WN (Surendran; credibility; new evidence) Democratic Republic of Congo [2004] UKIAT 00213

IMMIGRATION APPEAL TRIBUNAL

Date of Hearing: 16th April 2004
Date Determination notified:
4th August 2004

Before:

The Honourable Mr Justice Ouseley (President)
Mr D J Parkes (Acting Vice President)
Mr D C Walker

Between:

APPELLANT

and

Secretary of State for the Home Department

RESPONDENT

For the Appellant: Ms R Chapman, instructed by Wilson & Co
For the Respondent: Mr C Buckley, Home Office Presenting Officer

DETERMINATION AND REASONS

1. This is an appeal against the determination of an Adjudicator, Mr R A Prickett, promulgated on 22nd July 2003. In his determination he dismissed the appeal on asylum and human rights grounds against the decision of the SSHD of 17th February 2003.

2. The Appellant is a 35 year old man, a national of the Democratic Republic of Congo, who arrived in the United Kingdom on 17th October 2002 and claimed asylum about two weeks later. The basis of his claim was that he was of mixed ethnicity with a Congolese mother and a Rwandese father. He claimed that he was unable to obtain a job in Kinshasa for a number of years. In August 1998, the war in the Democratic Republic of Congo began. The Congolese began targeting those with Rwandan parents or roots. He said that a crowd of 30 or 40 people had come to his house one day, two had entered and had begun to question the Appellant's sister while the people outside were threatening to burn all Rwandese Tutsi. He said he fled through the back door

and went some 40-50 metres to the neighbour's house where the Congolese neighbours, who had been good friends, took pity on him and let him stay for the night. The neighbours told him that his sister had been burnt alive and they gave him money to buy a boat ticket for the long journey to Bumba, where he immediately went. He met somebody who let him stay and grow food, but he also said that he was in hiding there. While he was there, a boy who knew him in Kinshasa saw him and told the Bumba community that the Appellant was Rwandan and that he had fled because the army had killed his sister. The boy had approached him asking him what he was doing in Bumba as a Rwandan, so the Appellant next day left Bumba in fear of his life and went to Kisangani. This was on 11th May 2002, so he had been in Bumba for nearly four years.

3. On the morning that he arrived in Kisangani he bumped into four young people from Kinshasa who knew him very well. They returned with the Congolese police, said that he was Rwandan and then the police beat and tortured him. He was put in a deserted house and a few days later, the Appellant was able to escape, because the guards deserted the prison and left the doors open as they fled during fighting between Rwandan and Ugandan soldiers.

4. The Appellant then found a priest who was also fleeing the Democratic Republic of Congo and together they went to Tanzania from where the two flew to London in October 2002. They had stayed some five months in Tanzania. The priest then left the Appellant with the Congolese community in London.

5. At his screening interview he was interviewed through a French interpreter; the form said that he would prefer to be interviewed in French. At the asylum interview the Appellant said that he would prefer to be interviewed in Lingala, but understood the French interpreter. He was asked some questions at interview at which he explained that he had had no problems in Kinshasa before the day his house was attacked. He did not know the name of the priest who assisted him but the priest had organised everything and prepared the documents enabling the Appellant to flee; the priest had received no money for organising the flight. The priest had prepared all the documents and showed them to the authorities on arrival.

6. The Secretary of State's refusal letter said that he did not find the Appellant's account plausible or accept that he had moved to either Bumba or Kisangani or fled from the country in the way described. He noted that he had spent five months in Tanzania without claiming asylum and considered that even if the claim was true and that he was of mixed ethnicity, he had not explained how he could be identified as a Tutsi or of Tutsi ancestry.

7. Before the Adjudicator's hearing, the Appellant submitted several bundles of new documents. These included his parents' marriage certificate and his own birth certificate which had been sent to him by his uncle. He explained in his witness statement that after he had gone into hiding in Bumba in August 1998, he had maintained contact with his wife and she was to come and stay with him for a month every three months; that was the explanation as to how the three children were born while he was in Bumba. The Appellant said to the Adjudicator that he had met his wife by chance in Bumba in 1999 when she had come to Bumba as part of her trading work. He had previously lost contact with her. They were not living together at the time of the attack in 1998 because they could not afford to do so.

8. But he also produced an article in a newspaper "*La Reference*" of 18th December 2002, a DRC newspaper which mentioned the incident of 26th August 1998, gave the Appellant's name as a collaborator for the Rwandan secret services and the Appellant said that the account had been given to the newspaper by the priest who had helped him escape. The copy of the newspaper had been sent by his uncle. There was further background material.

9. The Adjudicator records that he told the Appellant's representative that he considered credibility to be the main issue in the appeal. The Secretary of State was not represented. Accordingly, the Adjudicator records that he reminded himself of the Surendran guidelines and says (paragraph 23) that he told the Appellant's representative that as credibility had been raised as an issue, he was required to deal with that.

10. The Adjudicator concluded that the Appellant was not credible, rejected his account and said that he was not satisfied to the required standard of proof that the Appellant was part Tutsi or in one of the categories of persons identified by the UNHCR as being at risk of persecution on return. Accordingly, he dismissed the appeal. He set out at some length why he reached that view.

11. The Adjudicator referred to the argument that he should disregard the contents of the asylum interview because that had been conducted in French, whereas the Appellant would have preferred to have been interviewed in Lingala but none was available. The Adjudicator correctly dismissed that contention. The Appellant had agreed to be interviewed in French, said that he understood the questions and the interpreter, said that he was happy with the conduct of the interview, and answered all the questions. There is no record that he asked for questions to be repeated or appeared not to understand them. He had also been interviewed in French at the screening interview, at which he had said that he wanted to be interviewed in French. A complaint was made about that

conclusion in the grounds of appeal to the Tribunal. It does not appear to have been pursued in the later application for Statutory Review. There is nothing in it.

12. The Adjudicator said that he found all the events described by the Appellant to be implausible. As to the attack on 26th August 1998, he thought it implausible that the Appellant would be able to escape from the back door and enter the house next door some 40-50 metres away. He expressed his conclusion in the form of a question, *"Why did the crowd not ensure, and it was a large crowd, that no one could leave the house through the back door? Why did the crowd not see him as he covered this distance? Why did the Appellant not leave Kinshasa immediately or go to hide in an area well away from where the crowd was?"* He thought it highly unlikely that someone would seek refuge from a murderous crowd in the neighbour's house, spending the night there. He queried why the Appellant did not consider leaving the Democratic Republic of Congo at that stage.

13. The Adjudicator then refers to the Appellant's journey to Bumba and points out that he says nothing in the SEF about where his pregnant wife was at that stage. He queried why he had left her in Kinshasa and made no attempt to see whether she was safe before he left. He did not accept that she would be safe as a Congolese, because she was married to the Appellant and the child, when born, would on the Appellant's story be part Tutsi. He found it implausible that the Appellant, having gone to Bumba, would have no problems there for four years until he was seen by a boy who knew him from Kinshasa and told the Bumba community that he was Rwandan. The Appellant had said that he was in hiding in Bumba for four years, but that was not consistent with his having a small garden from which to feed himself from the food he grew there.

14. The Adjudicator pointed out that it was only in his witness statement that he referred to seeing his wife in Bumba, saying that she used to come and stay for a month about every three months. He said that the Appellant had told him that the first time this had happened was in 1999, but that was inconsistent with the dates of birth of the children. He found it implausible that he should have met his wife by chance on a street in Bumba when she was visiting as a trader; it was a large town. He also did not understand how the Appellant was able to meet his wife in the street if he was in hiding. He expressed himself by asking questions, *"Why was this meeting by chance? Why if the Appellant knew that his wife came to Bumba to trade did he not contact her in Kinshasa and tell her where he was hiding?"* He also found it implausible that the Appellant had lived for four years in Bumba without problems but then was recognised by a boy whom he had known in Kinshasa, and then decided to leave

Bumba in fear of his life the following day. In his SEF statement at interview he said that he had decided he could earn a better living in Kisangani and would go there for work. The Adjudicator asks *"Did the Appellant decide to leave Bumba because he was in fear of his life or because he was looking for work?"* He also asked *"if it was apparent to the population in Bumba that the Appellant was part Tutsi because of facial and other characteristics then why did he have no problems there for almost four years and why did he suddenly decide to leave after a boy had accused him of being Tutsi?"*

15. The Adjudicator then referred to the evidence that the Appellant in Kisangani bumped into four young people Kinshasa who know him well. He referred to a series of remarkable coincidences; the Appellant had bumped into his wife by chance in Bumba, bumped into the boy from Kinshasa in Bumba and bumped into four people from Kinshasa on the very morning he arrives in Kisangani. The Adjudicator then queried why the Appellant had made no mention of sexual abuse by the police in any of his earlier accounts of what they did to him in Kisangani. The evidence about how many had done that was very vague.

16. He referred to the escape and the Appellant's going to the priest who organised his travel to Tanzania and then to London: the Appellant said that he did not know the priest's name, notwithstanding that they had stayed together in Tanzania for five months. The Adjudicator said "W*hy if the Appellant stayed with the priest for so long does he not know his name*?" In his witness statement he does give the name of the priest, a change of account. The Appellant said that all the documents had been got together to go to Tanzania in one day. "*The priest like the Appellant was fleeing so how was he able to prepare forged travel documents for the Appellant in one day?*" asked the Adjudicator.

17. The Adjudicator concluded that it was highly unlikely that the Appellant would be able to go through immigration control with the priest showing the false documents without being questioned by the immigration officer. He queried the delay in claiming asylum in the United Kingdom. He also found it highly unlikely that the priest, whose name the Appellant at interview did not know, would have been able financially to help the Appellant by paying for both flights to London, the travel to Tanzania, and to provide him with accommodation. It also was strange that the priest had not subsequently contacted someone in whom he had shown such interest.

18. The Adjudicator accepted that there were parts of what the Appellant had said which were consistent with troubles in Democratic Republic of Congo in 1998 and 2002, but he found it implausible that whilst the Congolese police and military were

planning for a mutiny against Rwandan elements within RCD/Goma in Kisangani, they should have had time to concern themselves with the Appellant. He queried why the soldiers or police or population had not killed the Appellant in May 2002 if Rwandans were being killed as the objective evidence showed several had been. He also found the Appellant unable to answer questions when giving evidence and was vague and evasive when questioned about a number of incidents.

19. The Adjudicator also found that the further documents which had been produced did not support but rather further damaged the Appellant's credibility. The new documents were not produced until the appeal hearing before the Adjudicator. He had said at interview that he had had no contact with his family in the Democratic Republic of Congo since he left and indeed, that he had no information since August 1998 about his family; that latter is obviously incorrect in the light of his later statement. But as he received a copy of his birth certificate and his parents' marriage certificate from his uncle in the Democratic Republic of Congo, it was obvious that there was some means of contact. The Adjudicator said that he did not understand how the Appellant was able to contact the uncle as soon as his application was refused so that the uncle could send documents to him if he had had no contact with the family in the Democratic Republic of Congo.

20. The newspaper article was rejected along with the certificates as not being genuine. There were a number of factors in the newspaper article which led to that conclusion. There were differences between what the Appellant had said and what was set out in the article. It did not refer to the Appellant's sister being burnt alive but rather to her being raped. The Appellant said that the source of the information was the priest who helped him escape. The Adjudicator could not understand why so many inaccurate details had been supplied to a newspaper by the priest which made life, it was said, difficult for the Appellant should he be returned, nor could the Adjudicator understand why the newspaper in 18th December 2002 should carry an article about an event four years before; "*why has the Appellant never before said that the police and the DRC believe that he was working for the Rwandan cause?*" There is no obvious reason why, four years after the event, somebody who had lived a seemingly uneventful life in Kinshasa for so many years should suddenly have been suspected of being a traitor, and having been suspected of being a traitor, should have an article written about him four years later. This latter point is an additional one not made by the Adjudicator but which we consider does not assist the Appellant's credibility.

21. The Adjudicator then referred to the UNHCR letter of 16th May 2003 concerning Democratic Republic of Congo asylum seekers with a political or military profile or background and to a recent

serious deterioration in the situation in the Democratic Republic of Congo. He also referred to the CIPU Report of April 2003 and concluded in the light of that that the Appellant had not shown that he was in the category of those identified by the UNHCR of being at risk of persecution on return and did not find him to be part Tutsi.

22. As we have said, the grounds upon which permission to appeal to the Tribunal was sought referred to the unfair reliance, it was said, placed upon the Claimant's record at interview; we have dealt with that. It then contended that the determination breached the Surendran guidelines referred to in the starred determination MNM, 1st November 2000: the Adjudicator had set out several questions in his determination relating to the plausibility of the Claimant's account which, it was said, had not been directly put to the Appellant. It was said that the Adjudicator was unclear as to whether he was saying that the information supplied to the newspaper was false or whether the article itself was a forgery. The Appellant sought permission at that stage to produce the report of an expert produced for the case of the Claimant's niece, which said that the newspaper article and report was genuine. The Adjudicator was said not to have provided any proper reasons for rejecting the birth and marriage certificates. The Appellant sought permission to produce another UNHCR letter, submitted in the Claimant's niece's appeal, which advised against the return of those of mixed ethnicity. These grounds of appeal were rejected in a considered determination which said that the Adjudicator's determination was full and fair, and leave to appeal was accordingly refused.

23. The more elaborate grounds for statutory review which, as with the grounds of appeal, were not prepared by the advocate who had appeared before the Adjudicator, again made assertions about what had or had not happened before the Adjudicator in terms of questions raised in the determination, which it was said had not been put to the Appellant, in breach of the Surendran guidelines. It was said to be clear that the Adjudicator's negative findings in respect of the credibility and plausibility of the Claimant's account went well beyond the Secretary of State's refusal letter. It was said to be entirely unclear from the determination whether the specific points of concern had been put to the Claimant's representative in order to give him the opportunity to make detailed submissions on them. The decision of the Vice-President to refuse leave to appeal was criticised because it failed to deal with evidence only before the Vice-President "*in order to refute the Adjudicator's finding … that the newspaper article was not genuine*." The grounds for Statutory Review also referred to a letter from UNHCR dated 10th December 2002 which referred to persons of Tutsi or ethnically mixed Tutsi origin who were known to have been the targets of human rights

abuses. The Vice-President was criticised for making no reference to this letter.

24. Richards J said on the application for Statutory Review, which he granted, that it was arguable that the adverse credibility findings were based on matters that went beyond the decision letter and were not put to the Applicant at the hearing. He also said that the grant of leave to appeal would enable the Tribunal to consider fresh evidence concerning the treatment of failed asylum seekers on their return to the Democratic Republic of Congo. Where an appeal was justified on other grounds, the evidence should be considered, even though by itself it was unlikely that evidence not before the Adjudicator could ground an error of law.

Allegations as to what happened before the Adjudicator

25. We turn first to the contention that points were relied on by the Adjudicator in his adverse findings, which had not been put to the Appellant by the Adjudicator and did not arise out of the Secretary of State's refusal letter. Neither in the generality nor in the detail is that submission justified. There are a number of matters which need to be stated clearly in respect of it. First, there was no evidence before the Vice-President nor before Richards J, which showed that the Adjudicator had in fact decided the credibility issue adversely to the Appellant without giving him a chance to deal with those issues. No witness statement from the Appellant or the representative identified what had or had not been put to the Appellant during the course of the hearing, nor was there any evidence which compared the Secretary of State's refusal letter and the points taken by the Adjudicator; nor was there any evidence which compared the witness statement from the Appellant, which the Secretary of State would not have had, with the points taken by the Adjudicator. If it is to be said that an Adjudicator has been unfair in the questions which he has asked or has not asked that, or some events occurred before the Adjudicator which warrant an appeal on the ground of error of law, or it is necessary that there be evidence of what happened before the Adjudicator. In this case, the advocate who signed the grounds of appeal was not the advocate before the Adjudicator. The advocate who signed the grounds of statutory review was not the advocate who had signed the grounds of appeal or had appeared before the Adjudicator. There was simply no evidence at all as to what had happened. At the stage where an application for leave to appeal is made it may sometimes be that a detailed ground of appeal signed by an advocate or representative who has been present will suffice. By the time the matter is dealt with at substantive appeal, however, more than that will certainly be required. We take the view here that there is no evidence which suggests that any issue which the Adjudicator relied on in rejecting the Appellant's credibility had not fairly been raised by

the Adjudicator. Allegations about what happened in front of the Adjudicator are made far too often with no supporting evidence. Credence should not be given to allegations not supported by evidence.

The necessity to put points

26. Second, two decisions, Koca Outer House 22nd November 2002, paragraphs 34-36, per Lord Carloway (IAS Update 2004 vol 7 no 4) and Maheshwaran v SSHD [2002] EWCA Civ 173, paragraphs 4 and 5, are important. They have been reported fairly recently. In the first, Lord Carloway dealt with a late change in a Turkish claim to alleged membership of HADEP. The Secretary of State was not represented; the Appellant knowing that credibility was in issue did not deal with that discrepancy. The Adjudicator did not ask about it in the course of his questions though he later relied on it as a factor adverse to the Appellant's credibility. Lord Carloway said, refusing judicial review of the refusal of the Tribunal to grant leave of appeal, that it was not for the Adjudicator to assume "*the role of contradictor*" in the absence of a party. The Appellant had been given an opportunity in evidence and submissions to deal with the general issue as to credibility. He said:

> "[34] What seems to be being suggested is that, where there is no contradictor, an adjudicator must nevertheless go further and scrutinise the paperwork in advance of a hearing in a manner which will enable him to compose a list of potential problem areas which might influence his ultimate decision on credibility. He must, it was maintained, then put each of these in turn to the claimant. There are several problems with this approach. First it would put an adjudicator in the position of looking for defects in a claimant's case before he has heard what the claimant has to say about it. Such an approach may not be conducive to arriving at a balanced decision. Secondly, it would thrust the adjudicator into the role of inquisitor. Thirdly, the resultant '*cross-examination*' would be likely to be rightly criticised as displaying the very type of bias that was perceived by the Immigration Appeal Tribunal in *MNM* (*supra*). Although an adjudicator may, when reading the papers in advance, be concerned about a particular matter and thereafter ask about it at the hearing, it is going much too far to say that he must look for all matters which might later concern him and must also put these matters to the claimant or his representative at the hearing. In looking at the fairness of the hearing, the Adjudicator took an entirely reasonable approach in asking the petitioner to address the matter of credibility. Having heard all that was to be said, it was for her to resolve the issue on all the material which had been presented to her. As Guideline 4 itself echoes, the adjudicator is entitled to form a view on credibility on the basis of that material whether or not the claimant has addressed the issue and whether or not the adjudicator has expressed a particular concern.
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> [35] The HADEP discrepancy was created by the petitioner in the Witness Statement. If there was an obligation upon anyone to

put it to the petitioner then that must have rested on his representative, bearing in mind that the onus of establishing the case lay upon the petitioner. However, in so saying, I am in no way holding the representative at fault for not doing so. Quite the contrary. He had certain material before him, and must be presumed to have been aware of the content of the SEF and Interview records. He then assisted in the composition of the Witness Statement which contained the inconsistent material. It was a matter for him to decide whether or not to draw the Adjudicator's attention to the inconsistency and then try to remedy it or to ignore it in the hope that it might not be regarded as significant. That is a matter of judgment for one side or another to take in an adversarial context. What the petitioner seeks to do here, to an extent, is to have a further opportunity to address the Adjudicator on a discrepancy which he himself created but which he also accepts he did not deal with or explain adequately at the appropriate time.

[36] For these reasons, I hold that there was no obligation upon the Adjudicator to put the HADEP discrepancy to the petitioner either at the stage of examination or submission. Its full significance may not have even have been recognised by her at that time but whether that is so or not, it remains the case that a court or tribunal is not obliged to reveal what it might be thinking during the course of a hearing so that parties can make additional comments on that thinking. Nor is it bound to disclose, in advance of the announcement of its decision, how its reasoning process is developing with a view to affording parties yet another chance to address that. A fair hearing having occurred and parties having been given the opportunity to state their cases, the court or tribunal must then embark upon the decision making task. In doing so it can use any or all the material before it but, of course, only that material and without taking into account any additional facts or points of law not raised before it. If any new facts or points of law emerge, for whatever reason, then it may be necessary to hear further argument but that was not the case here."

He also pointed out that there was no evidence that the Appellant had an answer to the discrepancy, let alone a persuasive one.

27. In Maheshwaran, Schiemann LJ (specifically disapproving the rather wider statement by Turner J in Gunn (unreported CO/4630/97), which is so often cited by claimants in this context) rejected the submission that where credibility was in issue, the Adjudicator was bound to accept as fact a point not challenged by the SSHD or raised by the Adjudicator. He said:

"4. Undoubtedly failure to put to a party to litigation a point which is decided against him can be grossly unfair and lead to injustice. He must have a proper opportunity to deal with the point. Adjudicators must bear this in mind. Where a point is expressly conceded by one party it will usually be unfair to decide the case against the other party on the basis that the concession was wrongly made, unless the tribunal indicates that it is minded to take that course. Cases can occur when fairness will require the reopening of an appeal because some point of significance – perhaps arising out of a post hearing decision of the higher

courts – requires it. However, such cases will be rare.

5. Where much depends on the credibility of a party and when that party makes several inconsistent statements which are before the decision maker, that party manifestly has a forensic problem. Some will choose to confront the inconsistencies straight on and make evidential or forensic submissions on them. Others will hope that '*least said, soonest mended*' and consider that forensic concentration on the point will only make matters worse and that it would be better to try and switch the tribunal's attention to some other aspect of the case. Undoubtedly it is open to the tribunal expressly to put a particular inconsistency to a witness because it considers that the witness may not be alerted to the point or because it fears that it may have perceived something as inconsistent with an earlier answer which in truth is not inconsistent. Fairness may in some circumstances require this to be done but this will not be the usual case. Usually the tribunal, particularly if the part is represented, will remain silent and see how the case unfolds."

28. These show that neither in Scotland nor in England and Wales is it thought in the higher courts that every point which concerns an Adjudicator when dealing with the credibility of an Appellant needs to be raised explicitly with the Appellant in order for him to pass a comment upon it. There may be tactical reasons why an Appellant and his advocate decide not to grapple with what might be thought to be a problem; they may hope that the Adjudicator will not see it as a significant point or indeed may not spot it at all; but it is for an Appellant whose credibility is challenged as this Appellant's credibility most emphatically was, and challenged in almost every possible respect, to put forward all the evidence he can and to deal with the discrepancies which arise. Even where the Secretary of State is not represented, the Appellant cannot assume that points which are not put by the Adjudicator to him for his comment are points which are to be regarded as accepted, especially if they are obvious points of contradiction or implausibility which he has failed to grapple with. It is not necessary for a fair hearing that every point of concern which an Adjudicator has, be put expressly to a party, where credibility is plainly at issue. As we have said elsewhere, it is a matter of judgment whether to omit to do so is unfair or whether to do so risks appearing to be unfair as a form of cross-examination. On balance, the Adjudicator's major points of concern are better put, especially if they are not obvious. The questions should be focussed but open, not leading, expressed in a neutral way and manner, and not at too great a length or in too great a number. But, whether or not that is done, it is for the Claimant to make his case.

Surendran guidelines

29. Third, it is necessary to say something here about the significance of the Surendran guidelines. Too often there have been

challenges to Adjudicators' conduct of a hearing, both during the hearing and subsequently on appeal to us and indeed as here, on a further application for statutory review, based upon asserted breaches of these guidelines. The guidelines are guidelines and guidance; they are not rules of law. They are not a strait-jacket. They do not represent black and white answers to all the situations, many and varied as they are, which arise before an Adjudicator where the Home Office Presenting Officer is not present. The object behind them is to provide guidance as to how to ensure a fair hearing and how to avoid circumstances arising in which a fair-minded and informed observer would conclude that there was a real possibility or a real danger that the Adjudicator was biased; Porter v Magill [2001] UKHL 67, [2002] 2WLR 37.

30. The real test to be applied, however, is whether the hearing was fair or unfair and whether a fair-minded and informed observer would conclude that there was a real possibility that the Adjudicator was biased. In each case where there is non-compliance with the guidelines, it remains for the person asserting the unfairness or apparent unfairness to show that the actual or apparent unfairness was present. It is not sufficient merely to assert that the guidelines were not complied with. It is not by itself an error of law not to comply with the guidelines. The point rather is that compliance with the guidelines will make it very difficult, if not impossible, for an Appellant to show that the Adjudicator acted, or could properly be thought to have acted, unfairly. If they are not complied with, it plainly assists an argument as to actual or apparent unfairness. But it is not conclusive as to it at all. The statement in MNM paragraph 19 that they must be observed was never intended to elevate the guidelines into a distinct set of rules which had to be complied with, regardless of the underlying effect of any non-compliance. The Surendran guidelines should never be the means, and were never intended to be the means, whereby the proper and fair conduct of the hearing by the Adjudicator and the proper raising of issues by the Adjudicator should be prevented.

31. The guidelines now need to be read in the light of the two decisions in Koca and Maheshwaran where, as here, credibility is generally at issue. The obligation is on the Appellant to deal with obvious points which relate to his credibility without necessarily being asked to comment on them by the Adjudicator. The Appellant cannot expect to be able to make tactical decisions as to whether he should deal with an issue or ignore it, later to complain successfully if an Adjudicator has not raised it with him. An Appellant cannot simply say that a question was not put and therefore it was unfair for an inference to be drawn adversely to him on that point, where his credibility has been put at issue and the issue dealt with by the Adjudicator in the determination goes to credibility. Whether it is unfair depends on the circumstances

in the case.

32. Guideline four is clearly sound; there remains, in the light of those two decisions, an obligation on the Appellant to address issues of credibility raised in the letter of refusal. But it is clearly not inappropriate for the issue of concern to be raised in questions by the Adjudicator. It may be more useful for the Adjudicator to put those questions than to ask the representative to do so. This can all be seen as "*clarification*", for that emphasises that the task is not one of cross-examination and is subject to the caveats as to timing, manner, length and content which we deal with later.

33. Where guideline five applies because no matters of credibility have been raised in the refusal letter, and there is no new material before the Adjudicator, the Adjudicator should raise any issues which concern him, as guideline five says. But as with guideline four, it is proper for the issue to be raised by the Adjudicator himself directly in questions of a witness, subject to the same caveats as to timing, content, manner and length. The Adjudicator must here be especially careful not to invent his own theory of the case and must deal with what are significant problems, not minor points of detail. In this situation, it is much less likely that an Appellant would be aware that his credibility was under consideration if it were not raised with him, and it is unlikely to be fair for the issue to be raised in the determination for the first time. This is rather different from Koca and Maheshwaran.

34. Guideline five also needs to cover the position where no issue of credibility has been raised in the Refusal Letter and yet it may be obvious that further material provided to the Adjudicator raises issues of credibility. Issues of credibility which arise from the new material should be raised or put by the Adjudicator to the Appellant so that he may answer it, but it does not mean that the hearing has been unfair, where that is not done. That depends on the degree to which the issue of credibility was one which an advocate ought properly to have realised needed to be dealt with on the material which he was presenting to the Adjudicator, in the light of the Secretary of State's decision. Obvious points are: why the material had not been mentioned before; why there were contradictions between that and what had been said before; and how obvious implausibilities or improbabilities in it are to be answered. For an unrepresented Appellant, the Adjudicator is likely to have to draw his attention explicitly to the point, in order fairly to be able to rely on it.

35. Guideline six does not confine the Adjudicator to questions arising out of the Secretary of State's material. But as it is the Secretary of State's material which an Appellant usually seeks to answer, often with further evidence, it is right for Adjudicators to put

questions on it and on the further evidence as the total case put forward by the Appellant emerges.

36. As to guideline seven, clarification goes beyond checking whether something has been understood or for confirmation of a fact. It is legitimate for an Adjudicator to raise the questions relevant to the Secretary of State's decision letter or later material to which the Adjudicator considers he needs answers if he is to deal fairly, adequately and intelligibly with the material upon which he is being asked to adjudicate. He is not obliged to be the silent recipient of whatever an Appellant puts forward. If obvious points are not dealt with, the Adjudicator can deal with them in his determination and it is generally better that he should do so having given the Appellant the chance to answer them.

37. The last sentence of guideline seven can be misleading. It is designed to prevent cross examination or the appearance of cross examination, rather than to prevent a question being asked if it was a question which the Home Office Presenting Officer could have put if he had been present. The risk of cross-examining or appearing to cross-examine can be avoided by an Adjudicator in the manner, style or length of questions, which he asks. Generally, questions other than those designed to clarify what was said or intended to be said are better left until after the conclusion of evidence where no Home Office Presenting Officer is present and (after re-examination where a Home Office Presenting Officer is present but see K (Côte D'Ivoire) [2004] UKIAT 00061.

38. Questions should not be asked in a hostile tone. They should not be leading questions which suggest the answer which is desired, nor should they disguise what is the point of concern so as to appear like to a trap or a closing of the net. They should be open ended questions, neutrally phrased. They can be persisted in, in order to obtain an answer; but they should not be persisted in for longer than is necessary for the Adjudicator to be clear that the question was understood, or to establish why it was not being answered, or to pursue so far as necessary the detail underlying vague answers. This will be a matter for the judgment of Adjudicators and it should not usually take more than a few questions for an Adjudicator to establish the position to his own satisfaction. An advocate should always be given the chance to ask questions arising out of what the Adjudicator has asked, which will enable him to follow up, if he wishes, the answers given thus far. The Adjudicator can properly put, without it becoming a cross-examination, questions which trouble him or inferences from answers given which he might wish to draw adversely to a party. These questions should not be disproportionate in length to the evidence given as to the complexity of the case, and, we repeat, an Adjudicator should be careful to avoid developing his own theory of the case.

39. There is a tension, reflected in the guidelines, between fairness in enabling a party to know the points on which an Adjudicator may be minded to reach conclusions adverse to him where they have not directly otherwise been raised, and fairness in the Adjudicator not appearing to be partisan, asking questions that no-one else has thought it necessary to ask. This has proved troublesome on a number of occasions.

40. The tension should be resolved, so far as practicable, by recognising the following:

(1) It is not necessary for obvious points on credibility to be put, where credibility is generally at issue in the light of the refusal letter or obviously at issue as a result of later evidence.
(2) Where the point is important to the decision but not obvious or where the issue of credibility has not been raised or does not obviously arise on new material, or where an Appellant is unrepresented, it is generally better for the Adjudicator to raise the point if it is not otherwise raised. He can do so by direct questioning of a witness in an appropriate manner.
(3) We have set out the way in which such questions should be asked.
(4) There is no hard and fast rule embodied in (1) and (2). It is a question in each case for a judgment as to what is fair and properly perceived as fair.

The Surendran guidelines and MNM should be read with what we have set out above.

The circumstances of this case

41. Turning to the particulars of this case, it is quite clear from the Adjudicator's analysis of the Appellant's evidence that the questions which he asks in so many paragraphs are a mere stylistic device. It may be unwise to use it in the light of the Surendran guidelines, but phrased differently they could all be expressed as sound reasons for not accepting what the Appellant said. The allegation here that the points were not raised by the Secretary of State in his refusal letter are for the most part unfounded, and at times irrelevant where the points arose out of subsequent evidence, and throughout are misconceived: they are all obvious points, relevant to credibility which was the central issue, which the Appellant and his advocate could and should have dealt with, whether or not specifically raised in detail by the Adjudicator.

42. The problem that the mob in August 1998 were looking to kill Rwandans but did not cover the back door or notice him covering 40 to 50 metres to the neighbours' house, is apparent from paragraph 8 of the refusal letter. His failure to mention his wife's whereabouts until his witness statement is an evident problem which to deal with; paragraph 9 of the refusal letter. Her relations with him in Bumba arises from paragraphs 9 and 10. The contradiction between his alleged racial characteristics and the need to flee Bumba just because he met someone from Kinshasa who threatened to reveal his ethnicity is evident from paragraph 12. It is an obvious question why he did not leave the Democratic Republic of Congo in 1998; he should have dealt with it – it is no answer to say that he left Kinshasa for the long journey to Bumba given the known proximity of Kinshasa to the border, over which so many flee. His hiding and yet meeting both his wife and someone from Kinshasa willing to denounce him because of his ethnicity, constitute contradictions which obviously require explanation whether or not the Adjudicator asks questions. The sequence of coincidences of meeting his wife, and someone from Kinshasa in Bumba, and four from Kinshasa as soon as he arrived in Kisangani who were willing to denounce him (where it would apparently not have been obvious otherwise what his ethnicity was) requires careful justification to be credible. The late mention of sexual abuse requires an evidenced answer, not an advocate's response, as to why it was so late. The departures from the Democratic Republic of Congo and Tanzania are so obviously questionable that the Appellant should have sought to deal with them so far as possible.

43. In reality there was nothing remotely unfair or in breach of the Surendran guidelines in the way in which the Adjudicator reached his decision. Assuming, without any evidence, that he did not put those questions to the Appellant, he did not need to do so. The Appellant and his representative should have realised that they were all obvious points which required to be dealt with. Had the Adjudicator expressly raised those issues with the Appellant, significant in number though they would have been, there would have been no breach of the Surendran guidelines.

44. He may have felt inhibited by the guidelines or by the possible reaction of representatives from putting those questions, if he did not do so. He should have felt no such inhibition, if he did. In the light of what we have said, we hope that Adjudicators will not feel such inhibitions, subject to what we say about the manner, style or length of such questions. On the other hand, the fact that he may not have put such questions would not mean that the hearing was unfair in the light of the obvious questions which the Appellant's evidence raised.

Fresh evidence

45. The next points related to the submission to the Tribunal of further evidence, and of yet more on Statutory Review. We have considered the circumstances in which such evidence should be received in a number of occasions. This evidence fails to meet the relevant tests.

46. Ms Chapman referred to the expert's report on the newspaper and on ethnicity in the Appellant's niece's claim. This was dated 10th July 2003 and was produced eight days after his appeal was heard. There is no satisfactory reason why it should not have been sought and obtained earlier. The expert, Dr Pullen, who was an academic in development and post-conflict reconstruction with a particular interest in the Democratic Republic of Congo, regards the article as having "*all the hallmarks of authenticity*"; he does not explain what they are. He does not deal with the obvious problems, no doubt because he was unaware of them, to which the Adjudicator draws attention – the four year gap, the source and yet the inaccuracy of the information.

47. On ethnicity, if the Appellant were of mixed ethnicity, he would have inherited his father's Rwandese ethnicity, according to Dr Pullen. He says that in urban areas there are many mixed ethnicity families, fully accepted socially, particularly among the middle classes – in normal times. But now, Rwandese ethnicity had become threatening and remained a "*powerful vector of violence in Kinshasa*".

48. This was however a desk-top report without interviews, and none of course with this Appellant. (The niece according to the expert had Congolese ethnicity). So it does not grapple with the Adjudicator's concern about the absence of evidence as to relevant physical features from an expert, in view of his rejection of the reliability of the Appellant himself. The Adjudicator's conclusion (paragraph 57) is not seriously undermined.

49. The new evidence also included a UNHCR letter of 10th December 2002. This was obviously available and if relevant should have been placed before the Adjudicator. It was complained on statutory review that the Vice-President refusing leave to appeal had not specifically dealt with this "*new*" evidence. It plainly fails to meet the test in Ladd v Marshall, and no explanation for its not being placed before the Adjudicator was given. What was sought to be gained from this letter were the general remarks made in another case to the effect that persons from rebel-held territories arriving in Kinshasa especially if of Rwandese origin are at risk sometimes of persecution. Ethnically mixed Tutsis were equally known to be among those targeted with extreme human rights abuses, detained or sometimes killed. It is only relevant if the Appellant is of mixed Tutsi ethnicity which the Adjudicator has not

accepted, for sound reasons.

50. The Adjudicator however also considered the UNHCR letter of 16th May 2003 which did not say that those of mixed Tutsi ethnicity were at risk, and the CIPU Report of April 2003 which said that there had been a significant decrease in 2002 in serious abuses against Tutsi or mixed ethnicity Tutsis although discrimination continued.

51. If the Appellant is not of mixed ethnicity there is no reason, following the decision of the Tribunal in VL (DRC) (CG) [2004] UKIAT 00007, not to return him. We heard argument about the treatment of failed asylum-seekers in the case heard immediately before this one. We agreed to give this Appellant the benefit of any relevant decision in that case; Ms Chapman had nothing to add to the arguments. In the event, we considered that there was no breach of Article 3 in the lack of enquiries or investigations about those returnees, and there is no argument which this Appellant can advance based on that; RK (DRC) (Obligation to investigate) [2004] UKIAT 00129.

52. Although VL left open as a possible risk category those who were of mixed Tutsi ethnicity, we would add that on the material before us at present, those persons would not appear to be at a real risk of persecution or breach of Article 3 on return. Paragraph 6.3 of the CIPU Report of October 2003 may be over-optimistic in suggesting that the Government protected Tutsis at risk in government controlled territory but in paragraph 6.58, echoing the US State Department Reports, says:

> "Since the start of the conflict between the rebel forces and the Government in 1998, Tutsis have been subjected to serious human rights abuses, both in Kinshasa and elsewhere, by government security forces and by some citizens for perceived or potential disloyalty to the regime. In August and September 1998, an undetermined number of people who were not Tutsis but looked like Tutsis were subjected to indiscriminate human right abuses simply because of their appearance. The Tutsis are recognised by other Congolese by their great height, their pointed noses and their oval faces. Despite being subject to human rights abuses by the security forces and the civilian population since 1998, the Government has allowed international agencies to resettle thousands of Tutsis in other countries. Human rights abuses committed against Tutsis significantly decreased during 2002 but human rights groups have complained that discrimination against persons perceived to be of Tutsi ethnicity and their supporters continued in that year."

53. In December 2002, the UNHCR letter refers to what was happened to some ethnically mixed Tutsis but is vague as to its frequency or location, refers to no special risk on return or that they should not be returned to Kinshasa. Dr Mullen's report is suggestive of greater problems but we would not have regarded it as sufficient to demonstrate a real risk for this Appellant even were he of mixed ethnicity. That would still not make anything else which he

has said true.

54. This appeal is dismissed. It is reported for what we say about the Surendran guidelines, and should be read with MNM.

MR JUSTICE OUSELEY
PRESIDENT