JT (Tutsi - failed asylum seekers – evidence) Democratic Republic of Congo [2005] UKAIT 00102

ASYLUM AND IMMIGRATION TRIBUNAL

THE IMMIGRATION ACTS

Heard at Manchester Hearing Centre
On 12 May 2005
Determination promulgated:

Before:
Mr K Drabu (Senior Immigration Judge)
Mr John Lever (Immigration Judge)

Between

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr M Schwenk of Counsel, instructed by Greater Manchester Immigration Aid Unit
For the Respondent: Mr Wood, Home Office Presenting Officer

DETERMINATION AND REASONS

1. We heard this appeal in pursuance of the IAT direction for re-consideration afresh. The Asylum and Immigration Tribunal Practice Directions paragraph 14.11 state that: 'Where immediately before, 4 April 2005, an appeal was pending before an Adjudicator, having been remitted to an Adjudicator by a court or the IAT it will already have been decided that the original Adjudicator's determination cannot stand. The Tribunal will accordingly proceed to rehear the appeal.' Pursuant to Rule 31(3) of the Asylum and Immigration Appeal (Procedure) Rules 2005, we are obliged, therefore, to substitute a fresh decision to allow or dismiss the appeal.

2. The facts of the case as put to the respondent initially were as follows: The appellant is a national of the Democratic Republic of Congo. He was born on 1 December 1984 in Seke, DRC. He claims to have arrived clandestinely in the United Kingdom on 8 September 2004. On 13 September 2004 he applied for asylum at the ASU. On 28 October 2004 the respondent made a decision to refuse to grant asylum under paragraph 336 of HC395 (as amended) and on 1 November 2004 the respondent decided to give directions for his removal as an illegal entrant from the United Kingdom under paragraphs 8 to 10 of Schedule 2 to the Immigration Act 1971.

3. The decision to refuse to grant asylum and to give directions for removal was made for the reasons stated in the Reasons for Refusal letter dated 28 October 2004. In paragraph 5 of that letter the basis of the appellant's claim is summarised as follows: "The basis of your claim is that you are of Banyamulenge Tutsi ethnicity. You claim that you were educated in Zambia. You claim that after your education in 1999, you returned to the Democratic Republic of Congo (DRC) and in June or July 2001 your brother, who was a soldier for the Rassamblement Congolais pour la Democratie (RCD) was killed by government forces. Soon after you state that the Mai Mai raided and destroyed your home village. You claim that you were accused of supporting the RCD and the Mai Mai took some hostages from your village including your stepmother, but you were able to escape. You state that in October or November of 2003 you were apprehended by the RCD and were made to work for them for about two months. You claim that when they knew your name and where you came from they realised that you were of Tutsi origin and insisted that you join them as a soldier. You state that around Christmas of 2003 you managed to escape from the RCD by slipping out of the lorry they were using to transport you to a training camp. However you claim that you were then captured by the Mai Mai who noticed strap marks on your body sustained from carrying items and assumed from this that you were RCD soldiers. You state that you were taken to a camp and questioned about your activities. You allege that you were beaten with sticks and rubber batons. You claim that you were arrested as prisoners of war and the Government soldiers then came and questioned you. You claim that they did not believe that you were an active member of the RCD and so you were released around February 2004. You state that a friend told you that government forces and Mai Mai had killed your other brother. You claim you then did casual work and left the DRC by boat on 28 July 204. You fear that if you are returned to the DRC you will be tortured and beaten by Mai Mai rebels or the Interahamwe rebel Hutu group on account of your ethnicity. You fear that the DRC Government forces will imprison you because you are a Tutsi. In addition you fear retribution from the RCD because you escaped from the convoy taking you to training camp."

4. The letter then goes on to give reasons for the decision of the respondent. In summary the respondent does not accept the appellant's claim of being a Tutsi. The letter gives a number of reasons for rejecting the appellant's claim of being a Tutsi including the fact that he had on his own account lived in the DRC without difficulties from December 2001 to November 2003 doing casual work in various areas of the DRC which according to the respondent would not have been possible had he been a Tutsi. The respondent also disbelieved the appellant in his claim to have escaped from the custody of the Mai Mai as well as his claim to be detained by the RCD and his escape from the RCD. Having considered and rejected the appellant's claim for asylum, the respondent considered and also rejected the appellant's claim to Humanitarian Protection under Articles 2 and 3 of the ECHR and Discretionary Leave for infringement of Article 8.

5. When we heard the appeal the appellant said that he does not need an interpreter and that his command of English language is good. Mr Schwenk confirmed that an interpreter was not needed. The appellant gave oral evidence, relying on his bundle of documents, which included his two written statements dated 6 January 2005 and 28 April 2005. He confirmed the veracity of these statements and also the contents of his statement made on 29 September 2004, which he had submitted, to the respondent. He said he does not presently have a passport or a travel document. He said that he receives £31 from NASS for his maintenance. He said that if he is returned to the DRC and if he were required to pay a bribe on arrival to secure his safe entry, he would have no money to pay. He said that the reason Tutsis are discriminated and harassed in the DRC is because they are seen as foreigners and troublemakers. He said that if he is sent to Kinshasa he would be subject to the same treatment as anywhere else in the DRC as the authorities in Kinshasa are also hostile to Tutsis. He said that in Kinshasa he would have language difficulties as he speaks English and not French. He said he would be victimised and discriminated against in Kinshasa.

6. In cross-examination the appellant was taken through the answers that he had given at his interview and the statements that he had made in writing. He was asked what had happened to the other people who had been with him and who had been asked by the by the government forces to take guns and uniforms. He said he did not know. When asked if he knew where his father had been born, he said that he did not know. When asked to name big towns around his birthplace Seki, the appellant named Kosongo and Ovira and said that different languages are spoken in these areas. He said that his stepmother had funded his education in Zambia and that he had returned from Zambia in 2000. When asked why he had not re-located in the DRC he said that he could not as the Mai Mai were everywhere. He was asked to explain why he had described himself as unemployed in the DRC when according to his written statement he had worked on the ship. He said that he had said so because when he left the DRC he was unemployed. He had been employed in 2002/2003. He was asked why he had gone to Seke when he should have known that area to be unsafe. He said that he had gone there because his sister and mother were there and he did not know who was controlling Seke at that time. When asked about his passport he said that he had lost it on the boat. It had been issued in the DRC and he had always carried his passport on him. He explained that when he had been detained by the RCD he had the passport with him. Neither the RCD nor the Mai Mai had ever asked him to show his passport. When asked to explain his answer given at the interview that at the time of his arrest by the RCD he did not have his ID with him, the appellant said he meant his ID Card and not his passport, as he had not been asked about the passport. When reminded that he had earlier on said that he had not known who was controlling Seke when he returned there whereas in the interview he had said that it had been under the RCD control, he agreed that the South and the North was mostly under the RCD control. He was asked to explain the sequence of events when the government forces visited the camp where the Mai Mai had held

him. He said that when the forces came they treated the prisoners as rebels and tortured them on the suspicion that they had helped the RCD. The same people, he said, were then asked to pick up guns and uniforms and taken away by the government forces. When asked whether it was strange that the people who were treated as rebels were then asked to take guns and uniforms by the government forces, the appellant said he could not say whether the guns were loaded. He said that he was not taken because there was no uniform or gun left for him. When asked by the Tribunal to state why he did not want to be removed to the DRC, the appellant said that he did not want to go to the DRC because there is a war going on there and also because people in authority would discriminate him against as a Tutsi. He said he would not feel safe in the DRC. He was asked whether he was recognisable as a Tutsi by his physical appearance, he said he was. He was asked why then he had said that he was recognised by the RCD, as a Tutsi only after they had spoken to him and one of the RCD soldiers had known his brother. He was referred to paragraph 9 in his written statement and was asked to explain why he had used the word "consequently". He said that that part of the statement is wrong. He agreed that he had signed the statement and that he had earlier on confirmed its accuracy as well as veracity. He said that he had not meant to say that he had been recognised as a Tutsi only after the conversation. This concluded the evidence of the appellant.

7. We heard submissions from Mr Wood and Mr Schwenk. Mr Wood asked us to find that the appellant lacked credibility as a witness. He asked us to apply Section 8 of the 2004 Act. He argued that the appellant's evidence on the loss of passport did not add up. He had always kept his passport on his person, he claimed and he had never lost it in the DRC through all the claimed turmoil and tribulations and yet he had lost it, he claims, on the boat. As examples of inconsistency in his evidence, Mr Wood reminded us that the appellant had said that he had his passport on him when he was detained and yet during his interview he had said that he had no ID at the time. Further the appellant claimed that he was clearly a Tutsi by appearance and that he would be recognised as such and yet on his own evidence he was not recognised by his appearance either by the Mai Mai or the DRC when they apprehended him. Mr Wood said that the respondent does not accept the appellant to be a Tutsi and nor does the respondent accept that all Tutsis in the DRC are persecuted by reason of their ethnicity. He asked us to take account of the contents of paragraph 19 of the IAT decision in **TC [2004] UKIAT 00238** and note that in the case before us the appellant had not produced any expert evidence to support his claim to Tutsi ethnicity. Mr Wood also pointed out that the appellant has no political profile and no criminal record in the DRC. He asked us to find that the expert's report (the report of Dr Kennes dated 27 March 2005) to be of no assistance to the appellant in establishing a real risk of persecution or suffering of treatment contrary to Article 2 or 3 on removal to the DRC. He said that the report says no more than failed asylum seekers in the circumstances of the appellant may be stopped on arrival at Kinshasa with the intention of pressuring them to pay bribes for their release. He said that such conduct on the part of the authorities in the DRC does not engage

the Refugee Convention because the harassment is not caused for a Convention reason but for the perceived ability of returnees to meet demands for payment.

8. Mr Schwenk put his case for the appellant under two heads. He argued that the appellant as a Tutsi failed asylum seeker faced real risk of persecution on return throughout the DRC and that he would also be at serious risk of receiving treatment contrary to Article 3 at the airport in Kinshasa because he would not have the means to pay bribes to officials to secure his release from custody and entry into the DRC. Mr Schwenk said that the appellant is a Tutsi and he would be seen as such on arrival or at worst he would have to disclose his ethnicity when asked. Mr Schwenk said that he relied on the report of Dr Kennes whose credentials and expertise had been favourably commented upon by the IAT in its decision in **VL [2004] UKIAT 00007**. When asked whether the report that had been placed before us had been written by Dr Kennes for this case, Mr Schwenk said that it had not and that he had come across this report in a different case and had asked his instructing solicitors to include it in the appellant's bundle of documents in this case. We asked whether his instructing solicitors had sought the permission of Dr Kennes for production of this report in this case. He said that they had not. He went on to say that it was evident from Dr Kennes report that he expected the report to be used in cases other than the one for which he had written it and that indeed the Tribunal itself had taken account of Dr Kennes report in **VL [2004] UKIAT 0007** although the report had not been written for that case and nor had Dr Kennes authorised its production. He then took us through Dr Kennes report. He argued that the contents of the report showed that the previous decisions of the Tribunal on risk on return to failed asylum seekers of Tutsi origin wee no longer valid. Mr Schwenk also pointed out that according to paragraph 6.269 of the CIPU Tutsis are generally granted asylum in the United Kingdom. He said this clearly suggested acceptance on the part of the respondent that Tutsis as an ethnic/racial group is at real risk of persecution in the DRC. Mr Schwenk also drew our attention to the UNHCR document of January 2005 and asked that we find the appellant a Tutsi and reject the points raised against his claim to be a Tutsi. Mr Schwenk said that although the points raised by the respondent in this regard cannot be brushed aside, the doubts cast are insufficient. He said that the appellant had given explanations in respect of the issues raised and the explanations were plausible. Mr Schwenk said that the conflict in the DRC had cost an estimated three million human lives and that the appellant would not be safe in any part of the DRC for the reasons that he had given in his evidence. Mr Schwenk asked us to accept that evidence and allow the appeal.

9. We adjourned for a short while to enable Mr Wood to take instructions on the contents of Paragraph 6.269 of the CIPU. He informed us that there was no policy of the respondent to grant asylum to those from the DRC who established their Tutsi ethnic origin. He said that the contents were erroneous. Mr Schwenk agreed that there was no policy of the respondent to grant refugee status to Tutsis from the DRC.

10. We have given careful consideration to all the evidence – subjective as well as objective, oral as well as documentary. In appraising the evidence we have borne in mind that the burden of proof is on the appellant and that the standard of proof is reasonable likelihood or substantial grounds for believing. We have also reminded ourselves that whilst evidence of past experiences may assist in forecasting the future, it is the future that we must focus on, asking ourselves whether the appellant is reasonably likely to be at real risk of persecution for a Convention reason on being removed to the DRC and/or whether there are substantial grounds for believing that he will be subjected to treatment that is contrary to Article 3 of the ECHR. In deciding on the credibility of the appellant as a witness, we have, as we must, take account of Section 8 of the 2004 Act.

11. The appellant came across as a well spoken, pleasant and intelligent young man. Whilst he was not able to explain all the concerns, which were raised, about the credibility of his claim to be a Tutsi by the respondent, we are satisfied, on the standard of reasonable likelihood that he is of Tutsi ethnic origin. However, contrary to his claim, we are not satisfied that his physical appearance marks him out as a Tutsi. We say this because his own evidence on the matter is clearly inconsistent with that claim. He was not recognised as a Tutsi by his physical appearance either by the Mai Mai or the RCD. Indeed in paragraph 9 of his written statement dated 29 September 2004 he clearly states that it was only as a consequence of conversation with him that the RCD found out that he is Tutsi. Although in re-examination he attempted to distance himself from the natural meaning of what he said in that paragraph, we remain of the view that not all Tutsis are recognisable just by physical appearance and that he is one who is not.

12. Mr Wood asked us to take account of the IAT's views on proving Tutsi ethnicity as expressed in paragraph 19 of its decision in **TC [2004] UKIAT 00238.** The IAT said, "For our part, we consider the starting-point must be that it is for the Claimant to establish his case and that, if he expressly wished to claim that his physical appearance would alone put him at risk, it was necessary to adduce evidence to that effect. It would not be sufficient for the Claimant himself to claim that his appearance placed him at risk because such a contention should normally be dealt with by expert evidence." We do not think that the IAT could have meant that expert evidence would normally be required to prove Claimant's ethnicity if it is disputed. There is no rule of law, which enables a Court to be prescriptive about method of proving an assertion. It is of course the case that the burden of proving an assertion rests upon the person who makes it, but what evidence will discharge that burden will depend on the Court, which has to make the decision. Such a court may regard the oral evidence of the Claimant sufficient as we have in this case. We do not understand the IAT decision to impose a requirement of expert evidence in cases of disputed ethnicity or indeed of laying down the kind of evidence that another Tribunal must seek to satisfy itself on an issue of fact.

13. Having taken account of the respondent's points about the appellant's claim to be a Tutsi, we have concluded, applying the correct standard of proof, that he is a Tutsi by ethnicity. We are therefore dealing in this case with a Tutsi from the DRC who has no political profile and no criminal record. He is not likely to be recognised, in our view, as a Tutsi. He has been the victim of a number of tragedies and difficulties while in the DRC. His brothers have been killed in the conflict – one in 2001 and the other more recently in 2004. They had both joined the RCD. His parents are dead – his father having been killed by the Banyamulenge, his own ethnic group on suspicion of being a spy for the Mobutu government. He himself was at a boarding school in Zambia from 1994 until 2000. In 2001 the appellant's village was raided by the Mai-Mai, which caused the appellant to go into hiding for two weeks in the bush. In December 2001 he was detained overnight by the RCD. From December 2001 to October 2003 the appellant was working and mostly for a man called Samuel assisting him with the sale of precious stones. This involved travelling and during one of such travels he was apprehended in October 2003 by the RCD. He was forced to work for them for two months carrying boxes to and from Lake Tanganyika. When they learned his name and where his village was based one of the rebels claimed to know his brother and consequently they found out that he was a Tutsi. On learning that he was Tutsi the RCD people insisted that he joined their group and become one of the soldiers. Around Christmas 2003 he managed to escape from the RCD. Soon thereafter he was arrested by the Mai-Mai who were in the area and who upon finding belt marks on his shoulders, chest, back and waist suspected him to be a member of the RCD. He was taken to the camp in Pangi where the Mai Mai was holding a lot of other prisoners. He was questioned and during questioning he was ill-treated. He was told that he was now a prisoner of war and that he would be handed over, with the other prisoners, to the government army to be taken to Kindu or Mbujima and which was on its way to the camp. When the government soldiers came, he was questioned and as a result of his answers the government soldiers were satisfied that he was not a member of the RCD and he was released in February 2004. He then went go his home village Seke and found it abandoned with no sign of life. He travelled for two days to get to Kindu to see a friend. While travelling he found out that the government forces had killed his brother. When he met up with his friend they went to port Boma to work on the ships. He then obtained casual employment on board a ship bound for Sierra Leone. His job was to load and unload goods on and off the ship while it passed through ports. In Sierra Leone he managed to find a ship that was coming to Europe and he arrived in the United Kingdom on 8 September 2004. His four sisters were living with his stepmother in Seke but he does not know their whereabouts now.

14. We have no good reason to disbelieve the appellant except on matters where his evidence is inconsistent or is based on a belief that is unsupported by objective evidence - (see paragraphs 12 and 19 of this determination). On the facts as found above, we have to ask ourselves whether the appellant is a refugee and/or qualifies for grant of Humanitarian Leave. In deciding the matter we have

obviously considered the relevant objective evidence, the relevant case law as well as the report from Dr Kennes.

15. By way of background objective evidence, we note that the United Nations News, DR of Congo published on 6 January 2005 carries the headline “DR of Congo moves steadily towards elections in 2005 but challenges are formidable”. The Voice of America News of 21 December 2004 states that the “Congolese Tutsis feel targeted by government troops.” It goes on to say, “The conflict in Congo’s North Kivu province is stirring up ethnic hostility between many Congolese and Congo’s ethnic Tutsi population. BY some estimates, there are more than one million ethnic Tutsis living in the hills of Congo’s Kivu provinces. Many Tutsi families have lived here for decades and some even identify themselves as Congolese. But many Congolese reject Tutsis as countrymen, saying the Tutsis are, for the most part, Rwandan with Rwandan family ties, Rwandan businesses, Rwandan bank accounts, with sons and daughters who go to Rwandan schools and universities. Many Congolese have accused them of siding with the rebels backed by Rwanda’s Tutsi led government, who have clashed with Congolese troops. Some observers say the current crisis in eastern Congo is essentially ethnic: there is a widening rift between the Congolese and so-called Rwandaphones, meaning anyone who speaks Kinyarwandan, the Rwandan language. That includes about one million Congolese Tutsis and Hutus, Banyamelenges, Banyejombas and Bagogwes clustered in the lush green hills of Congo’s North and South Kivu provinces.” On 8 December 2004 the United Nations High Commissioner for Human Rights, Human rights experts are reported as having expressed concern about mounting tensions in the DRC and about information on the presence of Rwandese troops in the territory of the DRC.” The Human Rights Watch report dated 19 November 2004 states “Guns and ethnic hatred make for catastrophic mix” and asks “UN peacekeepers need to interrupt the arms flows and Security Council members must pressure local leaders to stop fuelling ethnic hostilities.” On this evidence we accept that the conditions in the DRC remain volatile and inter-ethnic tensions are fairly intense.

16. On the more specific objective evidence relevant to the facts before us we note that in an article published by the Institute of Race Relations and written by Arun Kundnani who interviewed Rene Kabala, described as Congolese human rights activist, it is stated that “grim fate awaits those deported to Congo.” The article says,” According to reports that we have had from returning asylum seekers as well as from agents of the DGM, deportees are held by the DGM in small cells at the airport. There are no windows and there is no light. But you can see cockroaches and rats. From these cells, they are called in one by one to the director of the DGM for an interrogation. During the interrogation, deportees are sifted into different groups. Only those able to pay a bribe of between $250 and $300 have a chance of immediate escape from detention. Since the officials of the DGM have not been paid for so long, accepting bribes is their only income. Yet few deportees have easy access to these sums of money; it would take a university professor six months to earn the required amount on local wages. Of those who

cannot bribe their way out, many will be handed over to the National Security (ANR), which operates its own extra-judicial prisons where people are detained illegally for long periods of time. As individuals who have claimed asylum in Europe deportees are automatically regarded by the ANR as threats to national security in Congo. Simply because they have claimed asylum in the West, the Congolese authorities consider them political dissidents. There are cases I have dealt with in which somebody asks for asylum in Europe for humanitarian rather than political reasons. However when they are returned to Ndili airport, they are put in prison like all others. They may then stand trial under the national security legislation and if convicted find themselves imprisoned in Makala." The article states that Rene Kabala was not able to produce figures on what proportion of asylum seekers deported from Europe end up in Makala or other forms of illegal detention in Kinshasa. He is reported as saying, "There are many cases which escape us. We can follow up those that we know about. Others disappear if we haven't got contact details for their families. But even those deportees who are released face insecurity. The DGM takes down details of all deportees' family members and, often, agents arrive on the doorsteps a few weeks later to make arrests. Some deportees have chosen to disappear on their return to Kinshasa to avoid re-arrest." Whilst we accept that the person interviewed may genuinely believe what he has said to the author, he has not disclosed the sources of his information and perhaps for understandable reasons. Nevertheless, in the circumstances we have looked at the contents of the interview and the author's own views in the context of other reliable information such as the report of Dr Kennes.

17. We have taken account of the IAT decisions in **[2004] UKIAT 00075 M, [2004] UKIAT 00072 I, [2004] UKIAT 00337, [2004] UKIAT 00007 VL and [2004] UKIAT 00238 TC.** We note that the IAT said in **[2004] UKIAT 00075 M** that Tutsis do not fall into a separate risk category. The Tribunal said, "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 Kinois, not by the authorities. The latter, to repeat, are described as affording protection to Tutsis against civilian actions." The decision in **M** was promulgated in August 2004 and we have not been shown any credible evidence that casts proper doubts on the Tribunal's findings.

18. Dr Kennes report of March 27 2005 begins with the statement that the "report is not a summary of existing documents or information but contains new, unedited and most of all reliable information about the fate of failed returned asylum seekers." It goes on to say, "This report is an updated version of the report submitted to Lawrence Lupin on October 19, 2004. It deals with an important change in immigration policy by the Congolese authority, more specifically since the nomination of Mr Jean-Claude Tshijik Kamb, successor to Mr Yambuya, as head of the Congolese migration services in October 2004. The update relies on several confidential sources from within the security services at the airport. The information has been double checked." In paragraph 1 of his report

Dr Kennes says, “Quite evidently, a number of stories by asylum seekers are invented. The reasons for this are obvious: the closure of the European borders for ordinary immigration leaves only one possibility for a Congolese citizen to leave the country, namely seeking of political asylum. The economic and social situation in the DRC is simply terrible. It has never, never in the whole history of the country, been so bad. Anyone in the same situation would do anything to escape.” We regard this to be an important and objective piece of information.

19. Paragraph 2 of the report is titled “Risks for failed returned asylum seekers.” It starts off as, “this risk presumes that somebody is identified as a failed asylum seeker. This will only happen when the following situation happens (or a combination of these elements). (1) This person does not have ordinary travel documents; (2) The immigration or security services have a reason for interrogating or arresting this person about whom they have an amount of information available. This person may have a known charge against him/her or may belong to a risk category.” The appellant is not likely to have “an ordinary travel document” and therefore he is likely to be interrogated. We note that the appellant does not have a criminal record and does not have a political profile. Dr Kennes report in respect of such people says, “This category of persons (i.e. failed returned asylum seeker without known political charges against them) is, in a sense, ‘ransomed’ by these services. They are kept in detention in irregular places (often offices) and are released only upon payment of ‘fines’ that disappear in the pockets of state officials. These fines may amount to about USD1000 or more, depending on the case.” We note that on page 14 of his report Dr Kennes says, “All passengers identified as returned asylum seekers are kept ‘hostage’ for financial reasons. If the person kept in detention cannot pay and/or his family cannot pay or is unwilling to pay, this person is transferred to Makala prison and the sum requested for release becomes even more important. Generally speaking this situation is resolved when payment is made, except for risk categories (as e.g. ethnic Rwandans, UDPS militants etc.)” Dr Kennes goes on to say, “In my opinion it is true that failed returned asylum seekers per se, i.e. independently of any risk category they may belong to, and supposing their story was totally untrue, are not the object of persecution. But it is equally true that any person who is known to be a failed returned asylum seeker, again independently of any other qualifications, is the object of harassment and is put to ransom. Indeed important sums of money are requested for ‘buying’ their entry into the country. If they are unable to pay, they are arrested and transferred to Makala prison (CPRK) to put more pressure on the family of the returnee. The recent MONUC report on prison conditions is explicit about the terrible and inhuman conditions in DRC prisons. This leads to the conclusion that, while failed returned asylum seekers per se are not prosecuted, they are subjected to cruel, inhuman and degrading treatment.”

20. Pausing here for a moment, we should point out that if the purpose of harassing returnees is to extract money as is repeatedly suggested by Dr Kennes in his report, it must follow that putting

further pressure on a person who has no ability to offer money or arrange money from relatives by putting him or threatening to put him in prisons with 'inhuman and degrading conditions' is not going to meet the objective of securing pecuniary benefit. In those cases it would be reasonable to assume, the person concerned, absent criminal record and political profile, would be allowed to enter following initial harassment. We do not accept Dr Kennes description of that treatment as "persecution". We accept that it amounts to harassment as Dr Kennes himself says on page 15 of his report: "Again, an identified returned asylum seeker does not automatically run the risk of persecution, but will automatically be harassed or even imprisoned for financial reasons. Risk categories run the risk of being arrested." In his risk categories Dr Kennes includes persons who are considered as Tutsi or Rwandan. Persons from Kivu region are at risk of being considered Rwandans. UDPS members and activists from Kivu are also at risk.. We note that on page 8 with regard to Tutsis Dr Kennes says, "This is a category of persons most at risk. If a failed returned asylum seeker is Tutsi or says he/she is, he may not survive. The Congolese have suffered so much from the endless war that the resentment against anything Rwandan and anybody Rwandan is very high." We do not understand Dr Kennes to say that every Tutsi who is returned faces a real risk of death or even persecution. If that is what Dr Kennes meant, it goes contrary to other evidence and in any case has no support from any independent source.

21. Upon a close and careful analysis of the report of Dr Kennes and the other relevant objective evidence we are satisfied, on the requisite standard, that there is a real risk that the appellant will be stopped at the airport. He will be seen as a returned failed asylum seeker. He will not be recognised as a Tutsi. He will have no adverse record. We reject the suggestion that his escape from the custody of the RCD in 2003 will be on record. We do not believe the authorities or the militia in opposition in the DRC to be so well organised as to have records on such minor infringements in distant parts of the country located and registered centrally either at the airport or elsewhere. We have seen no evidence that establishes the suggestion on the standard of reasonable likelihood. We do not read the report of Dr Kennes to say that all failed returned asylum seekers would be harassed with demands for money at the airport. Many would, it seems to us. However the level and degree of harassment would depend on a number of factors including most importantly the leverage the authorities could have on a person with reference to his past record and his present ability to pay.

22. We find that if the appellant faces harassment at the airport, it will not amount to persecution. He may be asked to pay a bribe to secure his entry, which he may or may not be able to pay. If he is not able to pay it is most unlikely that he will suffer any further harassment because the infliction of further harassment can and will serve no purpose for those in authority. The appellant will be of no interest to the authorities except as a potential source of securing money. The treatment meted out to him in the course of extracting money will not have any nexus with any of the Convention reasons. Therefore the harassment that he may suffer

will not be due to any Convention reason. His claim to asylum must therefore fail for the reasons given.

23. With regard to the claim of the appellant that his removal to the DRC will be in violation of his rights under Articles 2 and 3 of the ECHR, it is our judgment that the evidence in support of that claim falls well below the required standard of proof. The rights are indeed absolute and accordingly the threshold is high. We have seen no evidence, which establishes on the standard of reasonable likelihood that failed returned asylum seekers are at real risk of losing their life on arrival or thereafter in the DRC at the hands of the authorities. We also have seen no reliable evidence which proves on the reasonable likelihood standard that the appellant will be at real risk of being subjected to torture or inhuman and degrading treatment by the authorities on arrival or thereafter. In this context we remind ourselves that Dr Kennes has said, "The economic and social situation in the DRC is simply terrible. It has never, never in the whole history of the country been so bad." However that "terrible" situation in the DRC in itself does not assist the appellant in making out a valid claim under Article 3. We do not believe that he will be imprisoned on return. Having regard to the objective evidence we believe that the worst that the appellant can expect to happen is temporary detention in an office at the airport so as to get him to pay a bribe. If he is able to comply with the demand, he will be released. If he is not, he may be held for a short period and on being satisfied that he has no money or not enough money on him, the authorities will let him go. The authorities will have no reason whatsoever to hold him for any reason other than obtaining money. Our attention has not been drawn to any credible evidence, which proves that those unable to pay a "fine" or bribe are ill treated or imprisoned. As we have already said, we do not find the assertions made in this regard by Dr Kennes as reliable since these are unsourced and are not mentioned in any other objective evidence.

24. Finally, we reject the submission made by Mr Schwenk that the relevant dicta in the Country Guidance and reported cases on the DRC are no longer valid because of the latest report of Dr Kennes. We have given full and detailed consideration to the report and we do not reach that view. In our respectful view the dicta in the cases that we have referred to in this determination remain valid in so far as these relate to the facts of this case – in particular that Tutsi ethnicity by itself is not a risk factor that is reasonably likely to cause real risk on return of persecution or treatment contrary to Article 3.

25. For the sake of completeness, we should say that we do not find any substance in the appellant's assertion that he cannot reasonably be expected to live in Kinshasa. He said he would have language difficulties there as he could only speak English. He also said that he has no family in Kinshasa and has never lived there. There is no requirement upon removal for the appellant to live in any particular part of the DRC. He can live wherever he feels comfortable and safe. He will of course be removed on a flight to Kinshasa but that does not mean that he must live there. In any event we do not

accept that he will be at any real risk should he decide to live in Kinshasa.

26. We dismiss this appeal.

K Drabu
Senior Immigration Judge
23 May 2005