

Heard at Field House  
On 25 February 2005

AB and DM (Risk categories  
reviewed – Tutsis added) DRC  
CG [2005] UKIAT 00118

## **IMMIGRATION APPEAL TRIBUNAL**

Date Determination notified:

21<sup>st</sup> July 2005

### **Before:**

Mr H J E Latter (Vice President)  
Dr H H Storey (Vice President)  
Mr R A McKee

Between

Appellant

and

Secretary of State for the Home Department

Respondent

and between

Appellant

and

Secretary of State for the Home Department

Respondent

### **Representation:**

For the First appellant:

Mr E Fripp of Counsel,

For the Second appellant

Ms Ojutiku of Counsel,

For the respondent:

Mr M Blundell, Home Office Presenting Officer

*The Tribunal broadly confirms the list of risk categories identified in M, VL and subsequent CG cases but finds that in view of the increase in anti-Rwandan feeling, Tutsis or those suspected of being Tutsi are at risk by reason of being associated with Rwandans. Essentially, the risk categories are those with an ethnic, political or military profile in opposition to the government. The assessment of risk in an individual case will depend upon a careful analysis of that individual's origins, background and profile.*

## **DETERMINATION AND REASONS**

1. There are two appeals before the Tribunal. In the first appeal, the appellant (the first appellant), a citizen of the Democratic Republic of the Congo (DRC) appeals against the determination of an Adjudicator,

Mr C B Buckwell issued on 14 February 2004, who dismissed his appeal on both asylum and human rights grounds against the decision made on 6 January 2004 refusing him leave to enter following the refusal of his claim for asylum. In the second appeal, the appellant (the second appellant) appeals against the determination of an Adjudicator, Mr Michael D Oakley issued on 9 May 2003, dismissing his appeal against a decision made on 31 December 2002 giving removal directions following the refusal of his claim for asylum. These appeals are being heard together with the consent of both parties as they raise common issues of fact relating to the situation in the DRC as to the current risk categories and in particular whether and to what extent those of Tutsi ethnicity are at real risk of persecution and more generally what the current risks are for failed asylum seekers. A summary of our conclusions appears at paragraph 51.

### The facts relating to the first appellant.

2. The first appellant was born in December 1970 in Kinshasa. His mother was from Kigali in Rwanda and was half Rwandan. His father was from the DRC. His father had worked for a private food company which had been associated with the government of the late President Mobutu. The first appellant said that his father was killed in 1986. He believed that it was because his father did not support President Mobutu. This raised the appellant's political awareness and when he was in his early 20's, he decided to join the Democratic and Christian Socialist party (PDSC) which opposed President Mobutu and his political Party, the Popular Revolutionary Movement (MPR). He joined the PDSC in 1992 or 1993 and had a role in encouraging meetings for younger members. He was a musician and used his skills to educate new members.
3. The appellant took part in demonstrations in 1990-1991 and was arrested on a number of occasions. On the first occasion he was released the same evening but on the second occasion he was beaten when in detention. A soldier hit him with a butt of a gun. President Laurent Kabila came to power in 1997. Once in power he suspended other political parties. He encouraged foreigners to come from Rwanda, Burundi and Uganda. Meetings were held by other political parties. There was a meeting at the first appellant's home when 50 people were present. The appellant said that because of this meeting he was arrested in December 1997, beaten and detained for 2 days. From 1998 President Kabila started requiring foreigners to return to their own countries. The appellant said that he was known as an individual who was half Rwandan and was also considered to be a foreigner. Those who did not wish to leave remained to fight together with remnants of the army of former President Mobutu. As a result government soldiers sought out foreigners. On 28 January 2000 the first appellant was away from home. He was told that he should not return because armed men in uniform were looking for him. He sought refuge in a church whose members raised money for him as they feared that his life was in danger. He was able to cross the river to Congo Brazzaville and then travel to Brussels before coming to the United Kingdom on 30 January 2000. He claimed asylum on arrival.

4. The Adjudicator found that the appellant was a credible witness. He identified three key elements within the claim. The first was his part-Rwandan ethnicity. The Adjudicator was satisfied that those of Rwandan descent had in the past been the subject of adverse attention by the DRC authorities. He referred to a newspaper article which had been produced in evidence which he accepted as authentic. It indicated that the appellant had encountered difficulties in the past due his ethnicity.
5. The second element related to the appellant's political activities. The Adjudicator accepted that as a result of these activities he had on occasions suffered from arbitrary detention and arrest. The objective evidence supported his claim that political parties held meetings on a local basis and these meetings were subject to aggressive visits by those acting on behalf of the authorities. The Adjudicator found that he had in the past been subjected to treatment which might be seen as amounting to persecution and which he described as certainly treatment contrary to the terms of Article 3.
6. The third element related to the position of this appellant as a musician. The Adjudicator accepted that musicians could have a very significant influence in Africa and it was a matter of public record that many African musicians specifically used their music and lyrics to put across certain political messages often critical of the government. It was part of the appellant's case that the band in which he was involved took the opportunity to adopt lyrics with such an approach. Certain of his songs called for democracy and political freedom. Evidence was produced showing a band including the first appellant in Kinshasa in June 1999. The Adjudicator commented that he did not know how his band would rank or whether the appellant himself would be specifically well known as a vocalist or as a member of the band's chorus.
7. The Adjudicator said that looking at matters in the round he was satisfied that the appellant was an individual who had previously come to the attention of the authorities. He accepted that he had suffered mistreatment in the past. However, on his own evidence there appeared to be no assertion that he had suffered in the past as a direct result of his activities as a musician or as a result of his ethnicity. He was detained in the past because of his political involvement. The Adjudicator accepted that the appellant had said that prior to his departure from the DRC he had been advised that he was being sought at the time not only because of his political opinions but also because of his ethnicity. The Adjudicator considered the Tribunal determinations in *VL (risk – failed asylum seekers) DRC CG* [2004] UKIAT 00007 and *S (DRC)* [2004] UKIAT 00010. He referred to the current situation in the DRC and the fact that since June 2003 there had been a transitional government. A National Assembly and Senate were opened in August 2003. Political parties across the spectrum were represented in a political power sharing government.
8. The Adjudicator was of the view that when the appellant arrived in the United Kingdom, there was a strong likelihood that he would have been entitled to asylum. He commented that an individual with his past background which included mistreatment at the hands of the

authorities might have been able to claim international protection until significant political changes were put in place. However, it was the Adjudicator's view that the new political arrangements had significantly transformed the political landscape in the DRC. The Adjudicator was not satisfied that the appellant's background and profile would now put him at risk. He went on to consider the claim under Article 8 based on the first appellant's family life with his girlfriend and the fact that they were expecting a child. He was not satisfied that removal would be disproportionate to a legitimate aim.

#### The facts relating to the second appellant

9. The second appellant was born in February 1980. It was his claim that his father had been a member of the Union for Democracy and Social Progress (UDPS) who during a demonstration in 1996 had been shot and killed. The appellant became a member in 1997 and was involved in distributing leaflets and arranging rooms for meetings. Following a demonstration he was detained for about 50 days and then released by an uncle paying a bribe. The second appellant continued his activities and was arrested again in 1998 and detained for 6 months before being released. In 1998 he became a driver working for his uncle. He continued with his UDPS activities. In 2002 he went to the east of the DRC to recruit young men from the UDPS to join him in starting an armed campaign. In September 2002 he volunteered to drive rebels to various areas in the east of the country and registered his interest at a local branch. He was given \$300 and told to wait until he was contacted. He later learned from a member of the UDPS committee that the chairman had been arrested and that those who had volunteered to go to the east were being sought by the authorities. In October 2002 the police came to the home of the second appellant's uncle looking for him. His brother contacted him as he had a mobile phone and told him to stay away. He went into hiding on 20 October 2002 leaving the DRC and arriving in Gabon on 30 October 2002. Arrangements were then made for him to fly to the United Kingdom. He arrived on 2 November 2002 by air with a false passport, applying for asylum on 6 November 2002.
10. The Adjudicator did not find the second appellant to be a credible witness and regarded his account of events in the DRC as a fabrication designed to gain access to the United Kingdom. The appeal was dismissed on both asylum and human rights grounds.

#### The grounds of appeal in the first appeal.

11. In the grounds of appeal it is argued that in the light of the Adjudicator's findings of fact, the decision in *VL* and the background evidence set out in particular in the UNCHR position paper, the Adjudicator was wrong to find that the first appellant was not someone who would be at risk of persecution by reason of his political beliefs heightened by the profile accompanying his musical activities. It is also argued that the first appellant would fall into a risk category as someone having Rwandan connections or being of Rwandan origin. The newspaper article produced in evidence confirmed the risk. The grounds assert that the Adjudicator failed to address all relevant issues when considering

proportionality and in particular the fact that removing the first appellant to the DRC would represent a permanent breach of contact between himself and his child. Permission to appeal was granted on the basis that the grounds raised an arguable issue that the Adjudicator may have erred in law in his assessment of the risk on return.

#### The grounds of appeal in the second appeal

12. The grounds argue that the Adjudicator has completely disregarded the fact that it would be unsafe for the second appellant to be returned to Kinshasa as he did not have a valid passport or any other travel documentation. The Adjudicator had found that there was no reasonable degree of likelihood that the second appellant would be detained other than possibly for a short time but he overlooked the fact that prison conditions in the DRC were harsh and in local prisons life threatening. Permission to appeal was granted in relation to the point that the second appellant might be in difficulties because he would have no travel documents or passport but permission was refused on all other issues raised in the grounds.

#### The hearing before the Tribunal: The evidence of Mr Eric Kennes

13. At the hearing before the Tribunal, Mr Eric Kennes was called to give oral evidence. He has prepared expert reports in both cases and permission had been given for him to give oral evidence in the second appellant's case. However, as both appeals are being heard together, his oral evidence relates to both appellants.
14. Mr Kennes has degrees in law, philosophy and political science. He has taught at the Catholic Seminary in Kolwezi in the DRC and at the University of Mbuji-Mayi. He has stayed in the DRC for varying periods of time for research or official missions in 1995, 1996, 1999 and 2001. His most recent trips have been in May 2003, August 2003, March 2004 and August-September 2004. He works as a full-time researcher at the Africa Institute, Africa Museum, Tervuren in Belgium, a leading documentation centre on the DRC.
15. In his oral evidence Mr Kennes confirmed and adopted his reports dated 19 October 2004 and updated to 21 February 2005 in respect of the second appellant and dated 18 November 2004 and 22 November 2004 in respect of the first appellant. In answer to questions from Ms Ojutiku, Mr Kennes confirmed that returnees to the DRC would normally be given substitution documents issued by a DRC Embassy. They were not identical to ordinary travel documents and would identify a returnee as having claimed asylum. There was some evidence that information was transferred back to the DRC from embassies about asylum seekers. The authorities tended to scrutinise files more carefully to determine whether someone was rightly or wrongly returned. Mr Kennes confirmed that a general peace agreement was concluded in December 2002 and it was agreed that appointments would be distributed amongst the different parties but security and immigration remained under the control of supporters of President Kabila and attempts were being made by his supporters to prevent opposition growing to the President.

16. Returnees with substitution documents would be interrogated and investigated. They would be interrogated at the airport. The aim would be to see firstly whether they were of interest to the authorities and secondly to extort money. Both the police and immigration services were ruled by arbitrariness. There was a risk that someone might be detained until they could raise money for their release. The going rate used to be about \$500 but could be up to \$1,000 depending on circumstances. There was a risk that the second appellant would be treated as having brought dishonour to the DRC. If he could not pay a fine then there was a risk of being detained and imprisoned. Conditions in Makala prison were terrible. The authorities were now more on their guard as there had been two attempts to destabilise the government in March and June 2004 with the incursion of Rwandan troops into the northern Kivu region. There was a deep divide in Congolese society between those from the west and east. The north of Kivu was controlled by Rwandan troops but the southern area had gone in the direction of Kinshasa. Recent events had exacerbated anti-UDPS feelings there. A suggestion that the elections should be delayed beyond the proposed date in mid-2005 led to an explosive reaction in Kinshasa and the police reacted with great brutality. In January 2005 the UDPS declared an action of ville morte (dead city) meaning that everyone should stay at home. The action was successful. In consequence the UDPS is regarded as a renewed threat to the government and the immigration services are scrutinising returnees carefully to prevent the opposition growing. A UDPS activist would be at risk on return.
17. In answer to questions from Mr Fripp, Mr Kennes said that if someone was returning with substitute documents, he did not see what risk he would be under save to try and take money from him. There would be an attempt to interrogate to find the real reason why they had been removed by the returning government and to ask for further sums of money. Everyone faced the same degree of interrogation. If there were no other factors, a person was likely to get out after paying money but this was speculative. He had not heard of violence being used at the airport during interrogations. That would happen in prison or at a detention centre. Mr Kennes was asked how much it would take for the authorities to conclude that a returnee was of interest to them. He replied that it depended on the evidence available. If there was information that someone had been involved in political activities, that would be a reason for some further investigation. Whether the authorities would trust what they were told by returnees would depend on the circumstances. In principle they distrusted the information they received but if they had no specific reason to distrust someone they would have to let them go.
18. There would not be a risk to someone from the area where the President or his wife came from. If a person really was suspected, he would be interrogated and that would continue in prison. If held in prison, a person would have to resort to other strategies such as asking a friend or relative in an influential position to intervene on his behalf. If someone did end up in prison he might well be forgotten about and left there for months or years. If the first appellant was suspected of being Rwandan by association, he would fall into a risk category. If there was

no evidence of this, he would not be at risk. The transfer of information between authorities in the DRC was not systematic. It may happen in some cases but not in others. Information was commonly transferred from DRC embassies abroad to the immigration service but the system was less efficient for transferring information internally between the regions.

19. In cross-examination by Mr Blundell, Mr Kennes confirmed that he researched political and economic matters. He had three areas of speciality, the mining industry, political elites including elections and the history of Presidents Laurent and Joseph Kabila. He had been on a number of official missions to the DRC. He was in contact with local NGOs and had other contacts. The immigration services did have instructions to arrest all those thought to be Rwandan or Tutsi. The first appellant had experienced problems in January 2000. If he was considered to be of Rwandan origin, he would be at risk from the authorities.

### The Submissions

20. Mr Fripp submitted that the evidence from Mr Kennes showed that there was visibly an increased concern with further scrutiny of those who had faced a review by an Embassy prior to the issue of substitution documents. The authorities' increased concern with the correctness of the paperwork indicated an increase in concern with the substance of the reasons why someone was out of the country. There was now a new Director of Immigration who had engaged with this issue. There was no improvement in the background human rights situation. The political situation in the DRC was in flux with attempted coups and incursions in the east. This might differentially affect different groups. The current Tribunal guidance should be revised to reflect these changes. The likelihood was that the local embassies would know about someone who had been involved in political activities. The first appellant would be at risk. The Adjudicator accepted there had been past persecution because of his political activities and ethnicity. He would have no satisfactory answer to questions he was likely to be asked on return. If his Rwandan links came to light, he would be at risk.
21. Ms Ojutiku submitted that there was a real likelihood that the second appellant's claim for asylum would have become known to the authorities in the DRC. He would be returning without his own travel documents but would be in possession of substitution documents. There was an Article 3 risk for those who returned in these circumstances. He was at risk of detention and ill-treatment. The original application had been based on his UDPS profile and that of his father. Mr Kennes confirmed that this was currently a risk category. She emphasised the significance of the fact that the second appellant had lived in Kinshasa but his father had lived in the east. He was likely to be a victim of the ransom system operated at the airport. The basis of the claim under Article 3 did not relate just to this risk but also the fact that he was a failed asylum seeker. He had no valid travel documents and had previously been arrested as a member of the UDPS.

22. Mr Blundell submitted that there was no further evidence to support a contention that failed asylum seekers as such would be at risk. There was still no call from the UNCHR for a cessation of returns to the DRC. There was a considerable vagueness about some of Mr Kennes' evidence such as his evidence about a particular flight where people were said to have been detained and as to the methodology of obtaining information. There was no real risk to the second appellant. So far as the first appellant was concerned his claim relied on the fact that he was partly Rwandan, his political interests and the fact that he was a failed asylum seeker. The Adjudicator was entitled to find that there had been a significant change in circumstances in the DRC. The evidence as to the risks to Tutsis was sparse.

### The background situation

23. The background to the current situation in the DRC can briefly be summarised as follows. The 5 year conflict in the DRC that began in August 1998 between the various rebel forces and the DRC government was effectively brought to an end by the December 2002 peace agreement and the setting up of the Transitional National Government in June 2003. This comprises the President and four Vice Presidents from different political groups. The new National Assembly and Senate were opened in August 2003. The National Assembly is made up of 500 members from the numerous political parties to the inter-Congolese dialogue, the former government, the unarmed political opposition, civil society and former rebel groups. The Senate is made up of a 120 members from the various parties to the national power sharing accord: paragraphs 4.24 – 7 of the CIPU report.
24. Mr Kennes in his reports has dealt more fully with this process. It has to be viewed in the context of the complexity of the previous conflict. There were three main groups involved, the government army, the rebel group controlled by Rwanda, the Congolese Rally for Democracy – Goma (RCD/Goma), and the rebel group controlled by Uganda, the Congo Liberation Movement (MLC) led by J-P Bemba. Further, within the RCD movement there have been dissident factions. The peace agreement has been made on a political front but according to Mr Kennes lasting peace will depend upon it being accepted by the various military factions. In April 2002 there was a partial agreement involving the MLC and the government but excluding the RCD. This was not implemented. The UDPS, the Unified Lumumbist Party (PALU) and the Forces for Union and Solidarity (FONUS) refused to join the MLC - government agreement. The RCD signed an alliance with the UDPS and others. There were then further negotiations in South Africa which led to a global agreement in December 2002 leading to power sharing between RCD/Goma, the MLC and the government with some lesser responsibilities going to other parties.
25. In Mr Kennes' view it remains doubtful whether this will lead to a durable political stabilisation of the country and questionable whether the parties to the agreement are sincerely committed to its implementation. It is also his view that it seems more likely that all parties will try to gain more power at the expense of their adversaries. There is considerable mutual distrust and a lack of will to co-operate



but against this, Mr Kennes accepts that the agreement has been functioning better than expected. Even so, the situation is fragile. There was an attempted coup at the end of March 2004 by forces thought to be loyal to former President Mobutu. The insurgents attacked four military camps in Kinshasa but the government remained united and in control and the coup was unsuccessful: this is also referred to in paragraphs 6.211-2 of the CIPU report. There was a further attempted coup on 11 June 2004 when Kinshasa was again struck by artillery and gun fire shortly after midnight. The coup bid was quickly put down.

26. According to Mr Kennes, the installation of the Transitional Government has not had any significant impact on the human rights situation in the DRC. He described the general situation as government by warlords jockeying for power. The UDPS at present are refusing to participate. There continues to be a risk of a coup. The overall picture is one of generalised chaos. The position is being exacerbated not just by the attempted coups referred to above but also by continuing concerns that the Rwandan government is interfering in the Kivu region. In May 2004 two militias took over Bukavu in what was seen as an attempt to de-stabilise the transition process. In June 2004 there were mass demonstrations across the DRC protesting against the activities of the Rwandans. Mr Kennes report records that the human rights record of all the formerly warring factions is appalling and that they continue in practice to control much of the territory they have conquered. One current tendency is perceptible: a reinforcement of the anti-Rwandan and anti-Tutsi sentiment which creates some degree of unity between the warring factions. We note at this point that Mr Kennes' view of the widespread disregard for human rights is confirmed by the CIPU report: see for example paragraphs 5.23 and 5.27 of the October 2004 report dealing with detention and torture.
27. Mr Kennes has dealt at length in his evidence with the risk to those of Tutsi or Rwandan ethnicity. He says that the peace agreement has not modified the situation but has even intensified the risk for ethnic Tutsis. After the installation of the Transitional Government there has been continued insecurity with each of the rebel movements waiting for a chance to take power. If the RDC/Goma prevent the reunification of the country under a transitional government, aggression will be directed against Tutsis and anyone considered to be Tutsis. The Rwandans will be seen as the cause of the evil that has come over the country. Acts by ethnic Tutsi troops led by Lauren Nkunda and Mutebusi in late May 2004 led to a generalised protest. In camps in and around Bukavu 26 Banyamulenge soldiers were killed by their fellow soldiers in June 2004 and about 30,000 ethnic Tutsi including many Banyamulenge fled to Rwanda and Burundi.
28. It is Mr Kennes' view that Tutsis are now arguably the category of people most at risk on return to the DRC. He says that the Congolese have suffered so much from the endless war that resentment against anything Rwandan is very high. He went so far as to say that the category Tutsi is not limited to real Tutsis but anybody who is considered to be Tutsi including anyone who is a member or sympathiser of the RDC/Goma rebel movement or even anybody who is

a member of the UDPS, the party that concluded an alliance with the RDC/Goma. Mr Kennes also identified the following risk categories: UDPS members, members of PALU, members of the Special Presidential division (DSP) or family members, high ranking MPR officials and their families and those involved in the assassination of President Kabila. So far as failed asylum seekers are concerned, the immigration services did not always have a list unless the embassies had been involved in the procedure and did not always track down the cases of returned asylum seekers but they would check the reasons why a person was returned. If a person had a political charge against him, he would be at risk and all failed asylum seekers were at risk of being required to pay "fines" to the services concerned.

29. In his report dated 19 October 2004 dealing specifically with the fate of returned failed asylum seekers, Mr Kennes accepts that quite evidently a number of stories by asylum seekers are invented. This is because the closure of European borders for ordinary immigration leaves only one possibility open to a DRC citizen to leave the country: seeking political asylum. The economic and social situation in the DRC has never been as bad as at present. He commented that the stories told by asylum seekers do display a pattern and in many cases may easily be correct but added that it was extraordinarily difficult to judge the credibility of a case on the basis of the case file. There was little standardisation of the documents used and most could be falsified.
30. The risk to a failed asylum seeker only occurred when a person did not have ordinary travel documents and the immigration or security services had a reason for interrogating or arresting the person and they had some information available. This person may have a known case against them or otherwise be of interest to the authorities. Failed asylum seekers might be required to pay a "ransom" if there was no case against them. One of the reasons for this was that they were regarded as having brought dishonour to the Congolese state. Mr Kennes accepted that there was no persecution of failed asylum seekers per se but it was his view that there was a serious risk of inhuman and degrading treatment not necessarily for political but for financial reasons.
31. In relation to the issue of failed asylum seekers returned to the DRC, we also had before us paragraphs 6.221 - 226 of the CIPU report October 2004. In a letter of November 2002 the British Ambassador said that he had not seen any evidence that failed asylum seekers were persecuted on arrival, a view shared by the French, Belgian and Dutch governments. The report refers to the UNCHR position paper of July 2004 that it is not opposed to the return of failed asylum seekers provided they have been found in fair procedures not to have international protection needs subject to the caveat that some areas remained unsafe and that states needed to ascertain carefully the nationality of rejected asylum seekers as well as their areas of origin, profile and political or military affiliation.

32. In *VL*, the Tribunal when dealing with the risk categories in the DRC came to the following conclusions:

"93. Our essential focus in this determination has been on the issue of failed asylum seekers. However, the Adjudicator in allowing this appeal made reference to one further risk factor, namely, being a woman with a very young child: see paragraph 22. In view of the analysis set out in *M* and preceding paragraphs of this determination, we also have to consider whether there was another possible risk category into which she would fall, with reference to identification by the Tribunal in *M* of two definitive risk categories as follows:

- (a) Nationality or perceived nationality of a state regarded as hostile to the DRC (in particular those who have or are presumed to have Rwandan connections or are of Rwandan origin);
- (b) Having or being perceived to have a military or political profile or background.

94. As explained earlier, we consider *M* (0071) reached sound conclusions and we adopt its conclusions in this respect as well as others. We note that both the latest UNHCR evidence and the latest report of Mr Kennes lent further support to the identification of these two categories. They also lend support to inclusion of a third category being without travel documents but this does not arise in the UK context for reasons already given.

95. We would also observe that the UNCHR and Mr Kennes have made reference in the past to other possible risk categories, including being from rebel held areas; being of a family of mixed ethnicity; being of Tutsi origin or being perceived to be Tutsis.

However, since in our view the latest evidence is not clear cut in respect of these additional categories and the Tribunal has not found that they are effective risk categories currently, we leave the matter to be more definitively decided as and when necessary in future reported cases".

33. In *M(DRC)* [2004] UKIAT 0075, the Tribunal considered the risk faced by the Tutsi community in Kinshasa. It stated as follows:

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

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

17. Thirdly, we do not quite understand Mr Khan's contention that Tutsis fall into separate risk category by virtue of being confused with Rwandans. It is clear that the authorities now protect Tutsis in Kinshasa. If there is a failure to make a distinction sometimes

between Tutsis and Rwandans, it is made by civilian Kinshasa not by the authorities. The latter to repeat, are described as affording protection to Tutsis against civilian actions.

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

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

34. The Tribunal in *TC (mixed ethnicity – Rwandan) DRC* [2004] UKIAT 00238 regarded *M* as properly addressing the risks faced by citizens of the DRC of mixed Rwandan/Tutsi ethnicity.

#### Conclusions on the risk categories

35. It is clear from the background evidence that since the start of the war in 1998 ethnic Tutsis have been subjected to serious abuses in the DRC but the security situation did improve during 2003 and according to the US State Department report for that year ethnic Tutsis were not subjected to serious abuses by government security forces or citizens. The camp in Kinshasa which had housed several hundred Tutsis since 1998 was closed in the summer of 2003 because the local population had become more tolerant towards the Tutsis. The ICRC helped find solutions for the former inhabitants of this camp. About 100 obtained exit visas for Canada, others travelled to the east of the DRC and others remained in Kinshasa. However, recent events have caused the situation to deteriorate. In this context the Tribunal refers to the UNCHR report of 2 February 2005 in response to a request for its opinion on the risk on return to the DRC for people of Rwandan origin or all those perceived as such.
36. This relevant part of the report reads as follows:

“Until recently, the Banyamulenge were viewed as allies of RCD-Goma and Rwanda, and were subsequently deemed to be safe in Eastern DRC. However, following a shift of alliances, the Banyamulenge are also reportedly targeted by Rwandan troops because of their perceived or actual opposition to the Rwandan occupation in Eastern DRC. Despite the efforts of the DRC authorities to protect the Banyamulenge/Tutsi ethnic group, the government may not be able to protect them from the generalised hostility of local communities. For these reasons, UNHCR is of the opinion that individuals of Banyamulenge ethnic origin may be at risk of persecutory acts on the grounds of nationality and membership of a racial group.”

The report focuses primarily on the situation in the East of the DRC but it does provide support for the fact that there is a risk to Tutsis from the generalised hostility of local communities at least in Eastern DRC. The Banyamulenge live mainly in the East. They are ethnically related to the Rwandan Tutsi although they have their own distinct dialect. They are descended from those who came from Rwanda before colonial occupation started in 1885. They have been seen as natural allies of the Rwandans even though they have sided with the Congolese against the Rwandans. The incursions by the ethnic Tutsi troops of Laurent Nkunda and Mutebesi was justified as necessary to protect the Banyamulenge but in all likelihood this was an excuse to intervene and its effect has been to harden attitudes against both Tutsis and Banyamulenge

37. We also note from this report that it is confirmed that active membership in a political party may lead to difficulties with the authorities. The government has reportedly been involved in arbitrary arrest, detention, torture of persons perceived to be government opponents. The report maintains that individuals with real or perceived political associations are likely to be at risk and therefore deserve to receive particular and careful consideration of their claims.
38. In the Human Rights Watch Report of 4 December 2004 dealing with press reports that Rwandan troops had again crossed into the DRC it was said that news of a Rwandan military presence would further spark anger towards Congolese of Rwandan origin, particularly those who were Tutsi. Congolese of other groups believed that Congolese Tutsi, and a related people, the Banyamulenge, would support a Rwandan invasion. Fear and hatred between ethnic groups had risen sharply in eastern Congo in the previous six months. These reports support Mr Kennes' view that at present there is an increased risk to Tutsis exacerbated by a reaction to the events in Bukavu in May-June 2004 and subsequently. According to Mr Kennes it is very dangerous for anyone who is a Tutsi or considered as such to live in Kinshasa. He would have to live in the commune of Gombe where there is some protection offered by MONUC but only the well off can live there. High level officials of RCD/Goma might enjoy some sort of protection.

### Tutsi ethnicity

39. The evidence currently available satisfies us that the position has changed since the Tribunal considered the issue of the risk to Tutsis in *M* and *TC*. In the current situation in the DRC the Tribunal accept that, with the exception of high level officials of RCD/Goma, returnees of Tutsi ethnicity or believed to be of this ethnicity could be at real risk on return. The resentment against anything or anybody Rwandan or perceived to be Rwandan is very high and such that there is a real risk of generalised hostility from local communities against which the authorities are currently unlikely to protect. The situation improved in 2003 but we are satisfied in the light of the evidence before us there has been a sharp deterioration in 2004. We accept Mr Kennes' evidence of the current dangers for Tutsis in Kinshasa, the great majority of whom

are unable generally to obtain the protection of either MONUC or the authorities.

40. However, we would emphasise that a person cannot expect to succeed in a refugee or Art 3 claim merely by asserting that he or she is a Tutsi or would be perceived as one. Given that there are distinct physical characteristics typical of a Tutsi – see CIPU report October 2004 para 6.71 - a highly significant consideration will be the extent to which a person possesses those characteristics. If a person claims to be of mixed Tutsi ethnicity it will be relevant to examine to what extent he or she will be seen to have taken the ethnic identity of their father or mother. Furthermore, given the importance in the DRC context of tribal links, geographical location, linguistic identity, customs, traditions and other factors, there may be valid reasons for finding that a person, albeit lacking entirely the physical characteristics of a Tutsi, will be perceived as one.
41. We would add, however, that we do not find very helpful Mr Kennes' suggestion (see above para 28) that the category of Tutsi should be seen as including anyone who is a member or sympathiser of the RDC/Goma rebel movement or even anybody who is a member of the UDPS. It may well be that within the DRC people use "Tutsi" as a general pejorative term to denote those who are pro-Rwandan, but it remains that it is seen to designate persons on ethnic grounds quite separately from their military or political affiliations. To adopt Mr Kennes' proposed extension of the Tutsi category would falsely imply that it covers only those who have a military or political profile.

#### Persons from Kivu

42. Mr Kennes' evidence was also that in Kinshasa there is a tendency to consider anybody from the Kivu region as Rwandese. However, we think in this respect his evidence was less specific and difficult to square with the fact, which must be evident to the DRC authorities and Kinshasa residents, that many non-Tutsi inhabitants of the Kivu region have faced oppression at the hands of rebel armies in league with the Rwandese. If Mr Kennes' evidence on this category were right, we would expect there to be evidence of wide-scale round-ups of or attacks upon persons entering Kinshasa from the Kivu region. So far as we can ascertain, such evidence is lacking.
43. This is not to say that an individual from Kivu could not succeed in showing a real risk where there are other factors adding to risk in play. This emphasises the importance of each case being looked at on its own facts. The fact that a returnee comes from Kivu would be a relevant factor to be taken into account but by itself is not determinative. The assessment of risk involves a careful scrutiny of the evidence as a whole including the evidence of to what extent an appellant's origin, background and descent might lead the authorities to consider him as Rwandese.

#### Military and political profile

44. We confirm that there continues to be a real risk for those with a political or military profile. Each case must be judged on its own facts but it is possible now to provide a little more detail at least about those who fall within the “political profile” subcategory.
45. We would emphasise first of all that use of the word “profile” highlights the fact that this category is intended to mark out those whose actual or perceived military or political activities or involvements are likely to have brought them or to bring them to the adverse attention of the Kabila regime. Mere membership of an opposition political party will not demonstrate that a person has such a profile.
46. Bearing this point in mind, we accept that at the present time it is very dangerous to be an active member of the UDPS. The success of the ville morte action in bringing much of Kinshasa to a standstill in January 2005 has threatened the Kabila leadership. We accept Mr Kennes’ evidence that UDPS militants abroad returning now would be at risk of detention. There is a much lesser risk for PALU members although this changes from time to time. According to Mr Kennes they tend to be released more easily than UDPS members. There is a potential risk for DPS members who are considered to be potential and actual collaborators or spies for Bemba and his MLC movement. The danger for high ranking MPR officials and their families has considerably diminished since the creation of the Transitional Government and depends on the position of persons held under the Mobutu regime. Those involved or believed to be involved in the assassination of President Kabila continue to be at risk of imprisonment and torture. The immigration and security services are still convinced that only part of the network that planned the assassination has been discovered and arrested.

#### Failed asylum seekers

47. The evidence presently before us does not satisfy us that there is any adequate evidential basis for taking a different view from current Tribunal jurisprudence that returned failed asylum seekers are not at real risk of persecution for that reason alone. We accept that while there might be attempts to extract money from returnees the authorities are only interested in those who have or are perceived to have an ethnic, military or political profile identifying them as opponents to those in power. Mr Kennes confirms in his evidence that a person returning with valid, ordinary travel documents will not be at risk unless of interest to the authorities for these reasons.
48. If someone is identified as a failed asylum seeker but there are no known political charges against him, there is a risk that they may be required to pay a “fine”. Those who do not have charges against them or are otherwise not of interest to the authorities will be released upon payment of the fine. According to Mr Kennes, a failure to pay leads to a risk of being detained in irregular places of detention such as an office and being released only upon payment of the fine but there are cases where returnees, having been sent abroad by an “asylum seeker immigration network” with the complicity of officials, have been able to look to that network for protection on return. The director of

immigration services does try to defend the interest of all returnees by checking whether they have been lawfully returned or whether somebody has received the papers they are entitled to. On one hand this is positive for the DRC citizens abroad who do not seek political asylum but it has led to a closer scrutiny of the cases of returned failed asylum seekers. Research into an individual case may more easily lead to the discovery of the political, military or ethnic background of a returnee but may also identify someone as a mere returned failed asylum-seeker.

49. This evidence emphasises that the primary risk to a returnee is where they have a political or military or ethnic (Tutsi) background which makes him of an adverse interest to the authorities. However, the risk arises because of his background and not because he is a returnee. The relevance of the fact that returns are closely scrutinised goes to the likelihood of that background coming to light. If someone is not of interest to the authorities but is identified as a failed asylum seeker then it is clear from the evidence that the only real risk they run is of being required to pay a fine. The officials involved are motivated for financial reasons using returnees as a potential source of income. This behaviour can certainly be categorised as harassment but we are not satisfied that the risks are such that there is a real risk of imprisonment or detention in conditions which amounts to a breach of article 3. The aim is to obtain money and must be viewed in the context of a society where corruption is endemic and there is a background of generalised chaos. The hard reality is that corruption is endemic in countries such as the DRC and officials may take the opportunity of using their position to extort money from returnees.
50. The issue for the Tribunal is whether the position is such that there is a real risk of a breach of article 3 for all returned asylum seekers identified as such. We are not satisfied that the high threshold is met. The risk is of having to pay a fine and being wrongly detained to encourage payment. We are not satisfied on the evidence before us that this amounts to a breach of article 3. We are confirmed in this view by the fact that the UNHCR in its letter of 2 February 2005 maintained its opinion which it has set out in previous letters that generally speaking it was possible for unsuccessful asylum seekers to return to the DRC provided that they had been found in fair procedures not to have international protection needs.

#### Summary of the Risk Categories

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.

52. In the light of our findings this determination is to be read as replacing the existing country guidance cases on the DRC save for *VL* for what it says about the approach to the issue failed asylum seekers. It also replaces *RK (obligation to investigate) CG [2004] UKIAT 00129*, but we would emphasise that the latter remains as a legally important reported case in respect of what it says about the obligation to investigate.

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 appeal of the first appellant

55. The Adjudicator accepted that the first appellant would have been entitled to asylum when he arrived in the United Kingdom but in view of the new political arrangements in place since the end of June 2003 he was satisfied that the political landscape in the DRC had been transformed. It was his view that the appellant's past detention was because of his political activities with the PDSC. He found that there was now no risk arising to the first appellant from his political opinions or his activities as a musician. We are satisfied that the Adjudicator was entitled to reach this conclusion and there is no error of law in his findings and conclusions on this aspect of the first appellant's appeal.
56. The adjudicator went on to deal with the risk arising from the fact that the first appellant was of part Rwandan ethnicity. He found that there was no doubt as to his nationality. He had had no history of any involvement in fighting with any rebel group particularly in the east of the DRC. Despite his ethnicity he had not entered the DRC in the past from Rwanda, having been born in Kinshasa. However, the adjudicator did accept that the first appellant had encountered difficulties in the past due to his ethnicity and accepted that the newspaper report was genuine. He accepted the reliability of the newspaper article which referred to the first appellant by name as someone, of a mixed marriage, who was seriously threatened. We are satisfied that the Adjudicator did err in law by leaving these factors out of account when assessing in the light of the evidence before him and in particular the UNHCR report whether there would be a risk arising from his ethnicity.
57. As we have found a material error of law we are able to consider the further evidence now before us. In the light of this evidence dealing with the heightened risks to those suspected of Rwandan or Tutsi background and the fact that the first appellant has come to the attention of the authorities in the past, the Tribunal is satisfied that there is a real risk of persecution on return. We bear in mind that the Adjudicator accepted that in January 2000 the authorities were looking

for him and there was a newspaper article indicating that he had encountered some difficulties because of his ethnicity. The first appellant does not have the identifiable physical characteristics of a Tutsi, but the newspaper report indicates that his perceived ethnicity of Tutsi has been a significant factor in the adverse interest taken in him by the authorities previously. We consider that his perceived Tutsi ethnicity, together with his past political and musical involvements, would mean that he was likely to continue facing a real risk of adverse treatment either from the authorities or from local communities against which he would not receive effective protection.

### The facts relating to the second appellant

58. The second appellant's evidence was rejected by the Adjudicator who came to the conclusion that his account was a fabrication. He did not believe that the second appellant had been a member of the UDPS or had been detained. The Tribunal is not satisfied that he would be at risk because he would have no travel documents or passport. If he is returned he will be provided with substitute documents through the DRC Embassy. The Tribunal is not satisfied that there is any adequate basis for a successful argument that he would be at real risk on return. The authorities will only be adversely interested in him in so far as he falls into one of the known risk categories. In the light of the Adjudicator's findings he does not. We are not satisfied that the risk of having money extorted from him on arrival is such that there is a real risk of a breach of Article 3. This risk arises because of corruption within the security and immigration services. The Adjudicator was entitled to find that there was no reasonable likelihood of detention other than possibly a very short period when enquiries were made. As the appeal was decided before 9 June 2003, the appeal against the Adjudicator's determination is not limited to showing that there is an error of law. However, for the reasons we have given, we are not satisfied either that he erred in law or that there is any basis on which we would be entitled to interfere with his findings of fact or his assessment of risk on return. We agree with those findings and conclusions.

### Decisions

59. Accordingly, the appeal by the first appellant is allowed. The appeal by the second appellant is dismissed.

**H J E Latter**  
**Vice President**

Appendix A  
Background materials placed before the Tribunal

CIPU reports October 2003, April 2004 and October 2004  
Public AI Index AFR 62/28/98 dated 24 July 1998  
UNHCR letter "Returns to the DRC" 13 August 2003

Human rights Watch 24 July 2003  
US State Dept Report DRC 31 March 2003  
BID letters 25 Sept 2003, 16 April 2003, 7 May 2003, 16 May 2003, 30 May 2003  
Home Office letters 14 Feb 2003, 17 March 2003, 17 April 2003, 20 May 2003, 11 June 2003,  
12 August 2003  
Docu- Congo email 20 August 2003  
UNHCR letters 23 January 2003, 10 June 2003  
Home Office letters 15 July 2003, 1 August 2003  
Amnesty International faxes 9 July 2003 (x2)  
Docu-Congo 23 June 2003, 16 May 2003  
Undated statement by returned asylum seeker  
Home Office Bulletin 30 January 2003  
BID letter 30 May 2003  
Home Office letter 12 June 2003  
BID letter 16 July 2003  
Country report ACCORD/UNHCR seminar 28-9 June 2003  
Kennes Fate of returned asylum seekers 10 Feb 2003  
RLC documents on return 21 October 2003  
IRRN (UK) 2 Dec 2004 Arun Kundnani  
UNHCR letters 15 Sept 2003, 24 February 2004, 3 August 2004, 2 February 2005  
HRW report 4 December 2004  
UNHCR report 2005  
Congoceca July 2002 human rights abuses against UDPS  
Statement UDPS Gen Sec 10 Nov 1999  
Afrol News 20 March 2003  
Utusan online report 10 April 2003  
All Africa.com report 31 March 2003  
BBC news report 3 April 2003  
ABC news on line report 9 April 2003 (x2)  
BBC news report 8 April 2003  
World Refugee survey report 2004

#### Appendix B Expert Reports

Reports from Mr Kennes dated 19 October 2004, 18 November 2004, 22 November 2004, 27  
March 2005

#### Appendix C Cases cited or referred to

Senga CO-573-94  
B (DR Congo) [2003] UKIAT 00012  
M (DR Congo) [2003] UKIAT 00051  
VL (risk – failed asylum seekers) DRC [2004] UKIAT 00007  
S (DRC) [2004] UKIAT 00010  
M (Croatia) [2004] UKIAT 00024\*  
M (DRC) UKIAT 00075  
TC (mixed ethnicity –Rwandan) DRC [2004] UKIAT 00238  
RK (obligation to investigate) [2004] UKIAT 00129

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*Approved for electronic transmission*