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Case No: CO/7141/2012

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 09/12/2013

Before :

THE HONOURABLE MR JUSTICE PHILLIPS

- -

Between :

THE QUEEN ON THE APPLICATION OF P (DRC)	**Claimant**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Defendant**

UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER)
Transferred from
THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Case No. CO/7194/2012

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Double-click to add Judgment date

Before :

THE HONOURABLE MR JUSTICE PHILLIPS

- -

Between :

THE QUEEN ON THE APPLICATION OF R (DRC)	**Claimant**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Defendant**

- -
- -

Christopher Jacobs (instructed by **Duncan Lewis**) for the **Claimants**
David Blundell (instructed by **the Treasury Solicitor**) for the **Defendant**

Hearing date: 15 October 2013

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Approved Judgment

Mr Justice Phillips :

1. These proceedings raise the question of whether persons returned to the Democratic Republic of Congo ("the DRC") against their will are at real risk of ill-treatment contrary to Article 3 of the European Convention on Human Rights simply by reason of their status as either (a) failed asylum seekers or (b) criminal deportees.

2. A series of country guidance cases has decided that, at least in the case of failed asylum seekers, no such risk arises except for those having or perceived to have a military or political profile in opposition to the DRC government. In the most recent of that series, *BK (Failed Asylum Seekers) DRC CG* [2007] UKAIT 00098, the Upper Tribunal recorded the Secretary of State's concession (for the purposes of that case) that conditions in DRC prisons and detention centres were contrary to Article 3 (paragraph 177). The Tribunal further accepted that a person's status as a failed asylum seeker would be known at the point of return to N'Djili airport in Kinshasa, DRC (paragraph 188). But, after an extensive review of a large amount of documentary and witness evidence over a number of days, the Tribunal concluded that there was no evidence to substantiate the claim that returned failed asylum seekers to the DRC as such face a real risk of ill-treatment (paragraph 385).

3. The Tribunal added the following warning (paragraph 386):

   "*In the event of any future investigations being conducted of returned failed DRC asylum seekers, those concerned should take steps to ensure that basic relevant particulars are sought. Public funds, not to mention valuable judicial resources, are involved and must not be expended uselessly. In particular, we consider that where someone is known to have been a failed asylum seeker in the UK initial efforts should be directed to obtaining (with authorisation) details of that person's asylum claim and the outcome of any appeal …. that would at least ensure that the investigations into their claims about abuse on return have some external reference point for gauging the truth of what is now claimed.*"

4. In these proceedings R, a failed asylum seeker, contends that the country guidance in *BK* should not be followed in the light of more recent evidence to which I refer below. P, who is liable to automatic deportation to the DRC pursuant to s.32 of the UK Borders Act 2007 by reason of his criminal convictions in the United Kingdom, as well as having failed in an asylum claim, further contends that, in the light of the further evidence, criminal deportees to the DRC should be regarded as a new category of persons who are at risk of ill-treatment on return.

5. All parties were agreed that, although R's claim was subject to a mandatory transfer to the Upper Tribunal pursuant to s. 31A of the Senior Courts Act 1981, it was appropriate for the claims of R and P to be heard and determined together. I therefore directed that R's claim be transferred to the Upper Tribunal, but continued to hear the claim (concurrently with P's claim) as a Judge of that Tribunal as permitted by s. 6 of the Tribunals, Courts and Enforcement Act 2007.

<u>The factual background</u>

6. R is a national of the DRC, born in 1985. He arrived in the United Kingdom in November 2010 and applied for asylum, asserting that he feared persecution on the

basis of his ethnicity as a Tutsi of the Banyamulenge clan. That claim was rejected by the Secretary of State and R's appeal and subsequent applications for permission to appeal were unsuccessful. R was detained on 28 June 2012 and the Secretary of State set removal directions for 5 July 2012

7. P is also a national of the DRC, born in 1987. He arrived in the United Kingdom in 2001 to join his parents and was granted indefinite leave to remain in 2003. Between July 2003 and May 2004 he was convicted of offences of street robbery, affray and assault on a police officer. In June 2006 he was convicted at Blackfriars Crown Court of robbery, sentenced to detention for public protection with a minimum term of 2 years 6 months and placed in a young offender institution. On 14 March 2011 a deportation order was made against P. His appeals against that order and against the refusal of his claim for asylum were unsuccessful. On 14 May 2012 an emergency Travel Document was agreed with the DRC authorities. P was detained on 28 June 2012 and deportation arrangements were set for 5 July 2012.

The 5 July 2012 injunctions and the start of these Judicial Review proceedings

8. On 3 July 2012 Mary Glindon MP sent an e-mail to Halliday Reeves Solicitors, who were acting for a DRC national who was about to be returned to that country on the same flight as R and P. The e-mail included the following passage:

> *"Last week I attended a meeting organised by the All Party Parliamentary Group, which was addressed by the [DRC] Ambassador, Barnabe Kikaya Bin Karubi. I raised the issue of the failed asylum seekers plight.*
> *He type-cast all of these people saying that they have come to this country as members of the former oppressive regime in the DCR, are here because we have a good benefit system and having committed terrible crimes in this country have to be suitably punished when they return to the Congo. As Ambassador, he signs the deportation papers!"*

9. On 5 July 2012 both R and P, through their Counsel, Mr Jacobs, applied urgently by telephone to Hamblen J. for injunctions to restrain their removal from the United Kingdom, relying upon the above e-mail and an order made earlier that day by Collins J. in the case of D (CO/5969/2012) in which Collins J stated as follows:

> *"While the Claimant has no personal merit, there is concern at the Ambassador's statement to the MPs. I think this should be investigated and an answer given by the Secretary of State since it can affect all returns to the DRC. Thus I am prepared to direct that he should not be removed pending disposal of this claim or further order."*

10. Hamblen J. agreed with the approach of Collins J. and granted injunctions to restrain the removal of R and P.

11. On 6 July 2012, as required by Hamblen J's orders, R and P each filed the present claims for judicial review, relying on the DRC Ambassador's alleged statement and also upon a report entitled *Unsafe Return* compiled by Catherine Ramos of Justice First, a registered charity set up in 2006 to work with people in the Tees Valley who are claiming asylum. The report, dated 24 November 2011, was based on accounts (in most cases said to be first-hand) of the post-return experiences of 17 failed asylum

seekers (and their 9 children) returned to the DRC between August 2006 and June 2011. All 17 had had their asylum claims refused in the United Kingdom and (according to Mr Jacobs' skeleton argument) had not been found to be credible. According to the report, the accounts given to Ms Ramos revealed that the human rights of all 9 of the children and 15 of the adults were violated. In particular, it reported that 13 returnees were subjected to some degree of interrogation, arrest, imprisonment, verbal, physical and sexual abuse, rape and torture. However, as all of the asylum seekers had requested anonymity, none of them was identified in the report.

Subsequent investigations and developments

12. On 16 August 2012 the DRC Ambassador wrote to Mary Glindon MP, copied to the UKBA among others, stating that he had been misquoted as to what he had said to the All Party Parliamentary Group. The Ambassador stated that:

"*… at your question regarding the return of asylum seekers to the [DRC] who, allegedly are arrested, tortured and humiliated, I responded by saying that it was not the case. Congolese citizens who failed to acquire asylum in the United Kingdom are reunited with their families upon arrival…*

Nevertheless, people who are being deported for having committed crimes in the UK are held in custody for a period of time to allow the congolese justice system to clarify their situation".

13. In the meantime, between 18 and 28 June 2012, the Country of Origin Information Service of the UKBA had undertaken a Fact Finding Mission ("the FFM") to Kinshasa, DRC, to acquire information about the procedure for and treatment of Congolese nationals returning to the DRC from the United Kingdom and western Europe. The results of the FFM were published in November 2012 in a report running to 107 pages, setting out information obtained from a large number of interlocutors.

14. In the light of the FFM report, the UKBA issued a Country Policy Bulletin ("the Bulletin") dated November 2012 to confirm its policy in relation to returns to the DRC. The Bulletin also considered the *Unsafe Return* report, but noted (paragraph 5.2.6) that the UKBA had not been provided with details of the individuals making the allegations, despite the fact that they were stated to have been in the asylum process and therefore known to the UKBA. The Bulletin further noted that the United Nations (which had facilitated 206,541 voluntary returns to the DRC in 2004 to 2010), Amnesty International, Human Rights Watch, the 11 states participating in the Intergovernmental Consultation on Migration, Asylum and Refugees (which had undertaken over 419 enforced returns to the DRC in the period 2009-2012) had all reported that they were not aware of any mistreatment of returnees. Three European Embassies in Kinshasa (Belgium, Switzerland and France) also reported no awareness of the mistreatment or detention of returnees, save that the French Embassy reported that the DRC authorities would detain a known foreign national offender.

15. The Bulletin concluded (at paragraph 9.11) that, when considering the totality of evidence, the UKBA maintained its position as stated in the DRC Operational Guidance Note of May 2012 in the following terms:

"*In accordance with the country guidance in [BK] the [UKBA] maintains that failed asylum seekers per se do not face a real risk of persecution or serious harm on return to the DRC. However BK does accept that returnees are likely to be questioned and case owners should review each case to determine whether the applicant falls into the risk categories identified in Country Guidance, whilst taking into consideration appropriate evidence which post dates BK*".

16. As for the risk of detention of returnees, the Bulletin stated as follows (paragraph 11.1):

"*In [the FFM report] the weight of evidence is that detention occurs only under certain circumstances; for example the French Embassy stated 'DGM [Direction Generale de Migration] do not detain people for immigration matters. This happens if you have committed crimes here or for example a returnee has committed a crime [the example given was murder] in the country the person has been returned from. In which case, the DGM will be looking out for their arrival. Therefore people are not detained for being returned but for their crimes. DGM does not have detention facilities at the airport. They detain people in town at their headquarters'*".

and concluded that (paragraph 11.7 and 11.8):

"*The consensus within the FFM is that returnees per se do not face a risk of detention, unless they committed a known offence, or have a recognised profile of opposition to the DRC government. … Whilst in general prison conditions in the DRC are severe and likely to reach the Article 3 threshold … consideration needs to be given to the individual facts, in particular (a) the reasons for any possible detention, (b) the likely length and type of detention and the individual's gender, age and state of health*".

17. The Bulletin also considered the DRC Ambassador's letter of 16 August 2012 (paragraph 14.9), noting his comments on those who commit offences in the UK, but stating that

"*The reality is … that no indication of status is given in the redocumentation process. The only potential for the DRC authorities to learn of a serious crime committed in the UK by one of its nationals is if the crime attracted significant media publicity and the offender was identified as a DRC national.*"

The Defendant's further decisions and challenges to those decisions

(a) The decision in R's case

18. The Defendant treated the grounds set out in R's claim for judicial review as further submissions pursuant to paragraph 353 of the Immigration Rules and issued a fresh decision letter dated 20 December 2012 addressed to R's solicitors.

19. Paragraph 353 (HC396 as amended) provides as follows:

"*When a human rights or asylum claim has been refused or withdrawn or treated as withdrawn under paragraph 333C of these Rules and any appeal relating to that claim is no longer pending, the decision maker will consider any further submissions*

and, if rejected, will then determine whether they amount to a fresh claim. The submissions will amount to a fresh claim if they are significantly different from the material that has previously been considered. The submissions will only be significantly different if the content:

(i) had not already been considered; and

(ii) taken together with the previously considered material, created a realistic prospect of success, notwithstanding its rejection.

This paragraph does not apply to claims made overseas."

20. The proper approach to the question whether further submissions amounted to a fresh claim was considered by the Court of Appeal in *R (on the application of WM (DRC)) v. Secretary of State for the Home Department* [2006] EWCA Civ 1495 at paragraph 7:

"*The rule only imposes a somewhat modest test that the application has to meet before it becomes a fresh claim. First, the question is whether there is a realistic prospect of success in an application before an adjudicator, but not more than that. Second, as Mr Nicol QC pertinently pointed out, the adjudicator himself does not have to achieve certainty, but only to think that there is a real risk of the applicant being persecuted on return. Third, and importantly, since asylum is in issue the consideration of all the decision-makers, the Secretary of State, the adjudicator and the court, must be informed by the anxious scrutiny of the material that is axiomatic in decisions that if made incorrectly may lead to the applicant's exposure to persecution. If authority is needed for that proposition, see per Lord Bridge of Harwich in Bugdaycay v. SSHD* [*1987] AC 514 at p 531F*."

21. The decision letter in R's case began by noting the requirement that the Defendant give anxious scrutiny to the question of whether the further submissions created a realistic prospect of success before an immigration judge, before considering the *Unsafe Return* report, the FFM report and the analysis of those documents in the Bulletin. After setting out UKBA's conclusion that it would maintain its existing policy, the letter stated at paragraph 10:

"*Consideration has therefore been given to whether your client fits the profile identified by the FFM as those who may be at risk. It has been confirmed that your client has not been convicted of any offence while in the UK and no evidence has been adduced to establish that he is wanted for any offences committed in the DRC. He cannot therefore be considered to be at risk on that basis"*.

22. The letter also stated that the Defendant had considered the remarks attributed to the DRC Ambassador and his subsequent letter clarifying his comments. Paragraph 15 of the letter concluded that:

"It is not proposed that your client should be deported for having committed crimes in the UK; it is proposed that he should be removed because he will not return voluntarily. It is not therefore considered that any comments attributed to the Ambassador support the view that your client will be placed at risk on return to the DRC."

23. The Defendant accordingly rejected R's submissions and further determined that they did not create a realistic prospect of success on appeal before an immigration judge

and therefore did not constitute a fresh claim which would give rise to a right of appeal. R's claim for judicial review has proceeded as a challenge to the refusal to treat R's submissions as a fresh claim.

24. The approach to be adopted in considering such a challenge was also explained by the Court of Appeal in *WM (DRC).* Whilst the decision under review remains that of the Secretary of State and a court reviewing such a decision is, therefore, limited to assessing it on a *Wednesbury* rationality basis, a decision will be irrational if it is not taken on the basis of anxious scrutiny: see also *R (MN (Tanzania)) v. Secretary of State for the Home Department* [2011] EWCA Civ 193, [2011] 1 WLR 3200. The Court of Appeal in *WM (DRC)* went on to state (paragraphs 10 and 11):

"*…. Accordingly, a court when reviewing a decision of the Secretary of State as to whether a fresh claim exists must address the following matters.*

First, has the Secretary of State asked himself the correct question? The question is not whether the Secretary of State himself thinks that the new claim is a good one or should succeed, but whether there is a realistic prospect of an adjudicator, applying the rule of anxious scrutiny, thinking that the applicant will be exposed to a real risk of persecution on return: see §7 above. The Secretary of State of course can, and no doubt logically should, treat his own view of the merits as a starting-point for that enquiry; but it is only a starting-point in the consideration of a question that is distinctly different from the exercise of the Secretary of State making up his own mind. Second, in addressing that question, both in respect of the evaluation of the facts and in respect of the legal conclusions to be drawn from those facts, has the Secretary of State satisfied the requirement of anxious scrutiny? If the court cannot be satisfied that the answer to both of those questions is in the affirmative it will have to grant an application for review of the Secretary of State's decision."

25. In rejecting an argument that the process to be followed was similar to that in deciding whether a claim was "clearly unfounded", the Court of Appeal in *WM (DRC)* stated (paragraph 18):

" *.. in borderline cases, particularly where there is doubt about the underlying facts, it would be entirely possible for a court to think that the case was arguable …. but accept nonetheless that it was open to the Secretary of State, having asked himself the right question and applied anxious scrutiny to that question, to think otherwise; or at least the Secretary of State would not be irrational if he then thought otherwise."*

(b) The decision in P's case

26. The decision letter in P's case, dated 24 April 2013 and also addressed to his solicitors, reiterated that the Defendant did not consider that the *Unsafe Return* report, in the context of all the evidence available, warranted any changes to her position on the return of failed asylum seeks to the DRC as set out in *BK* (paragraph 30). As to P's status as a criminal deportee, paragraph 44 of the letter refers to the fact that no indication of status is given in the re-documentation process, leading to the following conclusion in paragraph 45:

"…. the only potential for the DRC authorities to learn of a serious crime committed in the K by one of its nationals is if the crime attracted significant media attention

publicity and the offender was identified as a DRC national. Your client's case has not attracted significant media publicity which has identified him as a Foreign National Offender to the DRC authorities."

27. The Defendant accordingly rejected P's submissions and certified them as clearly unfounded under s. 94(2) of the Nationality, Immigration and Asylum Act 2002, so that P does not have any right of appeal against the decision from within the United Kingdom. P's claim for judicial review has proceeded as a challenge to the decision to issue such a certificate.

28. The correct approach to the "clearly unfounded" test was considered in *ZT (Kosovo) v SSHD* [2009] 1 WLR 348. In paragraph 22 Lord Phillips of Worth Matravers set out a passage from his judgment in the Court of Appeal decision in *R(L) v Secretary of State for the Home Department* [2003] EWCA Civ 25; [2003] 1 WLR 1230 which included the following test:

"… the decision-maker will (i) consider the factual substance and detail of the claim, (ii) consider how it stands with the known background data, (iii) consider whether in the round it is capable of belief, (iv) if not, consider whether some part of it is capable of belief, (v) consider whether, if eventually believed in whole or in part, it is capable of coming within the Convention. If the answers are such that the claim cannot on any legitimate view succeed, then the claim is clearly unfounded; if not, not".

29. Lord Phillips continued in paragraph 23:

"*Where, as here, there is no dispute of primary fact, the question of whether or not a claim is clearly unfounded is only susceptible to one rational answer. If any reasonable doubt exists as to whether the claim may succeed them it is not clearly unfounded. It follows that a challenge to the Secretary of State's conclusions that a claim is clearly unfounded is a rationality challenge. There is no way that a court can consider whether her conclusion was rational other than by asking itself the same question that she has considered. If the court concludes that a claim has a realistic prospect of success when the Secretary of State has reached a contrary view, the court will necessarily conclude that the Secretary of State's view was irrational.*

Discussion of R's claim: the risk to a failed asylum seeker on return to the DRC

30. The contention advanced by R in these proceedings, that a failed asylum seeker is at risk of ill-treatment on return to the DRC simply because of his status as such, was rejected in the country guidance case of *BK*. The special status of such decisions and the caution which must be exercised by the Administrative Court when being asked to depart from their conclusions was emphasised in *R (Madan) v. Secretary of State for the Home Department* Practice Note [2007] EWCA Civ 770, [2007] 1 WLR 2891. Buxton LJ, giving the judgment of the Court, stated at paragraph 12:

"*Dr Ballard's report is relied on to offset the country guidance case of SL (Returning Sikhs and Hindus) Afghanistan CG [2005] UKIAT 137 and thus to cause the Administrative Court to set aside the deportation orders, on the ground that Afghanistan is no longer safe for Sikhs or Hindus irrespective of their individual circumstances. The Administrative Court is really a wholly unsuitable tribunal for that purpose. Country guidance cases have a special status, failure to attend properly*

to them being recognised by this court as an error of law even though country guidance cases deal only with fact: see R (Iran) v Secretary of State for the Home Department [2005] Imm AR 535, para 27. They have that special status because they are produced by a specialist court, after what at least should be a review of all of the available material. And that in particular involves a judicial input from a background of experience, not least experience in assessing evidence about country conditions, that is not available to such judges as sit in the Administrative Court and in this court. A judge hearing a judicial review application will therefore wish to tread carefully before finding that a country guidance case is unreliable just on the basis of one or two subsequent reports. The parties appearing before him will in particular wish to ensure that he is aware of any decisions in the AIT subsequent to the country guidance case in which that case has been considered."

31. Mr Jacobs submitted that the approach required by *Madan* should not be adopted in the present case given that six years have passed since the guidance in *BK* was formulated, in contrast to the two years which had elapsed in *Madan*. That submission, however, amounts to an invitation to view country guidance cases as having an implicit expiry date some (unspecified) period after they are published. I see no basis in principle or in the Court of Appeal's reasoning in *Madan* for accepting such a limitation. I do of course accept that, in assessing evidence adduced to show a change in conditions since a country guidance case was published, it is relevant to take into account the passage of time, recognising that, the older a country guidance case is, the more readily it may be shown to have ceased to provide reliable guidance as to present conditions. But the elapse of time is only a factor in assessing a challenge to the continuing reliability of an extant country guidance case, not a basis for ignoring it altogether.

32. As to the evidence relied on to challenge the reliability of the guidance in *BK*, Mr Jacobs acknowledged, realistically in my view, that the matters which had prompted Collins J. and Hamblen J. to grant injunctions in July 2012 and which had featured in the original claims for judicial review had largely been overtaken by events by the time of the Defendant's further decisions.

33. First, the statement attributed to the DRC Ambassador, which had understandably given rise to concerns, was refuted by the DRC Ambassador himself in his letter of 16 August 2012 which sought to clarify the position of returnees to the DRC. Mr Jacobs accepted that the Defendant cannot be criticised for relying on the formal letter rather than upon a hearsay account of an informal oral statement. Mr Jacobs sought permission to introduce in evidence a further letter from the DRC Ambassador dated 13 May 2013, after the relevant decisions in these cases, but on reflection accepted that this further letter added nothing to the letter of 16 August 2012.

34. Second, the *Unsafe Return* report had to be (and was) viewed in the light of the subsequent FFM report. The contrast between the nature and status of these two reports is noteworthy.

35. The *Unsafe Return* report was compiled by a single author, Catherine Ramos. Whilst there is no reason to doubt her integrity or the sincerity of her motives, it is unclear what expertise or qualification Ms Ramos has, if any, in relation to investigating, interviewing and reporting on the matters in issue: the report itself does not record her qualifications, but it is elsewhere recorded that she is an interpreter and a trustee of

Justice First. What is clear is that her report approached matters from a subjective and even emotional perspective, recording that "*Residents in Tees Valley were greatly affected by the removal of the ten Congolese adults and their nine children, as they had been deeply embedded in the local community*" (page 7). It is apparent that the report was designed to produce evidence to support a particular point of view advocated by Justice First ("*This report aims to demonstrate the need for …*" p.10). The data in the report was based on accounts provided by a number of anonymous returnees, but does not provide individual histories or detailed notes of interviews, instead summarising how many of the interviewees claimed to have suffered various forms of ill-treatment. There was no attempt to assess the credibility of the accounts provided or to obtain evidence from other sources (save for one account of an interview with a Congolese Immigration Officer). Far from addressing the warning given in *BK* about the need to provide relevant particulars of failed asylum seekers so that the truth of their claims could be gauged, the report provides neither the Defendant nor the court with any basis for assessing the veracity of the anonymous accounts which it collated. I should mention that on 3 October 2013 Ms Ramos produced a further report, *Unsafe Return II*, summarising accounts of further returnees to the DRC (again without identifying them) and updating the situation of the 17 returnees referred to in the *Unsafe Return* report. Mr Blundell objected to *Unsafe Return II* being admitted in evidence, both because its late production meant that the Defendant had not been able to respond to it and, more fundamentally, because the report post-dated the Defendant's decisions and so could not affect the legality of those decisions. For those reasons, but also because Mr Jacobs accepted that he ultimately placed little reliance on the report, I have not treated *Unsafe Return II* as being part of the evidence in these proceedings.

36. The FFM, in contrast, was conducted by country researchers with the Country of Origin Information Service, supported by the British Embassy in Kinshasa, DCR. It was undertaken with reference to the EU common guidelines on Fact Finding Missions, the delegation seeking to interview a broad selection of informed sources in order to obtain accurate, relevant, balanced, impartial and up to date information against its published terms of reference. It was an objective and transparent attempt to obtain facts from identified sources (with the exception of two Congolese human rights organisations which requested anonymity). A list of interlocutors was identified in consultation with a range of expert bodies, each interlocutor being provided with a written set of questions, usually in advance of interview. Notes of interviews were sent for approval before being published in the report.

37. Although in no way abandoning reliance upon the *Unsafe Return* report, Mr Jacobs sensibly based his contentions primarily upon evidence in the FFM report, in particular responses from eight of the NGOs that contributed, pointing out that evidence from certain NGOs had been particularly influential in the decision in *BK*. Mr Jacobs submitted that the following broad propositions could be drawn from their responses:

> (1) Returning failed asylum seekers from diaspora countries are suspected of being opposed to the Kabila regime/ alternatively scrutinised more carefully than returnees from other countries.
>
> (2) They are detained on return for this purpose.

(3) "Strong interviews" may involve the use of torture.

(4) If responses to questioning are not clear the period of detention can be lengthy, thus increasing the likelihood of ill treatment.

(5) There is a screening process at the airport, whereby returnees are interviewed by DGM. During this process the returnee's luggage is searched for any evidence of opposition activity. DGM will then decide whether to free the individual.

(6) There may be a greater risk of ill treatment if an individual has been outside DRC for a longer period of time.

(7) There may be a greater risk of ill treatment if an individual has no family or connections in Kinshasa.

(8) Extortion and intimidation takes place at the airport.

(9) DGM officials go to the United Kingdom in order to identify Congolese returnees.

38. Mr Jacobs accepted that nine other interlocutors reported to the FFM that failed asylum seekers were not at risk on return to the DRC, but contended that nevertheless the Bulletin was plainly wrong to say that there was a "consensus" within the FFM report that there was no risk to failed asylum seekers as such. Further, argued Mr Jacobs, the very fact that eight NGOs provided evidence of ill-treatment of returning asylum seekers meant that there was at the very least a real risk which could not rationally be disregarded when considered with anxious scrutiny.

39. However, close examination of the interlocutors' responses reveals each of the eight NGO's that referred to ill-treatment of returnees did indeed make reference to the DRC's authorities' focus being on political or military opponents of the DRC government, as the following extracts demonstrate:

(a) Human Rescue: "The treatment of returnees is related to political activity. The greatest focus is on Congolese people living in the UK where the diaspora is very strong – returnees from the UK will be treated very badly. There are also some ex Mubutu army people living in the UK – when they are sent back they are detained and ill-treated".

(b) A Congolese Human Right Organisation: ".. if a person has made some declarations against the government they can have problems once in the DRC. Someone who has demonstrated against the government while abroad or even human rights defenders can have problems.

The UK is more open in giving opportunities to 'combatants', it is known there is freedom of speech there. That's the reason why when people are returned from the UK they are looked [at] more carefully than other countries"

(c) Les Amis de Nelson Mandela: The DGM and ANR [L'Agence nationale de renseignments] will search people's belongings to see if they are linked to the European combatants and also to see if they have any family in DRC. Those

without family are at risk of disappearing. …. If the DRC find a photo of President Kabila in a person's luggage and that person says Kabila is good, the person is not ill-treated."

(d) Association de Defense des Droits de l'Homme: "…. Those who have applied for asylum abroad are considered to have given a bad image to the government and identified as members of the opposition. They will be asked about their reasons for applying for asylum. If returnees are found to have a political connection they are sent to the ANR"

(e) Renadhoc: People who claim asylum whether in the UK or other western European countries put the government in a bad light so the image Congolese take to other countries is not seen well here by the government, but again it is the person's profile that counts, not where the person returns from."

(f) Oeuvres sociales pour le developpement: "'Important information' would be political activist connections or a problem with the government in place. If a DGM officer releases someone with either of these backgrounds they would be in trouble"

(g) A human rights organisation in DRC: "The profile of those [failed asylum seekers] and other returnees who are detained or ill-treated is to be perceived as a political opponent or provenance, for example, Equateur province or Kasai or being a former military official or being close to people who used to be in the Mobutu regime".

(h) Toges Noir: "There is the phenomenon of 'combatants' who are against the DRC authorities and attack DRC officials when they are in Europe/UK. Those people are on the black list. When there is a group return to the DRC, the authorities cannot make a difference between 'combatants' and other returnees. DGM officials accuse returnees of being 'combatants' to take money from them but if they are real combatants there is a different treatment".

40. In summary, whilst the eight NGO's in question do express varying degrees of concerns about the potential for ill-treatment of failed asylum seekers, some mentioning that all asylum seekers are detained for at least a short period and that there is particular focus on returnees from the United Kingdom, it appears that all eight recognise that the real and substantial risk is to persons perceived to be opponents of the DRC government. In those circumstances, taken together with the evidence from the other interlocutors (including representatives of the British, French, Belgian and Swiss Embassies) that they were aware of no risk to failed asylum seekers as such, the UKBA's conclusion as to the 'consensus' appearing from the FFM report would seem to be justified and certainly not irrational.

41. In addition to the view taken of the responses recorded in the FFM report, the UKBA was also entitled to give significant weight to the extensive experience of returns to the DRC reported by the United Nations and the 11 states participating in the Intergovernmental Consultation on Migration, Asylum and Refugees, referred to in paragraph 14 above. In the circumstances the UKBA's decision to continue to act in accordance with the country guidance in *BK* is difficult to fault. That decision, and the Defendant's reliance upon it in R's decision letter, far from being irrational, appears

entirely reasonable. Even applying the most anxious scrutiny, the evidence available does not justify the Defendant or this court departing from the existing country guidance.

42. Although not specifically mentioned by the Defendant in her decision letter, it is also relevant to note that on 12 November 2012 the British Embassy in Kinshasa wrote to the UKBA concerning the fate of the three DRC nationals who were returned on the flight on 5 July 2012, the flight on which both R and P had been due to travel. The Embassy reported that all three had been well treated on arrival at N'djili airport on 6 July. Each had been taken to ANR Head Quarters at about 7pm to confirm their identities because photographic ID had not been attached to their Emergency Travel Documents, but the ANR had confirmed to the Embassy that all had been released that same evening. None of the three or their families thereafter reported any mistreatment to the Embassy.

43. I also note that the High Court of Ireland in *PBN (DR Congo) v. Minister for Justice Equality and Law Reform* [2013] IEHC 435 recently considered the same material as referred to above, including the *Unsafe Return* report, the FFM report and the Bulletin, concluding (paragraphs 49 and 54) that the relevant Minister's decision that a failed asylum seeker being returned to the DRC was not at risk of treatment contrary to Article 3 ECHR was reasonable and rationale and based on objective Country of Origin Information. My conclusion in relation to the Defendant's decision in R's case is to the same effect.

Discussion of P's claim: the risk to criminal deportees

44. It is clear, and Mr Blundell did not dispute, that the position with regard to criminal deportees is significantly different from that of failed asylum seekers. In the first place, the starting point is different because the position of criminal deportees was not considered in *BK* (although certain of the evidence may have related to "deportees"). Further, the following two propositions are not seriously in dispute:

    i) First, that criminal deportees to the DRC, if identified as such, will be detained on arrival for an indeterminate period. The DRC Ambassador's official statement makes the unequivocal statement that "*people who are being deported for having committed crimes in the UK are held in custody for a period of time to allow the Congolese justice system to clarify their situation*". Further, there is ample evidence in the FFM report, most convincingly in the response from the French Embassy (see paragraph 16 above), that the DRC Ambassador's statement reflects what occurs in practice. Another interlocutor reported that returnees with a criminal record "*are taken straight to prison*". It is clear that the 'detention' referred to in this content is not merely a short period of administrative detention at the airport for immigration purposes (several interlocutors confirming that there are no detention facilities at the airport), but incarceration in a prison or detention facility in or around Kinshasa.

    ii) Second, such detention is likely to be in conditions which contravene Article 3 of the ECHR. The Bulletin acknowledges (paragraph 11.8) that prison conditions in the DRC are severe and likely to reach the Article 3 threshold. This was more than confirmed by a US State Department Report dated 19

April 2013 which records that conditions in most prisons remained severe and life threatening: "*Serious threats to life and health were widespread and included violence, particularly rape; food shortages; and inadequate food, potable water, space, sanitation, ventilation, temperature control, lighting and medical care. Death from starvation or disease was not uncommon"*. Mr Blundell advanced an argument that such concerns do not extend to DGM detention facilities in which deportees are likely to be held. However, the same Report goes on to state: "*Even harsher conditions prevailed in small detention centres, which were extremely overcrowded; had no toilets, mattresses, or medical care; and provided detainees with insufficient amounts of light, fresh air and water"*.

45. Given the above, it is not surprising that the Defendant appeared to accept in the decision letter in R's case (see paragraph 21 above) that those who had been convicted of a criminal offence in the UK "may be at risk" on return to the DRC.

46. The Defendant's reasoning for entirely discounting that acknowledged risk in the case of P (and criminal deportees more generally) is that the UKBA's re-documentation process does not identify a returnee as a criminal deportee, so there is no real risk to them unless the criminal offences in question had generated publicity identifying the offender as a DRC national. This reasoning was advanced in the Bulletin, in P's decision letter and in Mr Blundell's skeleton argument for these proceedings, in which Mr Blundell argued that P was not therefore in the position of having to lie to avoid his status being revealed.

47. However, it was recognised in *BK* that returnees from the UK "*will be questioned with a view to determining what type of expellee they are; and in particular whether they are either a failed asylum seeker or a deportee*" (paragraph 188) and almost all of the interlocutors cited in the FFM report confirmed that returnees are questioned on arrival by the DGM. Because of such questioning, the UKBA, in paragraph 9.11 of the Bulletin, advised that case owners should review each case to determine whether the applicant falls into the risk categories identified in Country Guidance, whilst taking into consideration appropriate evidence which post dates *BK*.

48. Acknowledging that the above material demonstrated that it was highly likely (if not inevitable) that P would be questioned about his status, Mr Blundell's fall-back position was that a realistic view should be taken as to how P would answer such questions. Given that he has been held to have lied in immigration proceedings in this country, it could safely be assumed, Mr Blundell argued, that he would lie to hide the fact of his convictions rather than face the potentially serious consequences of admitting them.

49. The question of whether an asylum seeker can reasonably be expected to lie to authorities on his return to his country of origin in order to avoid persecution was considered in *RT (Zimbabwe) v. Secretary of Sate for the Home Department* [2013] 1 AC 152. The Supreme Court ruled that to expect an asylum seeker to profess political beliefs he did not hold to avoid persecution was just as much a breach of his Convention rights as to require him to conceal beliefs he did hold. Mr Blundell pointed out that such reasoning did not assist P because his status as a convicted criminal was not a characteristic or status closely linked to his identity or an

expression of his fundamental rights such that to require him to deny it was a breach of his Convention rights.

50. However, Lord Kerr of Tonaghmore JSC, whilst agreeing with the approach of the other six members of the Supreme Court as to the protection of the right not to hold a political opinion, prefaced his agreement with the following (paragraphs 71-72):

"*As a general proposition, the denial of refugee protection on the basis that the person who is liable to be the victim of persecution can avoid it by engaging in mendacity is one that this court should find deeply unattractive, if not indeed totally offensive. Even more unattractive and offensive is the suggestion that a person who would otherwise suffer persecution should be required to take steps to evade it by fabricating a loyalty which he or she did not hold, to a brutal and despotic regime.*

As a matter of fundamental principle, refusal of refugee status should not be countenanced where the basis on which that otherwise undeniable status is not accorded is a requirement that the person who claims it should engage in dissimulation. This is especially so in the case of a pernicious and openly oppressive regime such as exists in Zimbabwe. But it is also entirely objectionable on purely practical grounds. The intellectual exercise (if it can be so described) of assessing whether (i) a person would – and could reasonably be expected to – lie; and (ii) whether that dissembling could be expected to succeed, is not only artificial, it is entirely unreal. To attempt to predict whether an individual on any given day, could convince a group of undisciplined and unpredictable militia of the fervour of his or her support for Zanu-PF is an impossible exercise."

51. Whilst Lord Dyson JSC (with whom the majority of the Court agreed) did not express the view that it was wrong in principle to refuse asylum on the basis that the claimant could engage in dissimulation, he did indicate the type of practical consideration which would arise in assessing whether lying would remove a real and substantial risk of persecution (paragraph 58):

" …. The immigration judge would have to consider the kind of questions that the applicant might be asked when interrogated at the road block; how effective a liar the applicant would be when asserting loyalty to the regime; how credulous the interrogators would be in the face of such lies; whether the interrogators might ask the applicant to produce a Zanu-PF card or sing the latest Zanu-PF campaign songs. It is difficult to see how a judge could provide confident answers to these questions. He or she would almost certainly be unable to avoid concluding that there would be a real and substantial risk that, if a politically neutral claimant were untruthfully to assert loyalty to the regime, his political neutrality would be discovered".

52. In the case of criminal deportees to DRC, it is clear that they will be interrogated on arrival, no doubt by professional, skilled and experienced immigration officials. According to the French embassy, those officials are specifically looking out for criminal deportees and no doubt able to probe for information and look for signs which would demonstrate that a returnee has been imprisoned in the United Kingdom. There would seem to be an obvious and serious risk that a criminal deportee such as P would not be able to hide the fact of his convictions in the face of interrogation designed to elicit that very fact.

53. Further, it must be assumed that immigration officials in the DRC are able to conduct internet searches in relation to a person they are interrogating. There must be a real and substantial risk that an offence which attracted a custodial sentence of 12 months or more (so as to give rise to automatic deportation) will have been reported in some form, even if the case did not generate substantial publicity. It would not seem to matter whether DRC nationality was mentioned in any report if the person was named. It is also relevant to note in this context that the FFM report recorded evidence from the police in Kinshasa that the DGM sends a team to the United Kingdom to identify Congolese who are to be returned to the DRC and that "*the same team who had identified them abroad (including the UK) welcome them here*".

54. In the light of the above discussion, and with considerable regret given the nature and extent of P's criminal record in this country, I am satisfied that P's application to revoke the Deportation Order made against him cannot be considered to be clearly unfounded. As the Defendant's decision to the contrary was based on the same undisputed evidence of the attitude of the DRC authorities which I have considered, it necessarily follows that I find that decision to be irrational. Indeed, in my judgment there is a real and substantial risk that P, in common with other criminal deportees (who have served the sentences imposed on them for their crimes in this country), would be subjected to further imprisonment and ill-treatment if returned to the DRC.

55. I cannot bind the Defendant in relation to other cases involving the deportation of convicted criminals to the DRC, but I should indicate my view, again expressed with regret, that, on the basis of the evidence I have seen, such persons have a strong claim for asylum and should not be deported to the DRC unless and until there is clear basis for believing that the risk indicated above no longer arises generally or does not arise in a particular case. In this regard the Upper Tribunal may wish to consider giving further country guidance in relation to the DRC in the near future to deal with the position of criminal deportees.

Conclusion

56. I will therefore make an order quashing the Defendant's decision of 24 April 2013 certifying that P's application to revoke the Deportation Order made against him was clearly unfounded.

57. R's claim for judicial review is dismissed.