RK (Obligation to investigate) DRC CG [2004] UKIAT 00129

IMMIGRATION APPEAL TRIBUNAL

Date of Hearing: 16th April 2004
Date Determination notified:
7th June 2004

Before:

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

Between:

SECRETARY OF STATE FOR THE HOME DEPARTMENT
APPELLANT

and

RESPONDENT

For the Appellant: Miss Chandran, instructed by Lawrence Lupin Solicitors
For the Respondent: Mr Buckley, Home Office Presenting Officer

DETERMINATION AND REASONS

1. This is an appeal by the Secretary of State from the determination of an Adjudicator, Mrs N Birch. She dismissed the asylum appeal but allowed the human rights appeal of the Appellant before her, whom we shall call the Claimant, in a determination dated 31st July 2003. The Claimant is a citizen of the Democratic Republic of Congo who left the Democratic Republic of Congo for Congo Brazzaville on 29th November 2002 and after two and a half weeks there left for the United Kingdom where she claimed asylum. Once again the Adjudicator's task was made more difficult than it should have been because the Secretary of State was not represented before her.

2. The Claimant's story was that she had to gone to Gombe in her employer's car to change some money for her, but, on the way, a large group of people shouted to some soldiers that the people in the car wanted to kill President Kabila; she realised that she was in the way of a presidential procession. It was expected that

everyone stop for the President. She was allowed to leave the car to urinate and took the opportunity to escape. She was seven and a half months pregnant at the time. The soldier guarding her had been distracted by the passage of the presidential car. She made her way to her grandmother's house. She was telephoned there by a neighbour who said that soldiers had arrested her mother whose address must have been given to them by the driver of her employer's car. Her employer told her to travel to Brazzaville with the money she had gone to change and she left there later with the help of a businesswoman.

3. The Adjudicator rejected that story as not credible, either as to the way in which a procession would be managed or as to her escape. She rejected the asylum claim. However, she allowed the human rights appeal on the basis that as the Claimant had left the country illegally without an exit visa, her return to the Democratic Republic of Congo, which was in a very unsettled condition, would expose her to a serious risk of imprisonment in harsh and life threatening conditions. The Adjudicator referred to the unofficial presence of security forces at Kinshasa airport, to the human rights abuses committed by the security forces and to the absence of an independent and effective judiciary. A UNHCR letter raised questions about whether failed asylum seekers could be returned without undue risk.

4. The Secretary of State contended in his Notice of Appeal that this determination ignored the up to date background material and the Tribunal's assessment of it, which showed that failed asylum seekers were not at risk if they were returned with valid travel documents.

5. By the time this appeal came on before us, the Tribunal, chaired by Dr Storey, had already delivered a detailed and comprehensive judgment dealing with the current position in relation to the return of failed asylum seekers to the Democratic Republic of Congo and considering all the Tribunal decisions which, whilst generally of the view that such returns could take place safely, also included two which adopted a different approach. The Tribunal heard argument in October 2003 and in the light of some further material, heard further argument in December 2003. Its determination was notified on 28th January 2004; VL (DRC) (CG) [2004] UKIAT 00007.

The decision in VL

6. This determination considered the CIPU Report, the UNHCR material, the practice and experiences of other European governments, two Reports from Dr Kennes, the material produced by BIDS relating to returnees and other evidence. It considered an argument that the United Kingdom Government ought to have

made more enquiries about what had happened to certain people to whom BIDS referred. It noted the importance of recent changes in HO policy whereby no-one would be returned without valid travel documents which would reduce greatly the risk of adverse attention and extortion on return to Kinshasa, which was the only place to which people were returned. In Dr Kennes' later report, he resiled from his previous position and accepted that failed asylum seekers per se were not now at risk on return. He concluded that failed asylum seekers were not at risk of a breach of Article 3 upon return merely because they had made an asylum claim abroad.

7. The case of VL also related to a young woman with a young child. It concluded that that did not create a risk factor. Nor did the fact that she was a low level member of the UDPS. There were two risk categories: those with an actual or perceived hostile nationality, particularly Rwandan, and those having a perceived political or military profile (which did not mean just having been a soldier or a member of a political party). Three other potential categories were identified.

8. None of the actual or potential risk categories apply to this Claimant. The Adjudicator's determination did not take account of the background material available to her at the time or of the Tribunal's assessment of it, although the Adjudicator would have undoubtedly been assisted by proper representation by the Secretary of State. On the basis of that decision, without more, the outcome of the appeal was inevitably that it would be allowed. Miss Chandran did not argue otherwise.

9. She said that the decision in VL should not be followed because of an argument which she wished to raise about the obligation on the United Kingdom to investigate allegations which had been made by BIDS about certain returned asylum seekers which she said United Kingdom authorities had agreed to, but had not carried out. This, it was said, meant that the return of the Claimant would be a breach of Article 3, which, like Article 2, contained an implicit duty to investigate credible allegations of a breach in order to make the Convention rights effective. This was an argument which was akin to and a development of one which was considered in VL and drew upon much of the same material which it considered.

10. We can introduce the material by reference to the Tribunal decision in VL:

> "41. For proper reasons largely to do with concerns about continued detention of a number of failed DRC asylum-seekers, the Bail for Immigration Detainees (BIDS) organisation whose co-ordinator is Mr Tim Baster, has entered into correspondence with the Home Office, with CIPU and a number of other bodies.

Towards the end of 2003 key parts of this correspondence together with a number of other documents were published by the Immigration Law Practitioners Association (ILPA). We do not propose to itemise all of it in the text of this determination. It will suffice to say that it broadly covers materials considered relevant by BIDS up to and including their letter to the Home Office dated 25 November 2003. It is necessary also to say that much of it raises issues, e.g. the continued detention of failed asylum seekers, the history of Home Office failure to respond to BIDS' request for further enquiries, which are not our concern. However, insofar as it constitutes relevant new evidence meriting Tribunal assessment, its essential particulars can be summarised as follows:

42. The November 2003 BIDS' letter asserts that on 12 March 2002 a charter flight was organised by the Resettlement and Co-ordination Unit (RESCU) to Kinshasa. It included 13 passengers who were nationals of the DRC. According to first and second hand information given to BIDS, all but one of the 13 passengers concerned met with detention and ill treatment upon return. As for the only one who was not, he had been returned straightaway to the UK. Another of the passengers who had eventually been released had made his way back to the UK and claimed asylum. An anonymised statement setting out his experiences on return was contained in the bundle before us.

43. The same BIDS letter asserts that it knows of 3 further DRC nationals who have been removed since 10 October, 2003, two of whom – AB and DE - appear to have ended up in the Central Prison in Makala.

44. Marrying this information together with that supplied by the Home Office regarding the number of person returned in 2002-2003, BIDS contends (in its 25 November 2003 letter) that:

> *'Even assuming that all DRC nationals who were removed from the UK between January 2002 and November 2003 were actually sent to Kinshasa, then of 38 (adding the 2002 statistics to the provisional statistics for January – March 2003 and the three recent removals that we are aware of) there is evidence that 15 of these returnees were imprisoned on arrival in Kinshasa. This represents a rate of detention of some 40% of all known returnees over a two year period.'*

45. The BIDS' bundle also includes materials from a Congolese NGO with an office in the Netherlands called 'DocuCongo' which indicates that this body has learnt of DRC nationals removed from other European countries who have been detained and ill treated on return. The position of this organisation on the subject

> is mainly set out in a letter dated 26 September 2003. It summarises two cases of persons said to have been returned from the Netherlands to Kinshasa in November 2002 and two in June 2003. Mention is also made of another person said to have been detained on arrival having been removed by Germany in September 2003. The author also refers to "a source in the DGM" (Direction Generale de Migration) giving an account of frequent mistreatment on return."

11. The principal allegations giving rise to a duty to investigate concerned the two who it is said returned from the charter flight of March 2002, and the two who ended up in Makala prison.

12. The Tribunal commented on the assertion made by BIDS that the UNHCR position and the practice and experiences of other European countries supported its concerns. It pointed out that UNHCR neither endorsed routine returns of failed asylum seekers nor considered that they were at risk per se either. It was simply incorrect for BIDS and others to argue that the UNHCR supported their position and they should stop doing so. It said that the letter from the British Ambassador to the Democratic Republic of Congo of November 2002 that he had seen no evidence that failed asylum seekers were persecuted on return, although unsourced, could reasonably be inferred to have been made by reference to real checks in Kinshasa. The position of the Dutch and Belgian Governments, the former of which had set up a procedure with the Democratic Republic of Congo for return and the latter monitored returns, led the Tribunal to conclude that there was strong support for the view that returned failed asylum seekers per se were not at risk. The Tribunal was critical of the "*denunciatory tone*" of some of the BIDS material.

13. The Tribunal then turned to the BIDS letters relating to the individuals. It pointed out that there was little evidence about them and that their details had not even been furnished to the Home Office for it to check. It continued:

> "78. The case in relation to which BIDS have adduced an anonymised statement concerns a DRC national who claims to have been one of the passengers on the March 2002 charter flight, He avers in that statement that upon arrival in Kinshasa he was detained and ill-treated before eventually being released. BIDS states that upon return to the UK he made a claim for asylum. We raised with the parties at the December hearing our receipt of unverified information that an asylum seeker who claimed to have been on the March 2002 flight had appealed and that an Adjudicator had dismissed his appeal quite recently. However, despite their raising no objections, we decided not to take steps to direct further inquiries or to seek to obtain a copy of any determination. Thus we make no judgment as to whether that dismissal, if one has been made, relates to the author of the statement submitted by BIDS. What we can state with certainty, however, is that there is no evidence before us to show that this

statement's author has been accepted as credible by either the immigration authorities or the appellate authorities. Doubtless if this person is found to be credible as a result of his asylum application and/or appeal, that would put matters in a very different light.

79. The same observation applies to the evidence of another person said by BIDS to have been on this flight but to have been '*bounced*' straight back. BIDS states that he has also claimed asylum. His evidence too can only be described as being as yet unaccepted by any UK authority.

80. BIDS elsewhere refers to other information it has received relating to persons who were on the March 2002 charter flight, but since nothing is specified, we can only assume it viewed such information as less significant than those items of evidence it has particularised.

81. That brings us to the two cases referred to by BIDS as AB and DE respectively. The BIDS letter describes the former case thus:

> *'AB' was removed from Heathrow in October 2003, by flight to Nairobi and thence to Kinshasa. His partner in the UK received a very distressed phone call from him at Kinshasa airport, in which he stated that he had already been arrested and was on his way to prison. A traveller at the airport witnessed his arrest and beating and also phoned his partner.'*

82. The BIDS letter goes on to state that based on the above information, it approached human rights organisations for help in tracing and confirming AB's whereabouts. It then outlines the contents of a statement from someone described as a '*reputable witness, known to a number of international human rights organisations*' who visited AB and heard from him about his detention and ill treatment.

83. BIDS' account of the case of DE was as follows. DE was removed in late October 2003. His solicitor was so concerned about his fate that she (unusually) gave him her mobile number immediately before removal and asked him to phone her on arrival in Kinshasa. He did not call her from Kinshasa for some two weeks after his removal, but, when he did, he said he was calling from Makala prison where he had been incarcerated and ill-treated.

86. A further matter we have to bear in mind is that, in respect of AB and DE, the accounts as given are far from self-evidently plausible. Believing AB's account would mean accepting as reasonably likely that the DRC authorities would have permitted him to phone after he had been arrested and was being escorted to prison. Believing DE's account would mean accepting that, whilst inside Makala prison, DE would still have had access to money he had with him when he arrived and would have been able to use it to bribe a prison official to call his solicitor in the UK. Both accounts described the calls as having been cut off or terminated. Given that both had said they had been granted access to a phone, this was a further oddity. AB's account involved acceptance, further, of the coincidence that not only was his arrest witnessed by a traveller at the airport but a traveller

who was able to elicit straightaway from the policeman who had beaten AB in front of him the address of where AB was going. This traveller also happened to know AB and so was able to phone his partner in the UK who had earlier received the phone call from AB himself. IF AB's account had indeed been verified by a '*reputable witness, known to a number of international human rights organisations*', then we would have expected that, between October and the date of hearing in December 2003, some specific report from such organisations not only confirming the visit but giving reasons why this person attached credence to AB's account would have been forthcoming."

14. After making some general comments about the evidence, the Tribunal said:

> "88. Another thing we have to bear in mind is that it is not known precisely why any of the individuals concerned in the BIDS and DocuCongo dossiers, even assuming their accounts were found after fuller examination to be true, fell foul of the authorities. Was it simply because they were failed asylum seekers or was it something related to other matters such as perceived political profiles or failure to perform civic obligations? Was it because they were regarded as having a nationality of a country hostile to the DRC (eg Rwanda, Uganda) or a political or military profile opposed to the regime? Certainly in some of the cases mentioned we simply do not know. Mr Aziz's response, again echoing BIDS, was that all that matters in relation to AB and DE is that these were people whom the UK authorities had found not to have any asylum-related problems on return. However, in point of fact we have no evidence in proper form even to show that the individuals concerned had made claims for asylum and were not, for example, persons returning from a family or business visit. Furthermore, even assuming each had made claims for asylum and been refused, the conclusions reached by UK authorities about their asylum claims can only have been based on the evidence as furnished by those individuals; it cannot be assumed those concerned necessarily gave the same account of themselves upon return to the DRC authorities.
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> 89. These shortcomings in the evidence presented in the BIDS materials lead us to seriously question their contention that there is a UK rate of detention of some 40% of all known DRC returnees over a two year period. Of the figure of 38 removed between Jan 2002 - March 2003, we have not found satisfactory the evidence relating to any of the 13 persons mentioned as being returned on a charter flight in March 2002 or the evidence relating to the two cases of AB and DE. Put bluntly, that means that we have not found the evidence satisfactory in relation to the claims made about any of the 38 mentioned."

15. The Tribunal considered an argument in relation to a duty to investigate as is shown by what it said in paragraphs 91-92:

> "91. That brings us to BIDS` argument that the Home Office and CIPU view about failed asylum seekers would be different had they undertaken proper inquiries into relevant matters, including the evidence relating to the March 2002 charter flight. It is not for us to pass judgment on Home Office procedures in respect of

removals. However, insofar as the BIDS argument raises the general point that more active steps should have been taken by UK authorities to monitor returns, we would concur with the point made in the Tribunal determination in the case of S (Serbia and Montenegro – Kosovo) [2003] UKIAT 00031 that the Tribunal is bound by the principles set out in the House of Lords judgment in Abdi and Gawe [1996] 1 WLR 298 regarding disclosure of evidence within accelerated procedures. There is no duty on the Secretary of State to embark upon an investigation into evidence not in his hands for the preparation of country bulletins or reports, in order to assist appellants in making their cases.

92. We note the reference in the BIDS letter to an Amnesty International (Netherlands) letter to the Dutch Government dated 8 July 2003 reporting intimidating behaviour from security services following removals from Holland to Kinshasa by charter flight. In one respect the accounts they mention do not support BIDS` contention that all asylum seekers are routinely detained on arrival at Kinshasa, since those concerned mention no problems at the airport beyond being asked to give their name and address. In another respect, however, the evidence does suggest that in these cases the security services began within a few days systematically and repeatedly visiting these addresses in order to make inquiries. As such it does raise some concerns. However, we consider (as did the Tribunal in M 00051 at para 11.13) that there would need to be much more substantial evidence indicative that this type of harassment was routine, before it demonstrated a real risk of persecution or serious harm. Furthermore, if this behaviour were routine, we would have expected that UNHCR and European governments who conduct returns would have made known concerns about it. Clearly the Dutch government considered this evidence but did not decide to change its policy in the light of it."

16. Miss Chandran provided an update in relation to two matters referred to by the Tribunal. First, she said that the case referred to in paragraph 78 had not yet been determined by the Home Office and second, that AB and DE were asylum seekers and that AB had returned and made a fresh asylum claim.

17. It is important, before we examine the material upon which Miss Chandran relies, that we record that her argument was not that the decision in VL was wrong on the evidence before it, nor was it that we should on the evidence before us reach a different conclusion as to whether the Claimant would face a risk of a breach of her human rights upon return; it was rather that the obligation under Article 3 to investigate allegations of ill-treatment meant that, in its absence there would be a breach of Article 3 in this country through a return of the claimant to DRC.

The correspondence

18. In April 2003, Mr Baster, the BIDS co-ordinator, wrote to ReSCU, the Removal Strategy Co-ordination Unit, asking for an investigation into what had happened to DRC nationals sent back on the March 2002 charter flight, in the light of information that

contradicted CIPU's information that ten had simply been checked and released; it said that one had been detained and ill-treated but was now back in the United Kingdom and that another had returned straightaway to the United Kingdom. He said that they had not made enough enquiries to be sure of the safety of those whom they returned.

19. In July 2003, Mr Baster wrote to Mr Jeffries, Director General of the IND, seeking the suspension of all removals to the Democratic Republic of Congo. He said that CIPU had agreed to look at the safety of return to Kinshasa, and that ReSCU had undertaken to investigate what had happened to those returned on the charter flight of March 2002. Mr Jeffries said that he would try to find out more information about the treatment of failed asylum seekers.

20. CIPU replied on 1st August 2003 to the letter to IND saying that it was not aware of any corroborated or objective evidence of the serious or systematic abuse of returned failed asylum seekers, nor of any international agency or national or international NGO reporting such abuse. Such abuse as had been reported related to those who were sought for rebellion and plotting assassination, (a distinction which BIDS does not always refer to). This was CIPU's response to the concerns raised. It explained its position to the UNHCR.

21. BIDS wrote a further long letter enclosing much of its earlier correspondence to Mr Jeffries on 25th September 2003. The Tribunal hearing VL had this before it. It repeated many of its earlier points, which were later to be ruled on in VL, including concern about the documentation activities of a Democratic Republic of Congo official about whom sinister allegations were made, and later rejected by the Tribunal. One appendix was an unsigned statement purporting to be from the unnamed individual who on return on the charter flight had been detained and ill-treated but who had been assisted to escape by a prison officer who felt sorry for him after which he had again returned to the United Kingdom. (See paragraph 78 VL). Mr Baster said that this showed either that the Democratic Republic of Congo knew all about political activities through the activities of its officials or that no failed asylum seeker was safe. He asked for further information about those who had been returned and for investigation into allegations made by other NGOs who were providing information about returned asylum seekers.

22. Mr Jeffries replied, saying that CIPU did not accept that failed asylum seekers would be at risk simply as failed asylum seekers, repeating the position which he had previously adopted. Although ReSCU might not be the relevant body for an examination of what happened in detail on the ground in the Democratic Republic of Congo, it was unaware of any harsh treatment experienced by

returnees. There had been an issue as to the documentation which was available to returnees and as to whether retuning by charter marked them out in any way.

23. BIDS next letter of 25th November 2003, also before the Tribunal in VL, related to AB and DE. (See paragraphs 81-83 of VL). Mr Jeffries' reply of 5th December 2003 was in a similar vein to his earlier reply. The Tribunal had dealt with all this material in its determination in VL.

24. The new material before us consisted of the US State Department Report on the Democratic Republic of Congo human rights practices and two more letters. The former adds nothing; Miss Chandran referred to what it says about Makala prison conditions but that information would not have been new to the Tribunal. BIDS letter of 15th March 2004 recorded Mr Baster being told by CIPU that it had not investigated what had happened to AB and DE. There was no IS policy to monitor returns and so no research or resources were devoted by CIPU to that end. It had no first hand researchers and relied upon sources such as the FCO, UNHCR and NGOs in Kinshasa. The decision in VL meant that there was no reason to investigate the position in Kinshasa anyway. The reply confirmed what was set out in the BIDS' letter. There is in reality very little material which was not before the Tribunal in VL, and dealt with by it.

Submissions

25. The legal framework for Miss Chandran's submissions was provided by three ECtHR decisions. She submitted that it was a breach of Article 3 for the United Kingdom Government to fail to carry out the promised investigations into the situation revealed by the evidence. It was also a breach of Article 3 for a returning state party to fail to investigate allegations of torture and ill-treatment committed by a receiving state to which it was proposed to return failed asylum seekers.

26. In Aksoy v Turkey 26th November 1996, the ECtHR considered the obligations of the Turkish authorities in investigating the death of someone who, it was alleged, was tortured in police custody but against whose assailants no civil or criminal proceedings were brought. It said (paragraph 61) that where an individual in good health was taken into custody but was injured whilst there, it was "*incumbent on the State to provide a plausible explanation as to the causing of the injury failing which a clear issue arises under Article 3 …*". The nature of the rights under Article 3 meant that Article 13 imposed an obligation on the State to carry out a thorough and effective investigation of incidents of torture, as part of the notion of an "*effective remedy*".

27. The same approach was applied in Aydin v Turkey 25th September 1997 to an inadequate investigation of an essentially similar case. The public prosecutor failed to use his legal powers and resources to gather the necessary evidence.

28. Finally, in Assenov v Bulgaria 28th October 1998 the ECtHR, again dealing with claims of ill-treatment by the police of a suspect in custody, held that *"where an individual raises an arguable claim that he has been seriously ill-treated by the police or other such agents of the State unlawfully and in breach of Article 3, the provision, read in conjunction with the State's general duty under Article 1 of the Convention to 'secure to everyone within their jurisdiction the rights and freedoms defined in … [the] Convention,' requires by implication that there should be an effective official investigation … capable of leading to the identification and punishment of those responsible …"*. If this were not the case the prohibitions in Article 3 would be ineffective in practice and State agents could "*abuse the rights of those within their control with virtual impunity*"; paragraph 102. The lack of a thorough and effective investigation into the arguable claim of ill-treatment by the police, led to the finding of a breach of Article 3.

29. Miss Chandran developed her argument by pointing out that in a number of ECtHR and domestic decisions, Article 3 had been extended so as to preclude a State removing someone to another country where he would be at a real risk of treatment which breached Article 3; substantial grounds have to be shown for reaching that conclusion. She referred to paragraph 76 of the ECtHR decision in Cruz Varas v Sweden 20th February 1991, which concerned a person returned from Sweden to Chile who claimed that Article 3 had been breached through the risk that he would once again be tortured by the Chilean authorities and because of the trauma he faced in being returned to a country where previously he had been tortured. It said:

> "76. Since the nature of the Contracting States' responsibility under Article 3 (art.3) in cases of this kind lies in the act of exposing an individual to the risk of ill-treatment, the existence of the risk must be assessed primarily with reference to those facts which were known or ought to have been known to the Contracting State at the time of the expulsion; the Court is not precluded, however, from having regard to information which comes to light subsequent to the expulsion. This may be of value in confirming or refuting the appreciation that has been made by the Contracting Party or the well-foundedness or otherwise of an applicant's fears."

30. The Court, we observe, was primarily concerned in that paragraph to establish that in its examination of whether a removal had breached Article 3, it was not confined to an appraisal of the material which was before the returning State. Miss Chandran

emphasised that the assessment of risk by reference to facts which "*ought to be have been known to the Contracting State at the time of the expulsion*" showed that the State was obliged to carry out an investigation into arguable claims before returning someone, in order to avoid a breach of Article 3.

31. In Kacaj (O1/TH/00634)*, 19th July 2001, the then President, commenting on the positive obligation on a State to take preventive measures to protect an individual whose life might be at risk from the criminal acts of others, pointed out that the same approach as applied to Article 2 applied also to Article 3. He noted that the ECtHR in A v UK [1998] 27 EHRR 611 had referred to the steps to be taken in respect of a risk to life "*of which they have or ought to have knowledge.*" He continued: "*The duty to protect against a real risk can readily be equated to a duty not to expose to a real risk.*" Miss Chandran put some weight on that last point. That case was however concerned with establishing that there was no requirement on a claimant to establish facts beyond a reasonable doubt: the test was one of real risk.

32. Miss Chandran submitted that the correspondence showed the following. BIDS had provided evidence, before the decision in VL, which required an investigation which CIPU had said it would undertake. It was not rational now, after VL, to refuse to carry out that investigation. VL was being used as an excuse for the absence of investigation. It was no answer for the IS to say that the IS did not monitor returns or for CIPU to say that it could not carry out such research. Relevant evidence had been provided sufficient to justify an investigation into the future of the March 2002 Charter flight returnees and of AB and DE. That investigation had in effect been promised, but not undertaken. The United Kingdom authorities were in a position to undertake that investigation and to establish or disprove the claims made about specific returnees to the Democratic Republic of Congo.

33. Miss Chandran contended that the information about the two groups of returned asylum seekers required the United Kingdom Government to investigate their circumstances before returning the Claimant and that the reasonableness of her point was reinforced by the apparent acceptance of the Secretary of State that he would do so. He had the resources to do so or other relevant government departments had the resources to do so, which refugee charities did not. He could not shut his eyes to what had been said and claim that there was no evidence in reliance on his failure to carry out an investigation nor could he rationally say that the IAT determination in VL resolved the matter because his failure to investigate had deprived the IAT of information which might have led to a different decision. The United Kingdom had to investigate because it was responsible for the expulsion. The names and port reference of AB and DE had

been supplied to the Home Office before the second hearing in VL which the IAT ought to have been told by the Secretary of State. It had details of who were on the March 2002 charter flight. There was no evidence that the FCO had been asked to investigate by the Home Office.

34. The Tribunal's reliance in VL paragraph 91, upon R v SSHD ex parte Abdi and Gawe[1996] 1 WLR 298 HL, was mistaken; that case concerned the existence or otherwise of a duty on the Secretary of State to disclose material which he had relating to conditions in a safe third country and turned on specific provisions as to disclosure. It did not deal with any duty to obtain information through investigation. Similarly, the Tribunal decision in S (Serbia and Montenegro - Kosovo) [2003] UKIAT 00031 did not relate to the same duty to investigate. It concerned the absence of a duty to look for material which had not been part of his decision and of which he was not aware, albeit couched as a duty to disclose.

35. Although Miss Chandran referred to a letter written to her by UNHCR United Kingdom in February 2004, it did not advance matters beyond the position as set out in VL. Nationality of those returned had to be carefully ascertained and there were some areas to which returns could not safely be made. Certain profiles also required particularly careful consideration.

Conclusions

36. We take the view that Miss Chandran's submissions are wrong and in general we prefer those of Mr Buckley for the Secretary of State. We start from the position that on the evidence available to us, the Claimant has failed to make out the case that she would be at a real risk of treatment which breached Article 3 were she to be returned to the Democratic Republic of Congo. The assessment of the position as set out in VL applies to her and remains sound, there having been no relevant changes of conditions there. The assessment of the evidence in VL relating to the two groups whose circumstances are said to warrant investigation is not controverted by other material newly placed before us and we agree with the assessment of it in VL. The only new point is that the Home Office, though not Mr Buckley knew of certain details by the time for the second hearing in December 2003, but the IAT were unaware of that. But we do not see that that leads to a change in the assessment. Indeed, the whole basis of Miss Chandran's submission is that we should not make an assessment of whether the return of the Claimant to the Democratic Republic of Congo would expose her to treatment which would breach Article 3; her case is that there is an antecedent breach of Article 3 through the failure, it is said, to investigate, and that the carrying out of an investigation might reveal material which could

lead to such a conclusion. There is in effect a tacit recognition that the claim must fail judged on the currently available evidence.

37. This is not a case either where there is any suggestion that the Secretary of State or the Government more generally has relevant information which it is withholding deliberately. Although Abdi and Gawe does not deal with a duty to investigate in the human rights context, the decision reflects the limits on the duty of disclosure on the Secretary of State, now contained in Rule 9 of the 2003 Rules.

38. The duty thoroughly and effectively to investigate credible allegations of ill-treatment which breaches Article 3 is implicit in Article 3 in order to make the right in Article 3 effective. The duty has been held to arise, in the cases relied on by Miss Chandran, where State agents were the subject of the credible allegations. The State was obliged to investigate the acts of its agents. If it did not do so, the right would be ineffective because it was the State agents who had charge over the victim and who could otherwise breach his rights with impunity.

39. In our view, the duty to investigate is not necessarily confined to those precise situations; there might be an obligation on a contracting State to have a system of investigation and prosecution where credible allegations were made of criminal offences amounting to torture or other acts amounting to degrading treatment being carried out by non-state actors.

40. We consider that the circumstances in which the existence of such a duty is recognised may be quite broad but that its application or content should be sensitive to types of circumstances and to the specific facts in any case. So, a duty to investigate credible allegations of treatment which breaches Article 3 can be implied into Article 3 in circumstances which do not closely parallel those in the three cases to which Miss Chandran referred, but where the recognition of such a duty is necessary in order for the rights in Article 3 to be effective.

41. The distinctions, between the cases cited to us and the present circumstances, relied on by Mr Buckley, are real enough but they do not remove, circumscribe or define the relevant principle. Those distinctions are relevant to the question of whether in any given set of circumstances a duty to investigate arises and if so what its content is.

42. Where a removal is contested on the ground that it would breach the ECHR because of the anticipated act or omissions of State agents, the burden is on a claimant to show a real risk of treatment breaching Article 3 on return. This is the lower standard of proof. If a claimant is unable to show that real risk,

there is no reason why a refusal or failure on the part of the removing state to investigate his allegations should amount to a breach of Article 3. We do not suggest that that standard of proof is necessarily the same as the level required for the inception of the duty to investigate as might arise in respect of credible allegations of ill-treatment in custody by State agents. A distinction can properly exist between the threshold of proof applicable to those cases where a State is responsible for the acts of agents, where it is the only body in reality capable of mounting an investigation, where the claimant is the victim of identifiable past acts and the threshold of proof applicable to those cases where it is alleged that it is another state which has directly breached the rights of someone other than the claimant, as part of the claimant's case as to the existence of a real risk to him.

43. We do not consider that the reference in Cruz Varas to assessing risk in part by reference to facts which "*ought to have been known*" to the State at the time of removal, is a basis for imposing a duty to investigate of the sort contended for Miss Chandran. It reflects, as does the use of that phrase in other Article 3 or indeed Article 2 cases, the point that the State cannot evade its obligations under Article 3 by shutting its eyes to the obvious or by failing to put in place a reasonable system to enable it to know whether acts breaching Article 3 have occurred where a reasonable State would appreciate that there was a real risk that they would do so.

44. We do not consider it necessary, in order for the Article 3 rights available to someone to prevent their removal to be effective, for any duty to investigate allegations that a foreign state has mistreated a third party to arise, unless the claimant has already shown that he would be at a real risk of having his Article 3 rights breached upon his return. That standard may be well be higher than the level envisaged by "*credible allegations*" of ill-treatment by State agents of the State upon which the investigatory duty is then imposed.

45. But whether it is or not higher than such a duty, once that real risk has been shown, it becomes irrelevant whether or not there has in fact been an investigation, because the claimant will have already succeeded in his claim, by reference to the lower standard of proof which his case has to achieve.

46. Any other approach would amount to a reversal of the burden of proof or to a lowering of the standard of proof. This standard is already different from that applicable to the ascertainment of an actual breach of Article 3 through past acts. In practical terms this lower standard reflects the difficulties of proving the degree of future risk or the nature of the future risk which would be run, and the difficulties of proof and disproof of the allegations which, by

their nature, underlie claims for protection under both Conventions. These appeals and the original decision which gives rise to them are not inquisitorial by nature, even though an obligation to co-operate and assist each other can be spelt out from the very circumstances in which protection is sought and offered. That leads to a mutually owed, two-way, obligation. It is not aptly described as an accusatorial system either. The lower standard of proof, and obligations of fair dealing and co-operation where one party is possessed alone of almost all the relevant personal knowledge and the other is better placed to deal with general country conditions, dictate together that this is a unique jurisdiction. Neither label is apt. The lower standard of proof best reflects that; but it should not be diluted further. The provision as to the burden of proof is specifically contained in the 2003 Rules, at Rule 49.

47. It is for the Claimant, to the lower standard, to prove her case. She cannot do so. She cannot then say that the material which she has produced suffices to require an investigation of her material which, if not carried out, itself demonstrates a breach of Article 3. If she can do so, then any claimant who cannot succeed, can argue that the material is nonetheless sufficient to require an investigation of claims which that claimant may make about himself or others and until then a breach is shown by the failure to investigate. That would either involve putting the burden of proof on the Secretary of State or permitting a lower standard of proof than is currently applied.

48. We do not see that such an approach is necessary for the rights under Article 3 in respect of someone being removed from the jurisdiction to be made effective.

49. In any event, the background to that judgment is not one in which the contracting party is removing a non-national into the complete unknown. There is information, whatever criticisms of detail or methodology can be made of it, in the form of the CIPU Reports and those of other similar governmental agencies such as the US State Department. The Secretary of State co-operates with the appellant through the provision of such information; it does not and should not simply require an appellant to produce the general background material relevant to the case. There may be undisclosed and unsourced FCO material from United Kingdom Embassy diplomats. There is material from other countries which return failed asylum seekers, one of which monitors what happens at least at the airport. The UNHCR has its sources on the ground in the Democratic Republic of Congo which inform its letters and assessments. There are NGOs, international such as Amnesty International, or more domestically based, which can and do provide information relevant to individual cases or as to the situation more generally which the Secretary of State can take

into account, whether through CIPU or not. The IAT certainly does so. This too differentiates it from those situations in which the State alone, or virtually alone, is realistically capable of providing the relevant information, and where the information is simple, factual and probably uncontentious information. Here, the investigation requested concerns what may be highly contentious in terms of what happened to individuals and its more general significance. The Secretary of State is not required to investigate so as to provide, or prove or disprove the quality of, the components of an appellant's case.

50. At a more specific level, there is nothing in the material provided to the Tribunal which can be said to call for an investigation, failing which the rights of this Claimant under Article 3 would have been negated. We agree with the assessment of its fragility as carefully analysed in VL.

51. Although there has been a little more material provided to the Secretary of State in relation to AB and DE and there has been an update on AB, none of that amounts to a significant advance, whether as demonstrating a real risk to the Claimant on return or as creating a requirement for an investigation.

52. We do not consider that the correspondence before the Tribunal in VL or its further stages, which we have set out, alters the position. We agree with Miss Chandran that if there were an obligation to investigate before, it is not satisfied by the decision in VL. But we do not attribute to the correspondence the significance which Miss Chandran does. It is not clear whether CIPU had agreed itself to investigate the claims or that any agreement went beyond the undertaking of the sort of country assessment it does anyway. It is not an investigatory body in any other sense anyway; it is not an investigatory arm of the Home Office, IS or FCO. Paragraphs 20 and 22 show there to be no outstanding promise to BIDS to investigate matters, at least in the sense in which the Secretary of State agreed to undertake enquiries. We do not see him as conceding any legal obligation to make such enquiries. It is for the Tribunal to decide whether there was such a legal duty, and whether it has been breached. Mr Buckley was unaware of anything more having been done. But the material provided to IND was sparse, and of rather doubtful weight anyway.

53. BIDS and other NGOs also have some ability to investigate themselves and to produce evidence, particularly if it is said that the persons in question have returned to the United Kingdom. We are wholly unpersuaded by suggestions that weight should be attached to unsworn written material of such vagueness. There are obvious limitations of feasibility, even were resources unlimited and resourcefulness unbounded, in monitoring returns in certain countries; such attentions may be unwelcome even to

those returned.

54. All of this is reflected in the standard of proof. It leads us back to the essential reason why Miss Chandran's submissions are wrong. She cannot surmount the lower standard of proof on the available material and cannot do so by asserting that unproven assertions have not been investigated and disproved. If an allegation is proven or appears well- founded in respect of a third party, that becomes part of the material which has to be assessed in making the overall judgment as to risk.

55. Accordingly, for those reasons we reject her submissions and allow the Secretary of State's appeal.

MR JUSTICE OUSELEY
PRESIDENT