IMMIGRATION APPEAL TRIBUNAL

Appeal No: [2002] UKIAT 06124
HX54869-2001

Date heard: 25/07/2002
Date notified: 20/01/2003

Before:
MR C P MATHER (CHAIRMAN)
MR M L JAMES
MRS S HUSSAIN JP

BEBEY GUSSY ALEX PATRICK BABELA
Appellant

The Secretary of State for the Home Department
Respondents

Determination and Reasons

Representation:

For the Appellant Miss M Canavan, Refugee Legal Centre (London)
For the Respondent Mr C Buckley, Home Office Presenting Officer

1. The Appellant is a citizen of Congo (Brazzaville). He appeals, with leave of the Tribunal the decision of an Adjudicator (Mr J W Miller), promulgated on 3 April 2002, to dismiss his appeal against the refusal by the Respondent to grant leave to enter following refusal of his asylum claim.

2. There are four grounds of appeal. The first, and most substantial is that the Adjudicator did not take into consideration that the Appellant had already been granted refugee status in South Africa at the time that he arrived in the United Kingdom. The second is that the Adjudicator failed to properly address the expert evidence provided. Third, that the Adjudicator's findings concerning the risk to the Appellant due to his membership of his family as a social group were insufficient or unsustainable and, fourth, that the Adjudicator's assessment of the risk on return on human rights grounds was erroneous.

Immigration History

3. The Appellant left Congo (Brazzaville) in about 1994 and applied for asylum in South Africa. This was granted in 1998. On arrival in the United Kingdom on 2 January 1999, he attempted to see the UNHCR representative to have his refugee status transferred. That did not happen and he was detained for approximately six months. During that time, his South African travel document expired and his luggage, which contained his refugee documents, was stolen. A solicitor seems to have claimed asylum on his behalf. That application, following two interviews, was refused. The formal notice of the decision is dated 12 July 2001. Although it is not clear from the papers before us, we were told that the Respondent attempted to return the Appellant to South Africa after the expiry of his travel document. The Appellant appealed that decision and the appeal was conceded by the Respondent in 1999. Thereafter, the Appellant's application seems to have been treated as a

routine asylum claim.

The Adjudicator's Determination

4. Apart from recording the fact that the Appellant had been "in South Africa as a refugee there before coming to this country" the Adjudicator does not address the significance of that at all. In evaluating the evidence, he said that he did not find the Appellant to be a credible witness in large part. He accepted that the Appellant's father had participated in a failed coup many years earlier and had fled to Sweden. He noted that the family, although initially ill-treated when they continued to reside in Congo, were under house arrest which ceased in 1981. He said that the family had occupied a privileged position in society with access to money, education and favours and described the Appellant, who as a young student was involved with Kolelas MCDDI, as a low-level activist concerned with leaflet distribution. He said that the Appellant's detention in 1994 was not by government nor Lissouba (the then President), but by militia acting outside their duties and unsupervised. He said that the Appellant's escape with the help of friendly militia men was sufficient to illustrate that this was not government persecution nor condoned or encouraged by the then authorities. He went on to say that he found the militia visited the house and warned the Appellant through his mother to stay out of politics, but that he did not leave for South Africa until some months later. He lied to the Respondent about the date when he left South Africa and the Adjudicator said that was because he only wanted to disclose a minimum period in South Africa as a refugee before coming to the United Kingdom. The Adjudicator found that he was not a successful student and that his life in South Africa became unhappy. He felt demeaned by the work he had to accept. He felt discriminated against and sought to enter the United Kingdom to pursue a refugee claim here on substantially the same grounds as those he used in South Africa. The Adjudicator then comments that there has been "a sea change since 1994 in the circumstances now pertaining in the Congo". The Adjudicator said that he was not satisfied the Appellant had established his family had been singled out for persecution as a social group. He said that the Appellant's mother continues to reside in the country with other relatives and he specifically rejected any suggestion that "she is fleeing from forest to forest without a suitcase". He found the Appellant was exaggerating and, in particular, the relationship between Kotelas (a former Prime Minister, now in exile) and the Appellant's mother was an embellishment to try to bring himself within a group potentially at risk and identified as such by the UNHCR.

The Appellant's Status on Arrival

5. It is not disputed that when the Appellant arrived in the United Kingdom he had refugee status, having been recognised in South Africa. His travel document issued in accordance with Article 28 of the 1951 Convention was produced to the Respondent on arrival. There is a copy of it in the Respondent's appeal bundle, from which it can be clearly seen that it was issued on 21 August 1998 and expired on 21 October 1999. The Appellant said in his witness statement (and this was not challenged at the Adjudicator hearing, according to the record of proceedings) that whilst he was at Heathrow his luggage was taken and it contained his actual refugee papers. Miss Canavan suggested that the refugee papers would not have expired before the expiry date on the travel document and Mr Buckley did not disagree.

6. What happened to the appellant on his arrival at Heathrow is of interest. He sets this out in his witness statement, which was provided as part of his bundle of documents at the Adjudicator hearing. His account was not disputed during the hearing and is not mentioned by the Adjudicator. Having described the difficulties which he was experiencing in South Africa as a refugee and explaining that he had decided to leave he went on to say this:-

"20....I didn't specifically plan to come to the UK. My father had sent me a sponsorship letter from

Sweden and my intention was to try and join him there. I was determined to leave South Africa. But what happened was that at the last minute my money was stolen by people who I was living with. In the end, the journey was organised by my father. I already had my refugee passport. Because I didn't have much money, I couldn't get a direct flight to Sweden, so the flight I took left South Africa and went via Namibia to London. I was only intending to try to get to Sweden, perhaps by boat.

21. I think that I arrived in the UK on 2 January 1999 in the evening. I didn't know where to go when I got to the airport. I was frightened. I followed other people who were lining up in a queue. I was directed towards some airport staff and I said to them straight away that I wanted to see somebody from UNHCR. They asked me why and I told them that I was a refugee. They told me that I couldn't ask for asylum here because I was a refugee in South Africa. I told them I wanted to transfer my status. I went over to another Immigration Officer who was putting the entry stamps in people's passports because the other people I spoke to didn't seem to understand me. The reply of the first people that I spoke to frightened me a bit. The man who was doing the stamps asked me how long I wanted to stay. Because the first people had frightened me I said that I was visiting my sister and I wanted to stay for ten days. He asked to see what money I had to see what I was going to live on. He counted it up and it was only $100. He told me that it wasn't enough. He told me to wait and called another woman who came over. When the woman came over I took all my papers out and I told her then that I wanted to transfer my asylum case.

22. They told me that I needed a visa. The Immigration Officer ripped the cover off the passport and started shouting at me. He told me it was not a proper South African passport. I was really scared. This is when they told me that they wanted to deport me. They didn't speak to me in French so I am not sure I understood everything they said to me. I told them that I at least needed my luggage. They spent 20 minutes looking for my luggage but it had disappeared. I have never found my luggage since. It contained some important documents such as education certificates and my refugee papers.

23. The Immigration Officers asked American Airlines to wait for me but they couldn't wait anymore. The American pilot came out to see me. I was crying. By then, I couldn't understand any English anymore. The pilot asked me what language I spoke. I told him I spoke French. He called a French interpreter. When I spoke to the pilot I explained that I wanted my asylum to be transferred and that in my country there was war. I told him that the country I had come from was too violent. The pilot spoke to the immigration people and asked them to listen to my case. He told them that my case was not a deportation case but an asylum case.

24. After the pilot had gone, the immigration officials decided to put me in detention. I was held at a building called DA [Harmondsworth]. This was on the same evening that I arrived in the UK. The next day, I was crying and wondering why I had been detained. Some Nigerian people who were detained saw that I was in a terrible state and asked me what the problem was. They told me not to cry and that they would help me get a solicitor who would help stop my deportation. The solicitors office wasn't open because it was the New Year and there was a bank holiday that weekend. I was left in the detention centre over the weekend. No one from the Immigration Service came to talk to me during that weekend. The people who I had met in detention contacted their solicitor who I understand claimed asylum on my behalf even though he had not seen me. I was then transferred to Queen's Building where I was held for around one or two days.

25. The Immigration Service informed my solicitor that they would interview me on the Friday, but I think that it was on the Monday that they came to take me to an interview. The security staff came to take me. I asked them why I was being taken. Before they took me I called my solicitor. My solicitor told me that it couldn't be right because the interview was on Friday. He said that he

would call them and that I should wait for him to call before going to the interview and that if I didn't get a phone call from him before then I should refuse to go. When he rang back he said that he had spoken to Immigration and that he had threatened to take them to court if they tried to deport me without my solicitor being informed. He told me to refuse to answer questions if he was not present. This is what I told the Immigration Service when they came to get me. The Immigration Officer got very angry and banged the table. This is when they decided to put me in prison.

26. Before taking me away, they took my fingerprints and gave me some papers to show that I had claimed asylum. I think that I was taken to Rochester prison the next day. I felt I didn't understand anything anymore. I was interviewed by an Immigration Officer at Rochester prison on 7 January 1999. My solicitor was able to attend. I found it very intimidating being interviewed in prison. Some things I found difficult to remember, this is because of the torture. At the end of the interview they said that they would consider my case. They said because I was a refugee in South Africa that they would check that the passport was a genuine passport and then see if the South African authorities would accept me back.

26. My solicitor asked me if I could provide money for him to get me out on bail. I told him that I didn't have any money. I realised that he wasn't working on my case so I decided to take another solicitor. That solicitor was crazy. He told me to tell the Home Office that my refugee passport was a fake because that would make it easier to get me out of detention. I refused to do this. I told that solicitor I didn't want him to help me. I was interviewed again in March 1999 but I still didn't have a solicitor that I felt was advising me properly. The solicitor who attended the second interview with me asked me why I hadn't gone to France if I spoke French. None of the solicitors that I had made an application for me to be released. It was this that began to drive me to desperation. I had no hope, nothing was happening.

27. I was thinking that my human rights as a refugee were being violated and I felt that I wanted to kill myself to make them pay the price for what they were doing. I tried to kill myself for the first time. I took the sheets and tied them together to make a rope. I tied a noose and put it round my neck. My cell was on the first floor. I went to tie it on the metal to hang myself with. At the time I was tying it, the people on the same wing shouted out for the guards to come and intervene. At the moment when they arrived I had just thrown myself off and they caught me. I was crying. They locked everybody up in the cells and took me to the hospital. That was the first time that I had tried to kill myself. I think that this was perhaps about four months after I was detained but I can't remember clearly.

28. The longer I was in prison the worse it got and this is why I tried to hang myself a second time. I hadn't committed a crime. I wasn't a thief. A court hadn't sentenced me. I could [not] understand or accept why I was in prison. I tried to hang myself again. This was more serious. I think that I was more determined to succeed the second time because I had been in prison longer by then. I was hospitalised for more than fifteen days. I had gone on hunger strike for five days while I was in the hospital and I didn't even drink water. I was kept on my own in the hospital for five days and felt that I was being treated like a madman. The Home Office got scared and came to see me. They asked me what was wrong. I said that I wanted to be freed and that I shouldn't be in prison. They asked me if I had a solicitor and I told them that I didn't. They asked this woman who was a prison visitor to find a solicitor for me. The solicitors that she found, Morrisseys Solicitors, were able to make an application for my release. By the time I was released on bail I had been in detention for six or seven months.

29. When I was released from prison I suffered a lot from depression and insomnia. I also had asthma..."

Appellant's Submissions

7. Miss Canavan produced a skeleton argument and made detailed submissions based upon it. She told us in addition that the Refugee Legal Council had written to the Respondent asking for him to consider a transfer of the Appellant's refugee status to the United Kingdom but has never received a reply. She drew our attention to the fact that there is an IND policy document referring to transfer of refugee status, although she conceded that the policy operated outside the rules and that any decision or lack of it is not reviewable by us.

8. She started by saying that paragraphs 29 and 31 of the UNHCR handbook confirm the declaratory nature of refugee status. Those paragraphs and paragraph 28 read as follows:-

"28.A person is a refugee within the meaning of the 1951 Convention as soon as he fulfils the criteria contained in the definition. This would necessarily occur prior to the time at which his refugee status is formally determined. Recognition of his refugee status does not therefore make him a refugee but declares him to be one. He does not become a refugee because of recognition, but is recognised because he is a refugee.

29. Determination of refugee status. This is a process which takes place in two stages. Firstly, it is necessary to ascertain the relevant facts of the case. Secondly, the definitions in the 1951 Convention and the 1967 Protocol have to be applied to the facts thus ascertained.

31. The inclusion clauses define the criteria that a person must satisfy in order to be a refugee. They form the positive basis upon which the determination of refugee status is made. The so-called cessation and exclusion clauses have a negative significance; the former indicate the conditions under which a refugee ceases to be a refugee and the latter enumerate the circumstances in which a person is excluded from the application of the 1951 Convention although meeting the positive criteria of the inclusion clauses."

9. She then submitted that because of the declaratory nature of refugee status, the Appellant continues to be a refugee despite the fact that his South African papers have now expired. In support of this she produced a letter from UNHCR dated 24 July 2002. We gave leave for her to adduce this in evidence because it had only been sent the day before the hearing and could not have been produced earlier. The letter addresses the expiration of the documents and says:-

"As regards the expiration of his documents, this does not mean that Mr Babela is no longer a refugee. In the UNHCR's view, the document provides documentary evidence of the status accorded to Mr Babela in South Africa and is therefore not constitutive of such status. Its expiration does not annul his status as a refugee in South Africa."

10. Once a person has been recognised as a refugee, he will only cease to have such status if one of the cessation or exclusion clauses in Article 1 of the Convention applies. There is no suggestion that an exclusion clause is relevant. The cessation clauses are set out in Article 1C of the Convention. The only cessation clause which could be relevant is C(5):-

"He can no longer, because the circumstances in connection with which he has been recognised as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality."

It was submitted that there has been no such major change in circumstances. The expert evidence adduced on behalf of the Appellant was cited in support of that argument.

11. The UNHCR letter says this:-

"As regards the proper approach to be taken, the point of departure is that Mr Babela is a refugee who has been recognised as such by a state party to the Refugee Convention. His status as a refugee requires other states, particularly those who are also parties to the Convention, to acknowledge and abide by two key matters of principle in their dealings with Mr Babela. Both of these principles are firmly grounded in the consistent and long-standing practice of states.

One principle is that refugee status, once granted, should not be reviewed or annulled except on the most substantial and clear grounds. Such grounds are specified in the Refugee Convention as provisions for the cessation of refugee status. They may also include circumstances where it comes to light that a person should never have been recognised as a refugee in the first place... The rationale is that if international protection is to have practical meaning, then refugee status should have some stability and certitude, and refugees should be assured that their status will not be likely to be tampered with.

Another principle of relevance to this case is the extraterritorial effect of refugee status. UNHCR's Executive Committee, of which the UK is a member, has addressed this issue in its 1978 Conclusion on the Extraterritorial Effect on the Determination of Refugee Status."

A copy of the Executive Committee minute was produced. The document is dated 17 October 1978. After reviewing the various aspects of refugee status it:

"Recognised, therefore, that refugee status as determined in one contracting state should only be called into question by another contracting state in exceptional cases when it appears that the person manifested does not fulfil the requirements of the Convention, e.g. if facts become known indicating that the statements initially made were fraudulent of showing that the person concerned falls within the terms of a cessation or exclusion provision of the 1951 Convention."

12. The UNHCR letter goes on to quote, but not produce, a copy of a 1989 UNHCR Executive Committee conclusion which concerns refugees who move irregularly from a country in which they have already found protection. At paragraph (g) that committee apparently concluded:-

"It is recognised that there may be exceptional cases where a refugee... may justify the claim that he has reason to fear persecution or his physical safety and freedom are endangered in a country where has previously found protection. Such cases should be given favourable consideration by the authorities of the state where he requests asylum."

13. The letter goes on to say:-

"The upshot of the relevant principles and Executive Committee guidance is that while it is appropriate to give fair consideration to Mr Babela's reasons for leaving South Africa, it is not acceptable that his case should be looked at afresh under the criteria for refugee status. As long as Mr Babela retains his status as a refugee, his return to the Congo should not be contemplated.

In our view, it would be consistent with the relevant principles to consider Mr Babela's request for a transfer in a humanitarian spirit and in light of his overall circumstances. In this regard, factors that should weigh in his favour would include the fact that his father and brother have been recognised as refugees in Sweden and the UK respectively. From the UNHCR's point of view, the fact that Mr Babela has been driven to make several attempts on his own life should also be considered as a further basis for favourable humanitarian consideration."

14. Miss Canavan recognised that the burden of proof in an asylum claim is on the Applicant. However, she submitted in this case that he has produced prima facie evidence that he is a refugee. It was not disputed between the parties that the refugee status recognised by South Africa was genuine. There is a letter in the Appellant's appeal bundle from the South African High Commission Consular Section to the Respondent confirming that he had been recognised in South Africa, and indicating that he would be re-admissible provided he re-entered before his refugee status expired.

15. We do not accept the South African High Commission interpretation of the expiry of the Appellant's refugee status documents as being an end to his refugee status (for the reasons set out above). She then went on to submit that the Appellant's situation was covered by Mohammed Arif (1999 INLR 327). She extracted part of the judgment of Lord Justice Simon Brown where he started by referring to a passage from McDonalds Immigration Law and Practice:-

"Paragraph 12.58 at page 397, so far as material, reads:
'If the circumstances in the country of nationality... have so changed that refugees can no longer refuse to avail themselves of the protection of that country, Convention refugee status will cease... A cessation of circumstances refers to fundamental changes rather than merely transitory ones. A refugee's status should not be subject to frequent reviews since this would jeopardise a sense of security which the Convention was designed to provide. Proof that the circumstances of persecution have ceased to exist would fall upon the receiving state, cessation of refugee status will not automatically mean repatriation, since many refugees will have acquired settlement rights in their country of refuge. Problems can occur when the authority takes a long time to determine a claim and circumstances change in the meantime as the relevant date for the assessment of the claim is the date of decision.'

The sentence I will particularly emphasise there is 'proof that the circumstances of persecution have ceased to exist would fall upon the receiving state'. It is true that because of notoriously long delays which attend our system of asylum hearings, the Appellant here was never granted refugee status, even though until the change of government in Azad Kashmir in 1996, it is assumed on all sides that he was strictly entitled to it. It nevertheless seems to me that by analogy, on the particular facts of this case, there now is an evidential burden on the Secretary of State to establish that this Appellant could safely be returned home."

16. She then refers to Dyli (2000 INLR 372), which considered the judgment in Arif. She quoted:-

"In our view, the reversed burden identified in Mohammed Arif... occurs only in cases where the principle is the same as in Arif: that is, where it has been found or is accepted that at some time in the past, before the alleged change of circumstances, the claimant was a refugee. To confine it to such cases is correct in principle, but otherwise there would be a constant encouragement to investigate the question of whether the claimant had in the past been a refugee...

The court did not suggest that either the Adjudicator or the Tribunal was under any obligation to make a finding on whether the Appellant had in the past been a refugee. The position is clear. In Mohammed Arif... the starting point was that the Appellant had in the past been entitled to refugee status, and there was thus a burden on the Respondent."

17. She then referred to a passage in Hathaway on "The Law of Refugee Status" in which he said:

"The drafter's focus on reversion of democracy highlights the magnitude of change which should exist before the consideration of cessation is warranted. First, the change must be of substantial

political significance, in the sense that the power structure under which the persecution was deemed the real possibility no longer exists. The collapse of the persecutory regime, coupled with the holding of genuinely free and democratic elections, the assumption of power by a government committed to human rights, and a guarantee of fair treatment for enemies of the predecessor regime by way of amnesty or otherwise, is the appropriate indicator of a meaningful change of circumstances. It would, in contrast, be premature to consider cessation simply because relative calm had been restored in a country still governed by an oppressive political structure... Second, there must be reason to believe that the substantial political change is truly effective."

Miss Canavan submitted the Secretary of State was unable to show there were exceptional circumstances which would justify redetermining the Appellant's status or that there had been a major change in circumstances in the Appellant's country of origin so as to remove the basis of his fear of persecution.

18. Miss Canavan went on in her submission to refer to the expert evidence from Mr Melly who has produced both the generic and the specific report, both of which were before the Adjudicator.

The Respondent's Submissions

19. Mr Buckley started by reminding us that we were a statutory Tribunal which could only consider this appeal under Section 69(1) of the Immigration and Asylum Act 1999 and decide whether returning this Appellant would be in contravention of the 1951 Convention. We have no inherent jurisdiction to consider any other instruments. He also said that we were not dealing with a status appeal, but whether or not the United Kingdom would be in breach of the Convention if it were to return the Appellant.

20. He argued that there was inconsistency between the Respondent's policy of having a discretionary approach to accepting transfer of status whereas the Appellant was suggesting that the United Kingdom should accept this Appellant's refugee status as a matter of course. He agreed that refugee status is declaratory and does not depend on documents and said that loss of status is equally declaratory and occurs when a person no longer satisfies Article 1.A(2) of the Convention.

21. He said that nobody knows the basis upon which South Africa granted this Appellant refugee status. He said that without that knowledge a country in this situation could not possibly satisfy the burden of proof to show that there had been a sea change in the country of the Appellant's nationality and thus satisfy the burden in Arif. He relied heavily on Dyli, submitting that it said that Arif was decided on its own facts and should not be taken as saying that it was a shift in the evidential burden in every such similar case. He pointed out paragraph 25, where Arif had been distinguished and at 26 where it is said:-

"In our view, the reversed burden identified in Mohammed Arif v Secretary of State for the Home Department (1999 INLR 327) occurs only in cases where the principle is the same as in Arif: that is, where it has been found or is accepted that at some time in the past, before the alleged change of circumstances, the claimant was a refugee. To confine it to such cases is correct in principle, because otherwise there would be a constant encouragement to investigate the question of whether the claimant had in the past been a refugee."

He referred at paragraphs 27 and 28 of Dyli to other reasons why Arif was not of general application. He therefore argued that there was no shift in the burden of proof in this appeal. He then went on to say that we should not overlook the fact that in the determination the Adjudicator did not believe much of what the Appellant had to say. His credibility was in doubt and, as a result of this, it was not enough simply to point out a lack of change; the Appellant had not been believed

by the Adjudicator. He argued that the Appellant needs to establish whether on the very limited facts that the Adjudicator found he would be at risk. He said that rather than the Respondent being on the back foot having to show there had been a change in Congo (Brazzaville), it was the Appellant who had the uphill task, given the limited findings in his favour to show that he had a well founded fear of persecution if he were returned to Congo (Brazzaville) today and he cannot do that.

Decision

22. It is not in dispute that when this Appellant arrived in the United Kingdom he was in possession of a genuine and valid travel document issued to him as a refugee by the South African authorities. He says that he also had with him in his luggage the formal documents recognising his refugee status but he was unable to produce those because his baggage was stolen while he was dealing with the Immigration Officers at Heathrow. It is not disputed that his travel document expired on 21 October 1999. It is also not in dispute that recognition of refugee status is a declaratory event and that status does not expire with the expiry of any administrative document recording it. It therefore follows that when the Appellant arrived in the UK, he was a refugee.

23. The Appellant, who would have been better advised to have applied for a visa before travelling, quite properly asked to see the UNHCR representative at Heathrow but was declined. He asked for a transfer of his refugee status. It sounds from the account given by the Appellant in his statement, and which we have quoted above, that the Immigration Officer concerned had no idea what the Appellant was talking about. He did not recognise the travel document for what it was but told him that he could not apply for asylum as he was already a refugee and that he should return. This is quite contrary to the Respondent's own policy concerning the transfer of refugee status. That policy is set out in chapter 2, section 2 of the Law and Policy document issued by him. Much of the document is concerned with the administration of the European Agreement on the Transfer of Responsibilities for Refugees (EATRR), but at section 3 it says that:-

"Applications which do not fall under the EATRR provisions will need to be considered on a case by case basis. Such applications may be made at the British diplomatic post abroad, as well as at port or in country. The transfer application should not normally be refused without an interview".

It then goes on to describe factors to be considered. It is quite clear that at no time was the Appellant's request for a transfer of his refugee status considered by the Respondent.

24. We are satisfied that this unhappy state of affairs has not been approached in the right way from beginning to end. This is an appeal against a refusal of leave to enter following a refusal of asylum. It would perhaps have been better dealt with either by judicial review or an appeal to an Adjudicator under paragraph 21(1)(a) of schedule 4, Immigration and Asylum Act 1999 on the basis that the Respondent's decision to refuse the Appellant leave to enter was not in accordance with the law because it was not considered in accordance with the Appellant's own policy (Abdi, 1996 Imm. AR 148). However, the matter has not proceeded in that way and we must deal with what we are presented with.

25. This Tribunal is, as was the Adjudicator, a statutory tribunal. The only question we can deal with is whether or not the Appellant's removal in consequence of the refusal of leave to enter would be contrary to the 1951 Refugee Convention (69(1) Immigration and Asylum Act 1999).

26. In this case, the removal directions are set for DRC, which is the country from which this Appellant fled to South Africa. The Respondent attempted to return the Appellant to South Africa, from whence he had come, but then abandoned that in the face of an appeal. We do not know, but

presume, that decision had something to do with the fact that by then the travel document had expired.

27. The main question for us is what significance is to be given to the fact that the Appellant had refugee status recognised in South Africa at the time when he arrived. There is nothing in the 1951 Convention that requires a state to recognise grants of refugee status by another contracting state. We cannot be bound by the 1978 Executive Committee minute of UNHCR, despite its very positive recognition of the need for contracting states to recognise each other's grants of refugee status. It is not part of the 1951 Convention and, being a statutory Tribunal, we are therefore precluded from giving it effect. Similarly, the advice contained in the recent letter from the UNHCR, whilst persuasive, is not binding upon us.

28. It seems to us that the appropriate starting point in looking at this Appellant's asylum application should have been the fact that he already had refugee status. It is clearly recognised by the UNHCR minute and the UNHCR letter that the grant of status is a very significant matter. It is a continuing status. If we were considering a grant of refugee status by the United Kingdom, that could only be ended if the Appellant falls to be considered under one of the cessation clauses in Article 1.C of the Convention. The question is, therefore, how much weight to put upon this previous grant. In our opinion, the answer is, a great deal. We adopt the UNHCR's views set out in their letter of 24 July, where they say:-

"Refugee status, once granted, should not be reviewed or annulled except on the most substantial and clear grounds."

We also note the terms of the minute that refugee status determined in one contracting state should only be called into question by another contracting state in exceptional cases. The letter goes on to say that the well-foundedness of Mr Babela's fear of persecution in the Congo should not be open to question. It explains the rationale of all this by saying that if international protection is to have practical meaning, then refugee status should have some stability and certitude and refugees should be assured that their status will not be likely tampered with. We also note that the UNHCR were of the view that this Appellant's request for a transfer should have been considered in a humanitarian spirit. By no stretch of the imagination can the way this Appellant was treated at Heathrow and subsequently be considered to be humanitarian. He was treated disgracefully. That a state contracted to the 1951 Refugee Convention should behave in such a way to a person who has been granted such status by another contracting state is almost unbelievable.

29. The Appellant's previous refugee status should therefore not be questioned unless there is a very good reason for doing so. No such reason has been put forward here in our view and, therefore, prima facie he has made out his entitlement to refugee status in the United Kingdom. However, that is rebuttable and we consider that the correct approach is to say that the burden of proof in rebutting that is on the Respondent. We have considered the arguments concerning Arif and take the view that this appeal falls firmly within the principles enumerated in Arif. In some ways, it can be said to be a stronger argument than that in Arif itself. Arif was argued on the basis that if it was thought that Mr Arif's application for asylum would have been granted at the time that it was made, then the onus was on the Respondent to establish that there had been sufficient change in circumstances in his country of origin in the meantime, in order to defeat that application. Here, this Appellant was a refugee. There is no question of having to look back and assess his situation at an earlier date than when the decision was made.

30. To deal with the burden of proof in this way, in our view, satisfies the considerations under the Convention as to whether or not a cessation clause applies. It equally satisfies the guidance (which we find very persuasive) of the UNHCR in saying that the status should not be lightly tampered

with; that the status should not be reviewed or annulled except on the most substantial and clear grounds. We recognise that in Dyli the Tribunal sought to distinguish the majority of cases from Arif but, as we have said, we think that this case falls firmly into the Arif principles.

31. Mr Buckley argued that the Respondent would never be able to satisfy a burden of proof in a situation where he did not know the basis upon which refugee status was granted initially. There is, however, nothing in these papers to suggest that the Appellant's claim to asylum in South Africa was on any basis other than that upon which he has claimed it in the United Kingdom. He has not claimed that he will be persecuted if he is returned to South Africa, rather that he will be persecuted if he is returned to Congo (Brazzaville). That was his claim in South Africa.

32. In the determination, the Adjudicator states that there has been a sea change in Congo (Brazzaville) since 1994. Reading the determination as a whole, that is not a veiled reference to the considerations in Arif, but a general statement of his view of the objective material. However, we are not concerned with changes between 1994 and the present, but between the date that he was granted refugee status (his travel document is dated 21 August 1998, but there is some indication in his statement that the document took some time to come through). It seems that we are comparing the situations in 1998 and 2002. The Respondent's objective material comprises a very short CIPU operational guidance note and a copy of the US State Department Report. At least in part, the Appellant's claim involved a family relationship to ex-Prime Minister Kolela who, according to the US State Department report, was sentenced to death in his absence during 2000. Notwithstanding that, Kolela had attempted to return twice during the year 2000 and been prevented. The US State Department Report indicates that the government's human rights record remains poor with serious problems remaining and it is clear that the present government, obviously opposed to Kolela and his supporters, is very autocratic. There is a report both specifically about this Appellant and generically about the country from Mr Melly. Nothing in any of the objective material enables the Respondent to satisfy the burden of proof required to satisfy us that Article 1C is complied with. The expression used by Lord Justice Simon Brown was "proof that the circumstances of a persecution have ceased to exist".

33. We should make it clear that this appeal is founded on a most unusual set of facts. The grant of refugee status in another country does not give a refugee a right to move around other Convention countries at will. The respondent's policy is that a person wishing to transfer his refugee status should apply for a visa. In this case the respondent was quite entitled to return this appellant to South Africa when he first arrived. Why hd did not do so is far from clear. He later attempted to do so but, we are told, backed off when challenged by an appeal. There is no evidence of that in the papers. We do not know why the respondent did not persist. He then made an extraordinary decision and indicated his intention to return this appellant to Congo (Brazzaville). That decision, together with the treatment of the appellant, is indefensible where, as here, an appellant already has refugee status having fled from there. This situation is entirely of the respondent's own making.

34. Whilst we hope that he will not do so, there is of course no bar on the Respondent setting removal directions to South Africa as a result of its decision. It is a country in which the Appellant has not claimed he will be persecuted or treated in a way that would breach one or more of his human rights. He came from there and that destination qualifies as being one (or more) of those set out in paragraph 8(1)(c) of Schedule 2 to the Immigration Act 1971. Our decision relates only to a proposed return to DRC.

C P Mather
Chairman