

Asylum and Immigration Tribunal

THE IMMIGRATION ACTS

**Heard at Field House
On 30 June 2008**

Before

**SENIOR IMMIGRATION JUDGE LATTER
SENIOR IMMIGRATION JUDGE PERKINS
MRS J HOLT**

Between

NA

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr M Henderson of Counsel instructed by the IAS
For the Respondent: Mrs M Tanner, Home Office Presenting Officer

1. The country guidance in AB and DM (Risk categories reviewed – Tutsis added) DRC CG [2005] UKAIT 00118 is confirmed subject to adding that members of the Hema tribe are likely to be treated by the authorities in the DRC in the same way as Tutsis and Rwandans and may be at risk of persecution on return to the Ituri region. Tribal membership by itself is not determinative.

2. Whether a member of the Hema is at real risk of persecution or is able to relocate internally depends not only on his ethnicity but also on his profile, background and circumstances looked at in the light of the country evidence as a whole.

DETERMINATION AND REASONS

1. This is the reconsideration of an appeal against the respondent's decision made on 23 March 2005 refusing to vary the appellant's leave to remain following the refusal of his claim for asylum.

2. The appellant is a citizen of the Democratic Republic of Congo (DRC) born on 12 April 1986. He arrived in this country on 28 May 2003 claiming asylum on 15 July 2003. His application was refused on 12 August 2003 but he was granted limited leave to remain until 11 April 2004. On 19 February 2004 the appellant applied for further leave to remain on the grounds that he would be at real risk of persecution on return to the DRC because he belonged to the Hema ethnic group. The respondent did not believe the appellant's account of events in the DRC taking the view there were grave doubts about the appellant's claim to be a member of the Hema and did not accept that he would be at real risk of serious harm on return or that there would be a breach of Article 8. On 23 March the respondent refused the appellant further leave to remain.
3. The appellant's claim was that he had been forced to flee the DRC following an attack on his home village in which his father had been killed, his mother raped and his brothers and sisters had fled. He also claimed to be at risk because he was a member of the Hema which was in dispute with the Lendu. There had also been an attempt to recruit him to the Union of Congolese Patriots (UPC) by a man (T) who used to take boys of the appellant's age to join in order to fight the Lendu.
4. The respondent set out his reasons for refusing the application in the original reasons for refusal letter of 12 August 2003 as follows:
 - “8. You claim that on 26/5/2003 your father was killed by the RCD movement when they came to your home. RCD is a former rebel group. Formed by rebels in August 1998, the organisation split into two separate groups in 1999: RCD-Goma and RCD-Kisangani (later renamed RCD-ML). The leader of RCD-Goma is Adolphe Onusumba and the leader of RCD-ML is Mbusa Nyamwisi. A faction of the RCD-ML, called the RCD-National (RCD-N) has recently formed. The leader of RCD-N is Roger Lumbala. Another RCD faction, called RCD-Originale (RCD-O) has recently formed. The RCD-O leader is Felix Mumbere. You described how the men from the RCD movement wanted to rape your mother, and that when your father tried to prevent this they cut off his head, took his heart out and ate it. After killing your father you stated that they then raped your mother. During this incident you claimed that you were able to run for your life and found a man that was eventually to help you leave the country. The circumstances and ease with which you were able to escape from the RCD movement casts considerable doubt on the authenticity of your claim. It is not accepted that you would be able to escape from such ruthless and vicious men, who were no doubt armed, simply by running away. Having persecuted your family, such individuals would not let you escape in the way you claim.
 9. You claim that you cannot go back home because a man [T] from the UPC movement has tried to make you join the aforementioned organisation. As you did not want to do the UPC, you claim that this man tried to kill you. In the Ituri region of the north east, two tribally based armed groups emerged in 2002. These were the Lendu-dominated Patriotic Army of the Congo (APC) supported by the RCD(ML), and the Hema dominated UPC, led by Thomas Lubanga and supported by the Rwandan and Ugandan governments. Your claim regarding you being made to join the UPC movement is deemed fallacious on the grounds that had such an organisation wanted you to join them, you would have little if no choice as to whether you wished to be part of them. Likewise, any refusal on

your part given the nature and strength of the group would have resulted in certain death, and not just someone trying to kill you.

10. You claim to belong to the Hema clan who in turn fight against the Lendu clan. You stated that the reason for this fighting was because within the province where you lived there was a lot of gold. [T] from the UPC movement (see paragraph 9 above), you claim is part of the Hema people. You stated that the town that has the gold is called Ituri. It is accepted that during 2002 in the Ituri province in Orientale province, fighting between members of the Lendu and Hema ethnic groups resulted in thousands of civilian deaths and the displacement of more than 500,000 persons. UPDF and rebel factions have armed both groups and manipulated ethnic tensions resulting from long standing land disputes and colonial patriotism to the Hema, to exploit the region's resources. There have been reports that the Rwandan government has supplied and trained Hema militia led by Thomas Lubanga, while the RCD-ML have supported Lendu combatants. With this information in mind it is considered that the risk to yourself, and many others, of being embroiled or affected by such a conflict, was no less and no greater than any other civilian in similar, albeit difficult circumstances."

These reasons were adopted in the reasons for refusal letter of 23 March 2005 and the respondent's view was that the appellant had not give a truthful account of events in the DRC.

The hearing before the Immigration Judge

5. At the hearing before the Immigration Judge the appellant relied on a witness statement in which he confirmed his description of the attack on the houses in the village, the fact that T had tried to force him to join the UPC and there had been an occasion when he had been chased by them to conscript him. He said in his oral evidence that the Hema were still being killed by the Lendu because of their ethnicity and that his life would be in serious danger if he had to return to the DRC. He was a member of the Hema from the south and could speak some Kihema but not fluently. His parents had moved to Bunia before he was born. He had now built a new life for himself in this country and had worked hard to educate himself and become a responsible person.
6. In cross-examination he said that when the RCD men came to their house he was in the living room. He repeated the description of the attack on his father and mother and said that during the fracas he was able to flee out of the back door. There were no rebels at the back of the house and he was able to join other villagers who were running away. He accepted that in the DRC he had never been arrested or detained. He said that he could not return to live in another part of the country because it would be known that he was Hema from his accent.

The findings of the Immigration Judge

7. The immigration judge believed that the appellant's account was true. He said that he kept in mind that when the appellant had arrived in this country he was only 17, he had immediately sought the assistance of the Red Cross here and been put into the care of Social Services. The judge accepted this explanation for the delay in claiming asylum. At his interview he had been questioned in English as a Swahili

interpreter was not available and the judge accepted that this adequately explained any discrepancies. He found that the appellant's account was consistent with the objective evidence for 2003. He accepted that the appellant was at his home when RCD rebels attacked the village and his father was killed and mother raped. He found that everything the appellant said happened in May 2003 was amply supported by the objective evidence which showed that at that time there was a conflict between the Lendu and Hema and that the RCD, on behalf of the Lendu, had carried out horrific attacks on Hema including killings and rapes.

8. However, the judge said that the appellant's evidence must be seen in the context of a civil war and there was no evidence that the appellant and his family were specifically targeted. As the judge expressed it, in paragraph 103 of his determination, they were simply caught up in the ethnic frenzy that was going on at the time. He found that the situation in the Ituri area and around Bunia had substantially improved and, although there may well still be isolated incidents, the situation was not what it was in 2003. He commented that the appellant had not been personally harmed and had never suffered physical harm. He found on the evidence before him that there was no real likelihood of the appellant being persecuted on return to the DRC on account of his ethnicity or his actual imputed political beliefs. He accepted that the appellant had no family in the DRC but found that he was a fit young man who was well able to return to the DRC. The appeal was dismissed on asylum and human rights grounds.
9. Reconsideration was ordered on the appellant's application and the Tribunal (Senior Immigration Judge Perkins, Ms P L Ravenscroft and Mr F T Jamieson) found that the judge had materially erred in law as follows:
 - "1. The Appellant was born on 12 April 1986 and so is now aged 20 years. He is a citizen of the Democratic Republic of Congo. The Immigration Judge found that the appellant is a member of the Hema clan who had lived with his family in Bunia in the DRC.
 2. He had refused an invitation to join the UPC.
 3. He left the DRC shortly after this mother was raped and his father was murdered brutally in a racially inspired attack by RDC rebels.
 4. The Immigration Judge found that the appellant could return safely to the DRC because the 'situation in the Ituri area and around Bunia has ... substantially improved, as it set out in the CIPU report and, indeed, in the second refusal letter'.
 5. The Immigration Judge did not accept that the appellant would be at risk now because he declined to join the UPC. The Immigration Judge also ruled that the appellant's removal would [not] be contrary to his protected human rights.
 6. We see no basis for criticising either of these findings. It was not suggested before us that the UPC is able, or even inclined, to extract vengeance on people who chose not to join it and there was no suggestion before us that the decision to dismiss the appeal on human rights grounds was in any way erroneous.
 7. Additionally the determination was attacked because, it was said, the Immigration Judge had made contradictory findings and because he had not considered properly (or at all) the background material.

8. The suggestion that the Immigration Judge had made contradictory findings is wrong. It was based on a misreading of the determination. At paragraph 107 of his determination the Immigration Judge says "I do not find that this Appellant was, himself, persecuted on account of his ethnicity". This was said to contradict the Immigration Judge's finding that the appellant's family was attacked because the ethnicity of family members. This is not a contradiction. The Immigration Judge's point is that the appellant's family was attacked because of its ethnicity and not because of any personal animosity towards the appellant. The appellant, the Immigration Judge found, was not attacked at all.
 9. However we find that the criticism of the Immigration Judge's reasoning in support of the conclusion that the appellant would not be at risk now is so inadequately explained that it is erroneous in law, even though it may in fact be the correct conclusion.
 10. Certainly Miss Leatherland showed us passages in the background material that tend to support the conclusion reached by the Immigration Judge. Ms Braganza showed us passages that tended to support a contrary conclusion. We could not be satisfied that the Immigration Judge's conclusion was the result of a properly reasoned examination of the bundle of background material provided by the appellant's representative which extended to 365 pages. Even if it was the result of such an analysis it was not explained in a way that could be scrutinised or at all.
 11. The Immigration Judge erred because he failed to give reasons or any adequate reasons for findings on material matters;
 12. It follows that although we find no material error of law in the Immigration Judge's conclusion that the appellant is not at risk because he chose not to join the UPC and that returning the appellant to the DRC would not contravene his protected human rights he did err because his conclusion that the appellant could return safely to the DRC is reasoned inadequately and that point must be reconsidered.
 13. In order to do this the appellant may well want to give oral evidence himself and call expert evidence to show that he could not relocate safely to a different part of the DRC and/or that he should not be expected to relocate. We encourage him to make an appropriate application under rule 32 of the Asylum and Immigration Appeals (Procedure) Rules 2005 which the Tribunal will consider."
10. The Tribunal directed that the existing findings of fact on the appellant's evidence were to stand and reconsideration was limited to arguments about the risk, if any, that the appellant would face in the event of his returning to the DRC on account of his ethnicity whether he could avoid such risks by relocating.
 11. The parties were subsequently notified that this appeal would be listed for potential country guidance on the issue of whether there was a risk on return to members of the Hema tribe from Ituri and on whether re-internal relocation was available. The matter is listed for us to consider these issues. It was also accepted that we should reconsider the Article 8 appeal in the light of the opinions of the House of Lords in Beoku-Betts v Secretary of State for the Home Department [2008] UKHL 39.

Evidence at this hearing

12. The appellant's documentary evidence is set out in a bundle indexed and paginated 1– 445 including an expert report from Erik Kennes dated 12 June 2008 (A5) with a

further supplementary report dated 25 June 2008 and a report from Claudia Seymour dated 18 June 2008 with a supplementary report of 25 June 2008. The appellant and his partner have filed further witness statements both dated 27 June 2008. Mr Henderson has produced a skeleton argument. The respondent's documents are contained in a bundle R (1-28 together with the COI report for the DRC February 2008 and May 2008). A full list of the background evidence before the Tribunal is set out in the appendix. The appellant, his partner and Ms Seymour gave oral evidence.

The evidence of the appellant

13. In his further witness statement the appellant said that he had no family in the DRC that he knew of. He was born in Bunia and lived there with his parents. He had never left that area or lived in any other part of the country. It would not be safe for him in Kinshasa because he was a member of the Hema. The Hemas were farmers, keeping cattle and cultivating the land. His father had a small farm and a shop selling produce. He had tried to find his family through the Red Cross in this country but to no avail. He now lived with his partner. They had a daughter born on 13 September 2005 and his partner was now some ten weeks' pregnant. She also had a son who had been born to her in Kenya.

The evidence of the appellant's partner

14. The appellant's partner said that she was in fear of returning to Kenya. She is a Kenyan citizen who has applied for asylum. Her appeal has been dismissed. The judge accepted her account of events but came to the view that she would be able to relocate in a non-Kikuyu area. She did not accept that this was the case and her representatives had made further submissions to the respondent. She was afraid of going to the DRC with the appellant. She was pregnant. She had one son settled at school and a young daughter. If she was allowed to marry the appellant, she would. She could not put her children or her unborn child at risk by taking them to the DRC.
15. In cross-examination she confirmed that her daughter had been born when she was living in a hostel. She had been anxious for her son to be happy with her relationship with the appellant. He used to come to stay with her at weekends and sometimes in the middle of the week. They had now started living together.

The evidence of Claudia Seymour

16. Ms Seymour has served as a Child Protection Officer with the United Nations Department of Peacekeeping Operations (MONUC) in the DRC from February 2006 to June 2007. She has personal and professional experience of the Eastern DRC and has carried out doctoral research on children's experience of violent conflict in North Kivu. In her report dated 18 June 2008 she provides evidence about the situation in the Ituri district of the Eastern DRC and an assessment of the potential dangers that the appellant might face were he to be returned there.
17. She says that the situation in Ituri district although safer than it was when the appellant initially claimed asylum, remains highly insecure. There are inter-communal tensions and the government does not exert effective control anywhere in

the district. Dissident militias remain active and local communities are heavily armed. There is considerable political uncertainty in the lead-up to the local elections planned for 2009. She warns that caution should be used when discussing terminology such as “the Hema” and “the Lendu”: these are ethnic classifications over-simplifying the complexity, history and politics of group dynamics in Ituri. However, these classifications are real and it is her view that there is the possibility that the appellant will be targeted for his Hema ethnicity in acts of retributory violence.

18. She says that the current levels of insecurity in Ituri should not be underestimated where there remains serious concern about the presence of armed groups and militias. Most of the armed groups in Ituri have been brought under control but dissident factions of the FRPI, FNI and FARDC have caused large scale civilian displacement. There are high levels banditry and criminality particularly in the urban centre of Bunia. There is a local perception that Hema men are being targeted by soldiers and police in reprisal killings and since the beginning of 2008 six Hema taxi drivers have been killed. Young men in Ituri are at real risk of forced recruitment to local militias or conscripted labour in the mining and timber industries on behalf of militia commanders or by FARDC.
19. In her supplementary report dated 25 June 2008 Ms Seymour comments on the appellant’s situation were he and his family to return to Kinshasa. A young family returning there without a family or support network would in her opinion struggle to survive as there are effectively no state provisions. Young children would be especially at risk of serious malnutrition, illness and death. According to UNICEF, under-5 mortality rates in the DRC were 205 per 1,000 births in 2006 making it the ninth highest country in the world for under 5 mortality rates.
20. In her oral evidence she confirmed that in her view young children would be particularly at risk in Kinshasa, particularly new arrivals, as they would not have built up any natural immunity. There was evidence of prevalent sexual violence in the DRC which could be described as an epidemic. It had been used as a weapon initially by the military but now, it was happening in a civilian context.
21. In cross-examination she said that in the DRC, the perception was that the Hema were cousins of the Tutsi and came from Rwanda. In Kinshasa there was a xenophobic attitude to Rwandans. Hema would be recognised from their facial and body structure although she accepted that it was right to be cautious about such generalities. On return to Kinshasa survival would be extremely difficult. Even if the appellant had money he would be targeted for extortion. Survival would be difficult. She accepted that there were wealthy Tutsis in Kinshasa who were able to obtain protection and had the resources to leave in case of trouble. She said that she had not met the appellant before the hearing, but she could see immediately from his appearance that he would be recognised as a member of the Hema.
22. In re-examination she referred again to the fact that since the beginning of 2008 six Hema men had been killed in what appeared to be acts of retribution. There was a generalised risk in the DRC but in addition a risk arising from being a member of the Hema. There was a particular problem in Kinshasa for internally displaced people.

She had no experience or knowledge of someone being returned to the DRC who had been able to obtain work.

The expert report of Erik Kennes

23. In his report dated 12 June 2008 Mr Kennes deals with the general situation in the DRC and then turns to the situation in Ituri and Bunia (A27ff). The basis of his expertise on the DRC is set out at pages 1-2 of his report. For the purposes of this determination we need only set out the briefest of summaries of Mr Kennes' comprehensive account. He says that there were a number of structural conflicts in the Ituri region which were more or less kept under control before the war started in 1998. Basically two ethnic groups are pitted against each other: the Lendu, who are of Sudanese origin and mainly agriculturalists and the Hema, of Bantu origin and mainly pastoralists. He says that even if this parallel is not entirely correct it is constantly used to explain the support of the Ugandan army for the Hema whereas the Kinshasa government is generally accused of supporting the Lendu. His view is that the Hema, Lendu and other ethnic groups in the area have constantly been manipulated by Ugandan army officers and in a later phase by the Rwandan government and that the conflict is kept alive by outside forces to gain access to the huge gold reserves in the region. At times the conflict has run totally out of hand, the only constant element being the strategies by the Ugandan and Rwandan governments for control of the natural resources in the region.
24. The conflict abated to a certain extent in May 2003 when the leaders of the different factions signed a peace agreement in Dar-Es-Salaam. In June 2003 a military intervention of the European Union calmed the situation down and in September 2003 MONUC forces took over that mission. They settled the situation to a certain extent but left free space for armed factions in the areas uncontrolled by MONUC. By way of example Mahigi was a battleground between the FNI (Lendu) and the FAPC in a struggle for control of customs posts and goldmines. However, some civil administration has been restored and the arrest of some 30 leaders of armed groups has made a significant impact on the region. However, there continued to be fighting between various armed groups but by November 2006 the remaining Ituri armed groups had signed a comprehensive peace agreement with the government agreeing to surrender their weapons and to enter the process of disarmament, demobilisation and reintegration. The only movement that refused to carry out an agreement was Peter Karim's against whom decisive military action was taken. He surrendered with his main officers in April 2007. It is Mr Kennes' view that although the situation has calmed down in Ituri, the armed conflicts between a myriad of armed factions continues not always along ethnic lines but mainly for the control of lucrative natural resources.
25. When dealing with the position of those with a Hema profile Mr Kennes says (at A56):

"The situation of the Hema in the DR Congo is closely linked to the popular feeling of being invaded by a 'Nilotic network' and by the 'Hema-Tutsi'. There are persistent rumours about such an invasion. The major part of the Congolese population is Bantu and there is a tendency to assimilate the Congolese with the Bantu speakers, excluding the pygmies, the Sudanese and the Nilotic peoples.

The conflict with Rwanda, Burundi and Uganda also explains the situation of insecurity for the Tutsi and Hema populations from these countries in the DRC. A trans-national anti-Nilotic ideology reigns in the DR Congo. It stigmatises the 'Hema-Tutsi arrogance and hegemonic drive' and it attacks a trans-national complot of the 'international Tutsi power' aiming at the submission of Bantu peoples."

26. Mr Kennes says that the relevant authorities in the DRC regard the Hema as close to the RDC and Kigali. He continues:

"They are thus assimilated to 'the Tutsi'. It is still very dangerous to be Tutsi or to pretend to be and to return to the country. They are considered to be enemies or more or less permanent suspects. The animosity of the Congolese against the (real or so-called) 'Rwandans' is so intense and visible that one does not need to look very far to have elements of proof. The policy by the regime in Kigali to threaten regularly and untimely to invade the eastern part of the DRC has a direct and adverse effect for the ethnic 'Rwandans' in the DRC. This concerns firstly the Tutsi but the Hutu are also associated. The security services sometimes consider them even more dangerous because they resemble morphologically the 'real' Congolese."

27. Insofar as the appellant is concerned Mr Kennes makes the point that he has an ethnic Hema profile and is physically recognisable as a member of the Hema. His opinion is that if left on his own in Kinshasa the appellant would run a security risk and he would also be at risk as a failed asylum seeker coming from this country. He would run the risk of being perceived as a member of an anti-government movement linked to the Tutsi groups in Kivu. This would warrant further interrogation in the Kin Maziere detention centre where he would be at risk of cruel, inhuman and degrading treatment. The risk to him as a member of the Hema is based on the association made by the Congolese between Hema and Tutsi. The Hema-Hima-Tutsi are put "in the same bag" by the Congolese and regarded as enemies. This cultural factor must be taken together with the social background. The Hema were advantaged by the Belgian colonisers just as the Tutsi were considered to be. The Hema had a higher social status and possessed much of the land in Ituri. Finally there is also a political element; some Hema groups (as for example the militia of Thomas Lubanga) have been supported by the Rwandan regime thus reinforcing the association between Hema and Tutsi. Mr Kennes sets out in his report how he forwarded a picture of the appellant to four different people from the east of the DRC, one of whom specialised in the Ituri region. Their reply was unanimous: the form of the appellant's face, his nose and lips portrayed a Hema physiognomy. This was not the same as a Tutsi physiognomy but in Kinshasa and the western part of the country the Hema tribe was associated with the Tutsi even if they were physically different. He says that the appellant is clearly identified as a member of the Hema and would be so identified by the relevant immigration and security services on arrival.

Submissions

28. In her submissions Mrs Tanner accepted that the issue was whether the appellant would be at real risk as a member of the Hema on return to Kinshasa. She submitted that he would receive protection in government controlled areas. She relied on the OGN of August 2007 and in particular paragraphs 3.10.6 and 9. She submitted that much of Mr Kennes' report was historical and that the situation had now improved in

Ituri. The evidence about the appellant's physical appearance should be treated with caution. The views expressed by Mr Kennes were not his own but those of anonymous sources. There was no adequate evidence that the appellant would be at risk because of his appearance. She submitted he was not entitled to asylum or humanitarian protection nor would he be at risk of a breach of Article 3. However, she accepted in the light of the opinions of the House of Lords in Beoku-Betts that removal would be a disproportionate interference with the appellant's family and private life. She accepted that family life existed between the appellant and his partner and her son, that they had one child and that his partner was expecting another child. It would not be reasonable to expect her to return with him to the DRC or for him to return to make an application for entry clearance.

29. Mr Henderson submitted that the appeal should also succeed on asylum grounds. He argued that the appellant would be at risk not only in his home area but also in Kinshasa. Even if the question of internal flight did arise, in the light of his family circumstances, it must follow that it would be unduly harsh to expect him to relocate. There would be no adequate protection in Ituri and it would not be reasonable for him to return to Kinshasa. There was clear evidence to show that in the eyes of the DRC authorities the Hema were associated with Rwandans and Tutsis. It was accepted that the appellant was a member of the Hema and this alone would put him at risk. In any event there was cogent evidence that he would be identified as a member of the Hema and would be at risk in Kinshasa.

Article 8

30. Mrs Tanner conceded that the article 8 appeal should succeed and we need deal no further with that matter save to make it clear that this concession was properly made. The appellant's partner is a Kenyan citizen whose own claim for asylum was refused and her appeal dismissed in a determination issued on 22 November 2007. The Immigration Judge accepted that there was a real risk of FGM in her home area but found that she would be able to relocate. He also found that it would not be a breach of Article 8 for the appellant and her family to relocate in Kenya. We were told that further representations have been made to the respondent and they must be for her to consider. However, the question for us is not whether the appellant's partner and family should be returned to Kenya but what the position would be on return to the DRC. In the light of the evidence of Ms Seymour it would be unreasonable to expect the appellant's partner with her children to return with the appellant to the DRC and for the appellant to be separated from her and their daughter.

The Asylum Appeal

31. We remind ourselves that the appellant is entitled to asylum if owing to a well-founded fear of persecution for a Convention reason he is outside his country of nationality, the DRC, and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country. He has to show there is a reasonable degree of likelihood that he faces such persecution. This test can also be expressed as whether there is a real risk of persecution. We have taken into account the provisions of the Refugee or Persons in need of International Protection (Qualification) Regulations 2006 which, together with amendments to the Immigration

Rules, have brought into effect the provisions of the Qualification Directive 2004/83/EC.

The Situation in the DRC

32. We do not need to deal at any great length with the background situation in the DRC which has already been covered extensively in previous country guidance determinations and in particular AB and DM (Risk categories reviewed – Tutsis added) DRC CG [2005] UKIAT 00118 and BK (Failed asylum seekers) DRC CG [2007] UKAIT 0098. This appeal has focused on the situation in Ituri in the eastern DRC and in particular the conflict between the Hema and the Lendu. The general position has been summarised in the Human Rights Watch Report 2008 in para 8.23 of the COI Report May 2008 as follows:

“The people of the eastern Congo, buffeted by years of war, endured more armed conflicts and human rights abuses, including murders, rape, and the recruitment and use of child soldiers, despite political agreements meant to resolve conflicts in the eastern province of North Kivu. Early in the year combatants loyal to the renegade General Laurent Nkunda were integrated into the national army in a process called ‘mixage’. The newly organised mixed brigade killed scores of civilians and committed rapes and other abuses in their operations against the Forces for the Liberation of Rwanda (FDLR), a Rwandan rebel group based in eastern Congo. By August the political agreements had collapsed and many of Nkunda’s former troops returned to his control; renewed clashes between Nkunda’s troops and government soldiers followed.

Government policy towards the FDLR followed a confused and contradictory course, with the army sometimes supporting and sometimes attacking this group. The FDLR composed largely of Rwandese combatants, is supposedly committed to overthrowing the current government of Rwanda, but in recent years its members have attacked Congolese civilians more than they have engaged the Rwandan military.

The shifting configurations of the conflict have variously seen all forces fighting each other. The Congolese government, backed by the international community, tried various measures to end the fighting, but failed to address its underlying causes. Although crimes by all parties constituted violations of international humanitarian law, virtually none has been investigated let alone prosecuted.”

This summary confirms in more general terms the description given by Mr Kennes.

33. In the OGN of 20 August 2007 (A138-9) it is accepted that serious incidents of violence between the Lendu and Hema ethnic groups in the Ituri area in Orientale province have been occurring since 2002 and serious human rights abuses have been perpetrated by both sides. It records the gains made on the military front in 2005 but accepts that the overall security situation remains fragile. Dealing with the issue of sufficiency of protection, para 3.10.6 reads as follows:

“3.10.6 Sufficiency of protection: the government is seeking to establish its authority throughout the entire country, but the government’s control in certain areas of the East of the country remains weak. As such the state is as yet not fully able to provide sufficient protection to either the Lendu or Hema in the Ituri region. The government can however provide sufficient protection within areas fully under its control.”

34. The OGN goes on to deal with the issue of internal relocation. It accepts that movement between the different areas in the DRC can be hazardous but concludes as follows:

“3.10.9 Conclusion. Despite tangible improvements in the government’s anti-rebel offensives and disarmament programmes in 2005 and 2006 the security situation in the Ituri region remains unstable and serious human rights abuses of the civilian population continue to be reported. Nevertheless claimants who cite a serious risk of ill-treatment at the hands of non-state agents in the Ituri region as a consequence of their ethnic origin are able to escape that treatment by relocating to Kinshasa or other government controlled areas where they will, should the need arise, also be able to seek protection from the state authorities. It is therefore unlikely that the grant of asylum will be appropriate in such cases.”

The Current Country Guidance

35. As we have already indicated, the current country guidance on the issue we are concerned with is found in AB and DM (Risk categories reviewed – Tutsis added) DRC CG [2005] UKIAT 00118. The Tribunal summarised its findings in paragraph 51 as follows:

“51. Building on previous country guidance cases and in particular *M* and *VL*, the Tribunal would reformulate and summarise the current risk categories as follows:

- (i) We confirm as continuing to be a risk category those with a nationality or perceived nationality of a state regarded as hostile to the DRC and in particular those who have or presumed to have Rwandan connections or are of Rwandan origins.
- (ii) We consider that in light of recent developments there is now a risk category consisting of those who are Tutsi (or Banyamulenge) or are perceived to be Tutsi (or Banyamulenge). The only possible exception to it arises in relation to high-level officials of RCD/Goma. We accept that in practice there is considerable overlap with (i) since, as a result of the events of 2004 “Rwandan” and “Tutsi” are more often regarded as the same by the DRC authorities and civilian population and as a result Tutsis and those perceived as such face higher risks than before. However, they are distinct categories, one nationality-based, the other ethnicity-based.
- (iii) We also confirm as an existing risk category those having or being perceived to have a military or political profile in opposition to the government. The risk fluctuates in accordance with the political situation. On the basis of the evidence before us, the current position is as follows. The Tribunal accept that there is a real risk at present for UDPS activists. In the eyes of the authorities in Kinshasa UDPS supporters are assimilated with supporters of the RDC/Goma movement because of the alliance reached in 2003 even if later officially ended. At present there is a lesser risk for PALU members. There is a potential risk for DSP members who are considered as potential or actual collaborators for JP Bemba and his MLC movement. The risk for those associated with the Mobutu regime has considerably lessened. It is clear from the background evidence that close relatives of Mobutu have

returned to the DRC from exile: CIPU report paragraph 6.110-2. It is reported that those not suspected of collaboration with the rebels would no longer be at risk and affiliation to the MPR would not normally involve the risk of political persecution. No repression has been organised against PDSC members since the death of Laurent Kabila.

- (iv) The evidence before us sought to identify a number of further potential risk categories: rebel movement members now in opposition to their own movement and those who come from the east (including Kivu) but are returned to Kinshasa without a political or military profile. However, these issues do not arise in the present appeal and we do not have sufficient evidence to make it appropriate to reach conclusions about them.”

36. The Tribunal gave further guidance in paragraphs 53 and 54 as follows:

- “53. The Tribunal would reiterate some earlier observations on the task of assessing whether a person falls within the new second risk category as now extended. There are two main aspects to this. Firstly on the evidence before us, most but not all Tutsis would be at risk. As noted in paragraphs 39-40, some Tutsis may be able to obtain the protection of MONUC albeit in practice they may be limited to those with wealth who are high-level officials within RCD/Goma and appear able to look to the authorities for protection.
- 54. Secondly, as with the military or political category, much depends on the perception of the authorities as to whether they view someone adversely. It is not sufficient for an appellant simply to state that he is Rwandan or Tutsi or would be perceived as such. Evidence as to ethnicity will need to be scrutinised carefully. Given that Tutsis are described as being physically distinct from other tribes (CIPU report October 2004 para 6.71) a person is more likely to be viewed as a Tutsi by the authorities if he or she has those distinctive characteristics. Similarly those whose dialect, tribal links and geographical origins link them closely to Tutsis such as the Banyamulenge would also appear to fall within the at risk category. However, the mere fact of coming from the East or being of mixed ethnicity is unlikely without more to give rise to a perception of being Tutsi. The assessment must be made on the basis of a careful analysis of an appellant’s ethnicity, background and profile.”

The Risk to the Hema

37. The issue raised in this appeal is whether there is a risk on return to the DRC for members of the Hema tribe from Ituri and whether internal relocation is a viable option. In the light of the current situation in Ituri and the history of conflict between the Hema and the Lendu, even though the situation is being brought under some control, a member of the Hema tribe may be potentially at risk of serious harm on return to the Ituri region. Whether any particular members of the Hema will in fact be at real risk must take into account not only his ethnicity but also his background and profile. The appellant’s account accepted by the original Tribunal was that he was able to escape when his home was attacked by RCD rebels, an attack in which his father was killed and his mother raped. Taking into account the provisions of para 339K of HC 395 that the fact that a person has already been subjected to persecution or serious harm will be regarded as a serious indication of a person’s well-founded fear of persecution or real risk of serious harm, unless there are good reasons to consider that the persecution or serious harm will not be repeated,

although there has been some improvement in Ituri, in the light of what has happened to this appellant in the past we find that there is at least a real risk that the appellant will be at real risk of further serious harm as a member of the Hema. We also are satisfied that when this attack is looked at in the context of the violence in Ituri, the appellant was not simply a victim of the civil war but the attack was motivated by the ethnic conflicts in that region.

Internal Relocation

38. The must now consider whether the appellant in his particular circumstances is able to relocate in government controlled areas. It is the respondent's case that he can but it was argued on behalf of the appellant that members of the Hema are treated in the same way as Tutsis/Rwandans and for this reason he would be at risk in Kinshasa or any other government controlled area. On this issue there is ample evidence to show the hostility of the DRC authorities to those of Tutsi or Rwandan origin. This issue was explored at length in AB and DM. The issue for us is whether the Hema will be treated in the same light. We accept Mr Kennes' evidence on this issue. The authorities do associate the Hema with the Tutsi for the reasons set out in Mr Kennes' evidence. There are cultural, social and political reasons behind this perception which, whether justified or not, is real in the eyes of the DRC authorities. The respondent argued that the appellant would be able to look to the authorities for protection. It may be that some members of the Hema or persons perceived in the same way as Tutsis by reason of their official position or wealth may be able to do so but the appellant does not fall within any such category or otherwise have characteristics which could lead to a conclusion that he would not face the same risk as other members of the Hema.
39. The risk to the appellant arises from the fact that he is a member of the Hema but his appearance will in any event give him away. In Mr Kennes' report he says that he forwarded a picture of the appellant to four different people from the East of the DRC and that their reply was unanimous: the form of his face, his nose and lips betrayed a Hema physiognomy. Mrs Tanner rightly made the point that this evidence was second hand evidence from anonymous people and for this reason it must be treated with caution, but it was confirmed by Ms Seymour's evidence given at the hearing that although she had not seen the appellant before, she could see immediately from his appearance that he would be recognised as a member of the Hema. We accept that this view is genuinely expressed and that Ms Seymour has the experience of working in the DRC from February 2006 to June 2007 and for this reason is in a position to give an informed view. We also note that it was accepted in the evidence before the original Tribunal that the appellant spoke Kihema. We are therefore satisfied that the appellant not only is a member of the Hema but would be recognised as such and for this reason be at real risk in Kinshasa.
40. For the sake of completeness we make it clear that even if it was safe for the appellant to return to Kinshasa in our view it would be unduly harsh to expect him to relocate there because of his family and domestic circumstances as outlined when dealing with the Article 8 appeal.
41. So far as country guidance is concerned we confirm the guidance given in AB and DM amending it to the extent that the risk category in paragraph 51(2) should include

those from the Hema tribe who are likely to be treated by the DRC authorities in the same way as Tutsis and Rwandans. We adopt and repeat the guidance in paragraph 53 of AB and DM that although the Hema come within a risk category, clan or tribal membership by itself is not determinative. Whether an appellant is at risk or is able to relocate depends not only on his ethnicity but also on his own background and circumstances looked at in the light of the country evidence as a whole.

42. In the light of our findings we do not need to deal with the humanitarian protection appeal or with the issues which arise particularly under paragraph 339C(iv).

Decision

43. The original Tribunal materially erred in law. We substitute a decision allowing the appeal on asylum, Article 3 and Article 8 grounds. The appeal on humanitarian protection grounds is dismissed.
44. We are satisfied that at the time when reconsideration was ordered, the appeal had substantial prospects of success. We order that the costs of the application for reconsideration, the preparation for reconsideration and the reconsideration be paid from the relevant fund within the meaning of rule 33 of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

Signed

Date: 4 September 2008

Senior Immigration Judge Latter

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