European Community on country return information (part of a larger European Union funded project covering a number of countries), the process for returning arrivals is described in detail. Arrivals of deportees who are Congolese nationals are monitored by NGO VSV and it has been able to operate at the N'djili airport since 2004. The returnee will be questioned by the Directorate General of Migration and returnees will be subject to a high level of searching of belongings and extortion of money, 'for example if the vaccination certificate isn't valid', and this can continue by other police and military in other areas of the airport, based on the belief that returnees have some wealth. The report states in respect of those with an unsuccessful asylum claim that such individuals are 'not prosecuted unless he has earlier committed a crime for which he has not been pardoned or amnestied. However the candidate can be hassled by agents willing to take some of his goods or personal effects' (Country of Return Information Project 2009, *Country Sheet – Democratic Republic of Congo (DRC)*, June, <http://www.cri-project.eu/> - Accessed 3 December 2009, para 1.3.1, p. 11; para 1.4.2, p. 12).
90. Amnesty International in its 2009 submission to the UN Universal Periodic Review Working Group of the Human Rights Council (Amnesty International 2009, 'Democratic Republic of Congo - Submission to the UN Universal Periodic Review' 13 April, <http://www.amnesty.org/en/library/asset/AFR62/009/2009/en/28861dee-1df4-4f4d-af4f-bc9f53bae608/afr620092009en.html>) commented on the treatment of political prisoners and others detained without trial, and the strong likelihood those originating from Equateur province would be at higher risk of such detention. The submission stated that it was concerned that:
- many if not all of these individuals are detained solely because they share Jean-Pierre Bemba's ethnicity or geographical origin in Equateur province, and has repeatedly called for their prompt trial or release. Four of them have died in pre-trial detention from preventable illnesses and ill-health allegedly aggravated by torture. In July 2008, the government ordered the release of 258 military and civilian detainees from Kinshasa's central prison. The detainees had been held unlawfully without trial for long periods, some since 2004. While welcome, the releases appear to follow no organized or transparent judicial processes.
91. As noted in the UN Security Council report of 4<sup>th</sup> December (UN Security Council 2009, *Thirtieth report of the Secretary-General on the United Nations Organization*

*Mission in the Democratic Republic of the Congo*, 4 December), the MLC lost control of Equateur province in November when the MLC Governor was removed after embezzlement charges were brought against him:

23. On 13 November, following elections organized in Equateur province by the Commission Electorale Indépendante, the former Mouvement pour la libération du Congo (MLC) Governor of Equateur, who had been dismissed by the Supreme Court on charges of embezzlement, was replaced by an independent candidate, Jean-Claude Baende. Equateur was the only remaining province under the leadership of the opposition MLC party.

92. The UN Human Rights Council Universal Periodic Review report incorporating information from other bodies (submitted General Assembly September 2009) included the statement;

36. The High Commissioner stressed that other political groups such as the Mouvement de Libération du Congo (MLC) of former Vice-President Bemba were the targets of threats, arbitrary arrests, incommunicado detention, torture and other forms of intimidation or repression.<sup>138</sup> The Secretary-General and MONUC reported on the March 2007 events in Kinshasa, when security forces assaulted the Bemba security detail and about 300 persons were killed.<sup>139</sup> The High Commissioner indicated that in 2008, dozens of new cases of arbitrary detention of persons affiliated with MLC were reported (UN Human Rights Council 2009, *Compilation Prepared by the Office of the High Commissioner for Human Rights, in accordance with paragraph 15(b) of the Annex to Human Rights Council Resolution 5/1 - Democratic Republic of the Congo*, 18 September 2009, A/HRC/WG.6/6/COD/2).

93. The US State Department, 2009, *Country Reports on Human Rights Practices 2008 – Democratic Republic of the Congo*, February provided a summary of the general conditions of the country's prisons:

Conditions in most prisons remained harsh and life-threatening.

In all prisons except the Kinshasa Penitentiary and Reeducation Center (CPRK), the government had not provided food for many years--prisoners' friends and families provided the only available food and necessities. Malnutrition was widespread. Some prisoners starved to death. Prison staff often forced family members of prisoners to pay bribes for the right to bring food to prisoners.

Temporary holding cells in some prisons were extremely small for the number of prisoners they held. Many had no windows, lights, electricity, running water, or toilet facilities.

According to the UNJHRO, on January 17, inmates took the director of Kalemie Central Prison in Katanga Province hostage in protest against the chronic food shortage in the prison. The inmates had not eaten for three days. They released him the same day.

During the year many prisoners died due to neglect. For example, the UNJHRO reported in February that over a two-month period, 21 prisoners died from malnutrition or dysentery in prisons in Uvira, Bunia, and Mbuji-Mayi.

On April 17, local judicial authorities visiting Bunia Central Prison in Orientale Province observed that three prisoners had died that month due to malnutrition.

Between June 21 and 25, five inmates died of malnutrition in Mbuji-Mayi Central Prison in Kasai Oriental Province. The UNJHRO stated 12 other inmates were in critical condition.

...

According to MONUC, fewer than 90 of the country's 230 prisons actually held prisoners; while there were no reports of the government officially closing prisons during the year, dozens of prisons that had not functioned for years remained closed. In some cases security personnel who were detained or convicted for serious crimes were released from prison by military associates or by bribing unpaid guards. Most prisons were dilapidated or seriously neglected. Prisoners routinely escaped from prisons in all provinces.

...Despite President Kabila's 2006 decision to close illegal jails operated by the military or other security forces, there were no reports of illegal jails being closed during the year. According to MONUC the security services, particularly the intelligence services and the GR, continued to operate numerous illegal detention facilities characterized by harsh and life threatening conditions. Authorities routinely denied family members, friends, and lawyers access to these illegal facilities.

During the year the UNJHRO confirmed cases of torture in detention centers run by security services. For example, in April, six inmates in Musenze Central Prison in Goma, North Kivu, claimed that ANR agents tortured them in an ANR holding cell from March 29 to April 1, before transferring them to the prison. UNJHRO officers observed marks on their bodies that were consistent with their claims.

## **FINDINGS AND REASONS**

94. The applicant arrived in Australia on a Angolan passport which he stated was false and he claimed to be a national of Democratic Republic of Congo (DRC). The Tribunal has examined the evidence submitted by the applicant in support of his claimed Congolese nationality, namely his birth certificate and certificate of loss of identity documents. On the basis of this evidence the Tribunal accepts that the applicant is a national of DRC and therefore for the purposes of the Convention has assessed his claims against DRC.
95. The Tribunal found the applicant to be a consistent and credible witness. The Tribunal accepts the applicant was a member of the Movement for the Liberation of Congo (MLC). The applicant displayed a level of knowledge of the party consistent with being an active member. He was aware that the MLC formed in 1998 but only became a political party in 2003. The applicant also expressed clearly and concisely his motivation for supporting the MLC and his activities from 2004 onwards, once the party was legally recognised.
96. The Tribunal accepts that the applicant was employed as a security guard for opposition leader Jean Pierre Bemba from 2006. He provided detailed evidence regarding his duties [details deleted: s.431(2)]. The applicant's description of Bemba's security service was entirely plausible and consistent with independent information discussing Bemba's guards. His account of the conflict between government forces and Bemba's guards in 2007, including the reasons for the clash, the events of the two day military confrontation and subsequent events which led to Bemba's departure from the country, were also consistent with independent information.
97. The Tribunal accepts that the applicant was detained during the conflict between Bemba's guards and government forces in Kinshasa on 22 and 23 March 2007. The Tribunal accepts that whilst in detention the applicant was tortured in the manner he described. The applicant's account of his arrest and detention was consistent with



independent information. The Tribunal notes the September 2007 report by UNHCR provided that over 200 people were arrested by security forces during and after the fighting and a significant number suffered cruel, inhuman and degrading treatment during detention. The Human Rights Watch report *We Will Crush You. The Restriction of Public Space in the Democratic Republic of Congo*, November 2008 states that most of the over 600 persons (as opposed to the 200 reported by UNHCR) arrested during or shortly after the March 2007 military operation were either guards or supporters of Bemba.

98. The Tribunal accepts that the applicant escaped from detention whilst collecting water from the river. The Tribunal found the applicant's account of his escape entirely plausible. The Tribunal notes that the applicant provided the Tribunal with a copy of a wanted notice which he claims was issued after he fled detention and the DRC. The Tribunal referred this document to the Document Examination Unit for their consideration as to its veracity, however the result of the examination was inconclusive. The Tribunal finds it conceivable that someone who escapes from detention would be pursued by the authorities, especially in light of the events that were taking place in Kinshasa in mid 2007. The Tribunal therefore accepts that the applicant was wanted by the authorities.
99. The Tribunal also accepts the applicant's account of his departure from DRC to Angola based on his consistent evidence, as well as the country information cited above which discusses the problem of illegal immigration and the reported deportation of almost 19,000 Congolese from Angola in October 2009.
100. The Tribunal accepts that after crossing the border into Angola the applicant went to [Town 1] where he stayed with a friend of his aunt, for nine or ten months. The Tribunal accepts the applicant's aunt's friend arranged for the applicant to obtain an Angolan passport so he could leave the country. The Tribunal has taken into consideration the country information referred to by the delegate which discusses the procedures for getting a passport in Angola. However, the Tribunal accepts that it is plausible such processes can be bypassed especially by people who work within the system. The Tribunal accepts it is plausible that the applicant could have obtained an Angolan passport with the assistance of someone who worked at the passports office who came to his aunt's friend's home and completed the necessary forms for the applicant and took his fingerprints.
101. The Tribunal similarly accepts it is plausible that the applicant departed Angola after his aunt's friend made arrangements with a businessman to assist him to leave the country.
102. The Tribunal therefore accepts that the applicant is a member of MLC, as well as a former security guard of Jean Pierre Bemba, who escaped from prison and was on a wanted list. The Tribunal has had regard to the country information regarding the current situation in the DRC. Although the Tribunal accepts that there have been significant changes in the country since the applicant departed, such as the release of a number of people who were detained as a result of events that took place in March 2007 and developments in regard to the ability of opposition parties to function without restriction and outside interference, the Tribunal notes the Amnesty International 2009 submission to the UN Universal Periodic Review which commented on the strong likelihood of those originating from Equator province being at high risk of detention in

DRC. The Tribunal notes that Amnesty was concerned that many individuals were detained solely because they share Bemba's ethnicity or geographical origin in Equator province. The United Nations Human Rights Council, Universal Periodic Review Report, dated 18 September 2009 also discusses MLC members being targets of threats, arbitrary arrests, incommunicado detention, torture and other forms of intimidation or repression.

103. The Tribunal has also taken into consideration the independent information regarding the situation of returnees or failed asylum seekers to DRC. According to a report published in June 2009 as part of the Country of Return Information Project, *Country Sheet – Democratic Republic of Congo*, returnees to DRC are questioned by the Directorate General of Migration and are subject to a high level of searching of belongings and extortion of money and this can continue in other areas of the airport by other police and military based on perceptions that a returnee has wealth. The Tribunal notes the in the UK AIT judgment in *BK* the issue of payment of bribes by returnees to DRC was discussed in some detail and it was noted that there was a difference between those returnees who were likely to be in a position to be able to leave the airport having paid some kind of bribe, and those with other risk factors, such as those on wanted lists. It was noted that based on the evidence provided to the Tribunal, an individual with specific risk factors who may subsequently be transferred to a detention facility away from the airport will be in an extremely vulnerable situation characterized by physical and verbal abuse of a serious kind.
104. In light of the independent information discussed above and the applicant's particular profile as a former [Position A] of Jean Pierre Bemba who was on a wanted list as a result of escaping from detention, the Tribunal finds that there is more than a remote chance that the applicant would come to the attention of the authorities upon his arrival at N'djili airport and that he could face serious harm in the form of interrogation, detention and physical assault for reason of his political opinion.
105. The Tribunal does not accept that relocation would be reasonable in the applicant's case given it is satisfied there is more than a remote chance the applicant would come to the attention of the DRC authorities on his arrival in the country.
106. On the basis of the Tribunal's findings above, the Tribunal finds the applicant's fear of persecution for reason of his political opinion is well-founded.

## **CONCLUSIONS**

107. 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**

108. 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