

IMMIGRATION APPEAL TRIBUNAL

Date of Hearing: 12th March 2004
Determination delivered orally at Hearing
Date Determination notified:
22 April 2004

Before:

The Honourable Mr Justice Ouseley (President)
Miss K Eshun (Vice President)

Between:

APPELLANT

and

Secretary of State for the Home Department
RESPONDENT

For the Appellant: Ms S Panagiotopoulou, instructed by
Lawrence & Co

For the Respondent: Mr J Gulvin, Home Office Presenting
Officer

DETERMINATION AND REASONS

1. This is an appeal against the determination of an Adjudicator, Mrs D J Baker, promulgated on 23rd October 2003. The Appellant is a female citizen of the DRC, who entered the United Kingdom on 4th December 2002. On 15th March 2003, the Secretary of State refused to grant asylum and took a decision to give directions for her removal. He also rejected her claim that removal would breach her rights under ECHR.
2. The Adjudicator rejected both her claims. The Tribunal refused permission to appeal but permission to appeal was granted on Statutory Review. The Adjudicator concluded that very much of what the Appellant had to say was truthful. She accepted that the Appellant's parents were high ranking army officers under President Mobutu, one a Brigadier General and the other a Lieutenant Colonel. Her father was killed in 1998

by the Laurent Kabila regime and her mother was arrested by the rebels. The Appellant was working as a low level trainee journalist and continued working in that way to make a living. She was working with the Congolese National Radio and TV. She married a Rwandan Tutsi who refused to join the rebels. She was living in the rebel held area of Kisangani and was arrested and detained by them.

3. The Adjudicator accepted that, taking all the evidence around that together, the Appellant had been beaten, burned with cigarettes and raped. The Appellant points out that the account of torture was in fact more horrific than recorded by the Adjudicator, but we see no reason to suppose that the Adjudicator had not accepted the evidence in effect that the Appellant had been tortured by the rebels in Kisangani. The Adjudicator also accepted that she was suffering from PTSD.
4. Nonetheless the Adjudicator rejected certain other matters given in evidence by the Appellant. The Adjudicator rejected her account of her escape. She thought it implausible that a priest, to whom the rebels forced the detainees to confess, would arrange for her release. She thought it implausible that the nuns would fund her journey to the United Kingdom, as the Appellant had supposed. The Adjudicator thought that her account of the escape and journey to the United Kingdom was a fabrication and that the Appellant had in fact been released by the rebels after detention and that the rebels in power in Kisangani had no continuing interest in her. The Appellant said later that she did not know where her children were, although she said that they were in the house with their father when she had left for work but that they had gone when she returned home and found the soldiers waiting to arrest her. She relied upon a letter which the Adjudicator referred to as *"allegedly from her maternal Aunt"* telling her not to return and stating that there was no news of her children; this is a letter of 15th February 2003. The Appellant stated that shortly after receiving the letter she telephoned her aunt and was told not to keep calling and now does not know where her aunt is. The Adjudicator said *"I find that the later part of her account has been fabricated to embellish her claim of the risks she faces on return to DRC."*
5. The Adjudicator concluded that she was not at risk of persecution on the grounds of her husband's ethnic origin if she was not with him, and that, even if she were, there would be no real risk of treatment amounting to persecution. She would not be at any real risk of treatment contrary to Article 3 in a rebel controlled area; this is because the Adjudicator concluded that they had no continuing interest in her. The Adjudicator also concluded that there would be nothing

unduly harsh in the Appellant relocating in Kinshasa where she was born and where she might still have an aunt living. There were facilities for mental health treatment in DRC and although she might suffer a deterioration in her mental health at the point of return, she would be returning to Kinshasa where there was treatment which was under government control and where she would have no reason to fear the rebels, and accordingly concluded that Article 8 was not engaged.

6. The Appellant submitted that the background evidence showed that there would be a risk on return for those who had a military profile as she said she did, as the child of soldiers who were well known under the Mobutu regime and were well known in Kinshasa. The Adjudicator had ignored the fact that there was evidence that the Appellant's brother had more recently been imprisoned in Kinshasa through his associations with his parents. The rebel forces would have a continuing interest in her because it had been shown that her mother had been detained by the rebels. It was said that there was objective background evidence which showed that there was no adequate health system in DRC for those suffering from PTSD and that the Adjudicator had not applied the test in Razgar [2003] EWCA Civ 840 when considering Article 8.
7. The Appellant also submitted that the Adjudicator had failed to consider the problem which was raised before her of the Appellant being returned to Kinshasa but being seen by those in power there as a sympathiser with the rebels, even though she was not, because she came from Kisangani.
8. Miss Panagiotopoulou for the Appellant submitted that the case should be remitted for further findings of fact to be made against which the assessment of risk on return could be made. Those findings of fact in particular related to the position of the brother, the sister and the aunt and the risk to those coming from Kisangani. It would not be appropriate, she submitted, for the Tribunal to reach a conclusion in relation to the position of the brother based on the documentary material. There might be more evidence which the Appellant could give about it, although she was not in a position to help us with what that might be. She had no interpreter there to enable her to enquire of the Appellant what that position was.
9. Mr Gulvin for the Secretary of State said that there were certain omissions in the Adjudicator's findings, including a failure to make a finding as to the position of the brother; indeed there was a failure to make a finding in relation to the position of the sister and aunt, although that was not in fact a

subject matter of any ground of appeal. The problems she might face on return to Kinshasa as the daughter of high ranking Mobutu army officers or as someone perceived as coming from the rebel area of Kisangani had not been dealt with either.

10. We would only remit the case if relevant issues could not be resolved by us. Except for the allegations in relation to what happened to the brother and the asserted absence of findings in relation to him, the sister and aunt, the rest of the case is dependent upon an assessment of documentary evidence relating to background conditions. The Appellant has given her evidence about the risks she would face and for what reason and as we have said, there is no basis for supposing that she has any more to say about her brother.
11. The position in relation to the brother, sister and aunt is more straightforward than the Appellant submitted. In paragraph 25 of the Adjudicator's determination it is plain that she is not accepting the genuineness of the letter from the aunt dated 15th February 2003, or the truthfulness of its content. The Adjudicator says:

"In the Appellant's bundle at pages B13 and B14 is a letter allegedly from her maternal Aunt telling her not to return and enclosing a video, photographs and other documents and stating that there was no news of her children. The letter is dated 15th February 2003. The Appellant stated in evidence that shortly after receiving the letter she telephoned her aunt and was told not to keep calling and as a result she does not know where her aunt is now. I find that the latter part of her account has been fabricated to embellish her claim of the risks she faces on return to DRC."
12. It is clear that the conclusion that the latter part of the account had been fabricated, was not confined to the claim to have rung the aunt, but extended to the whole content of the paragraph; that is clear from the word "*allegedly*" used to describe the letter. Such a conclusion is also soundly based in the material itself. The letter in question sent from Kinshasa says in translation that "*your mother is wanted*", "*they said your mother will be killed without trial if she is arrested*", "*if you have any news from your mother let me know*".
13. The Adjudicator had found as a fact that the mother had been arrested by rebels in Kisangani (although the Appellant said initially that the mother had been arrested by Kabila soldiers and only that she had been arrested by rebels in the second statement). There is no suggestion that the Appellant told the aunt that that is what had happened in any phonecall to her or in any other way, itself surprising. The aunt was also in a position to know, before writing, what had happened to the Appellant's mother, her sister, from what the Appellant's

brother and sister would have told her when they went to the aunt in Kinshasa (bundle A7 and A13). They were present (C2 paragraph 4) when the mother was arrested and would have known therefore that she had been arrested by rebels and would have been in a position to tell the aunt. Accordingly, for good reason, the Adjudicator rejected the evidence about the brother, sister and aunt in Kinshasa. The sole source for the alleged information was this letter allegedly from her aunt and as we have said, there is no suggestion that the Appellant could add more. There is no justification for the matter going back to an Adjudicator for findings of fact to be made in relation to the position of the brother; they already have been made. There is no reliable evidence that he has been detained or ill treated in any way. The same goes for the sister and the aunt.

14. We now examine the return of the Appellant to Kinshasa. She would not be returned to anywhere else in DRC, she would go as a DRC national and with travel documents. It was contended on her behalf that she would be at risk on return to Kinshasa because she would be known to be the daughter of high ranking army officers who had served with Mobutu and moreover, she would be at risk of being considered by the government in Kinshasa as a rebel sympathiser because she had lived in Kisangani. This was an issue raised before the Adjudicator by the Appellant and although it was not the focus of her case, it was not an issue with which the Adjudicator dealt. The Adjudicator concentrated on the concerns raised about the risks which the Appellant would face were she to be returned to Kisangani.
15. The Appellant's submissions drew heavily on a report of June 2002 of proceedings at a seminar held under the auspices of ACCORD/UNHCR. It notes at the outset that the views and opinions in it do not necessarily reflect the views of the organisers of the workshop, and it does not deal with the extent to which the comments, opinions and assessments have been based on UNHCR sources or have gone through the verification and assessment process which UNHCR position papers go through.
16. At page D44, under the heading "Travel Restrictions and Freedom of Movement", the restrictions that existed in 2002 on travel between the government controlled and rebel controlled parts of DRC are identified. The risk of those travelling from Kinshasa to the East, is that one could be accused of spying for the Kinshasa government, and it notes:

"Amnesty International knows of many people who have fled from persecution by the RCD Rwandese or other forces in the East and have thought that it would be safer for them to go to Kinshasa and

have been subsequently arrested and detained in Kinshasa on suspicion of being in alliance with the armed opposition in the East. So many people dare not go to the other side”.

17. In support of the contention that there was a risk to the Appellant because of her parent’s high ranking military role under the Mobutu regime, the Appellant referred to page D56, which states:

“It would be possible that the children of such a soldier, be it a high ranking officer or a private, would be targeted by the new authorities due to the fact that their father held the respective position during the Mobutu regime. Sometimes people are abused without any justification at all. On the other hand, even a civilian, linked to someone who is in a powerful position, may have been responsible for abuses for which he may be held liable or be subjected to reprisals”.

18. An example was given of a general’s son driving an expensive car or military Land Rover. Family members of MPR officials were also said to be at risk. The MPR was the Mobutu political party. The Report noted that being associated or close to someone being sought by the government can create trouble sometimes amounting to persecution.

19. The Appellant also referred to a letter from UNHCR-UK dated 11th March 2004. This was written to the Appellant’s solicitors and concerned the return of failed asylum seekers to DRC. It repeated the position which the UNHCR had previously set out and is not specific in relation to any individual asylum seeker. It explains the basis upon which its assessment is set out:

“... as is customary with all country positions issued by the UK Branch Office of UNHCR, the latest position on the DRC was drafted on the basis of information that was sourced directly from Our field office in the DRC and cleared by our Headquarters in Geneva. Such procedures are followed throughout UNHCR in order to ensure the consistency of positions issued by our offices around the world”.

20. It referred to the UNHCR’s views on country of origin information as being a primary source because they were based on first hand reports from its field presence around the world. Its intention in providing information in a case such as this was to contribute to fair decisions, correctly and in a humanitarian spirit, and to determine the protection needs and essential interests of refugees. The letter said that the UNHCR made continuous efforts to ensure that its position mirrored the current situation in the country concerned. This is a helpful explanation of the UNHCR’s position and what it says must be accorded considerable weight.

21. The letter says:

“First hand accounts and reports from local human rights NGOs, suggests that certain individuals who are deported (regardless of whether they sought asylum abroad), or even repatriated voluntarily, may face serious problems following possible interrogation conducted by security services upon arrival in Kinshasa. Should the authorities in Kinshasa discover that a deportee has a political or military profile, or sought asylum abroad owing to a political or military background, such a person may be at risk of arbitrary detention and ill-treatment”.

22. After pointing out that the UNHCR’s view was that it was generally speaking possible for unsuccessful asylum seekers to return to the DRC provided they had been found in fair procedures not to have international protection needs, it said that that view was subject to two important caveats.
23. The first caveat is irrelevant because it concerns return to areas other than Kinshasa. The second caveat refers to the point already made in the letter that individuals with certain profiles, (eg those with real or perceived political or military associations) were likely to be at risk and therefore deserved to receive particular and careful consideration. It is to be noted that it does not seek, even for those, to say that they cannot be returned but it requires particularly careful consideration of their position. It does not define the scope of those who are perceived to have a military background or profile.
24. The predecessor UNHCR letter which was in the same terms and the position of returning failed asylum seekers to DRC was considered at length in the determination of the Tribunal, [2004] UKIAT 00007 L (DRC). That case was particularly concerned with whether there was a risk to those who returned merely because they were failed asylum seekers. It concluded that there was not. It recognised that there were possible risk categories, including those who had or were perceived to have a military or political profile or background, or who came from rebel held areas or who were a family of mixed ethnicity or were perceived to be Tutsi. There was however no significant risk arising from the fact that a returned failed asylum seeker was a women, nor indeed from being as in that case, a low level UDPS member. At paragraph 100 it pointed out that the UNHCR description of “*military or political profile or background*” did not draw a distinction between high and low level individuals, nor did it suggest that merely being a member of an opposition party such as the UDPS sufficed to place on in a risk category. Nor did the UNHCR letter state that persons in that category were necessarily at risk but rather that they were likely to be at risk and therefore deserved particular and careful consideration.
25. The Tribunal concluded that although the category was of a

broad definition, it could only apply to those whose activities had brought themselves to the adverse notice of the authorities so they acquired a certain profile in their eyes before they left.

26. We referred Miss Panagiotopoulou to the material on these issues in the CIPU Report for DRC of October 2003. It is clear from the Human Rights Review that in 2002 there were widespread abuses of human rights, both in government and rebel controlled areas, although they were probably more severe because of the lack of control in the rebel areas in the east where Kisangani is.
27. In 2003 all parties to the civil war and the external countries which had involved themselves ratified an agreement which had been signed in December 2002. The government, rebel movements and opposition parties agreed to set up a transitional government to oversee democratic elections and these are due to take place in 2005. The transitional government would include four Vice Presidents from rebel groups and the civil opposition. It was agreed that the rebel fighters should be merged into a new national army. Opposition politicians had returned to the DRC. At paragraph 4.28 CIPU comments that the setting up of the transitional government effectively ended the five year conflict that began in August 1998 between the various rebel forces and the DRC government. An agreement was reached in August 2003 on establishing a unified armed forces command. The national assembly includes members of former rebel groups.
28. Of course it is too early to say whether those structures will bear fruit and the position in DRC is plainly still unstable. Human rights abuses continue, but it provides a context in which what the Report later says about those associated with the armed forces under Mobutu and his regime can be seen. The attitude of the government to the former FAZ soldiers of Mobutu is relevant to the perception which the Kinshasa government would have of those who were Mobutu soldiers and hence of those who are their children. At 6.69 the Report says that former FAZ soldiers who are still living abroad are not at risk of persecution and can therefore return to the DRC. In 2002 all the key positions in the FAC high command were occupied by FAZ soldiers. Many former FAZ soldiers were serving in the current army and an estimate 20,000 plus former soldiers were living in Kinshasa. A committee had been formed to oversee the repatriation of the FAZ and the repatriation programme would also apply to former soldiers of Mobutu's presidential guard. It is difficult to see in the light of that material that the position of someone known to be the child of a former high ranking Mobutu officers would be

worse.

29. The Report discusses those closely associated with the Mobutu regime in paragraphs 6.72 and 6.73. It points out that many high ranking officials left the country in 1997 to avoid being arrested and accused of robbing the country of its wealth for their own enrichment. It says however that the security situation for those closely associated with the regime improved when Joseph Kabila came to power in January 2001 and even more so after the peace accord signed in April 2003:

“A large number of persons closely associated with the Mobutu regime have now returned to the DRC”. “Persons who were closely associated with the MPR during the Mobutu regime were not at risk of persecution by the security forces and can therefore return to the country if they are abroad.”

30. This information was criticised by Miss Panagiotopoulou as coming from a single source based on a 2002 fact finding mission from Belgium. We see no reason however not to accept it as part of the picture. The UNHCR Position Paper is the most cautious. It deals broadly with those with a political or military profile or background. It is not specific as to the level or nature of the military or political profile which calls for particular care. The reference to profile itself suggests that it has to be of some importance. The Appellant has no profile herself. Although her father had and her mother may still have a high profile and she would be known as their daughter, the background evidence from the CIPU Report does not suggest that their association with Mobutu would now be a cause of risk to them. Still less does it suggest that she would be at risk because of her association with them. We do not accept that the letter purporting to come from her aunt is a reliable document to which any weight can be attached. The UNHCR Paper does not contain enough detail to enable us to know whether she is within one of the categories about which it expresses concern. But it does not require that such a person be not returned; it requires that their position be carefully examined. The CIPU Report does not suggest that she is within such a category. The 2002 Seminar Report which is not a UNHCR Position Paper, does no more than say that it is “*possible*” that a child of any former Mobutu soldier of any rank might be at risk. But we regard that as a significantly less clear and authoritative statement of the picture than that set out at some length in the CIPU Report. It conflicts with the CIPU picture and offers nothing more than a speculation. We do not consider that the Appellant has established a real risk to herself on that basis.
31. The alternative basis of risk asserted by the Appellant but with which the Adjudicator did not deal, is that the Appellant

would be seen as a rebel sympathiser because she had lived in Kisangani and her father came from Equator province which was a rebel province. This does not seem to have been the focus of her case but it required to be dealt with nonetheless. It can be allied to her marriage to a Rwandan Tutsi. As to the latter, she does not know of the whereabouts of her husband or children and is unlikely to find them in the UK. The Adjudicator's comment that on her case she would not be associated with them in Kinshasa is reasonable. Although she would not be arriving in Kinshasa via a road leading from the east or on a plane or boat from the east, it is reasonable to suppose that it would become known upon arrival that that is where she had been living. It has not been suggested that her parents were suspected of pro-rebel activities nor that she was when working for the state radio and television station in Kisangani. Even if there were such suspicions, the position between the government and the rebels is now such that it is difficult to see how such suspicion could make persecution or a breach of Article 3 a real risk. They are moving towards a sharing of power, in government and in the armed forces, after a peace accord. Again we do not see the Appellant as being in a real risk category on that account. She comes within the general category of those to whom the carefully considered guidance in L (DRC) applies. She is not one who had brought herself to the adverse notice of the Kinshasa authorities so as to acquire a certain profile in their eyes before she left.

32. We do not consider that she faces a real risk of persecution or of treatment which breaches her rights under Article 3 ECHR, on either basis upon which she has relied.
33. Accordingly, this appeal is dismissed.

**MR JUSTICE OUSELEY
PRESIDENT**