

# IN THE IMMIGRATION APPEAL TRIBUNAL

Heard at: Field House Decision number: **BM (ARTICLE 3 - ARTICLE 8 - COUNTRY MATERIAL) DR Congo [2003] UKIAT 00051**

Heard on: 29th May 2003 Appeal number:  
Date typed: 31st May 2003  
Date promulgated: 10<sup>th</sup> July 2003

## The IMMIGRATION ACTS

Before:

MR A. MACKEY (CHAIRMAN)  
MS D K GILL (Vice President)

Between:

And

Appellant

The Secretary of State for the Home Department

Respondent

## DETERMINATION AND REASONS

### Representation:

For the Appellant: Mr. P. Ward, of P. J. Ward Solicitors.  
For the Respondent: Mr. P. Deller, Senior Home Office Presenting Officer.

1. This is a human rights appeal. The Appellant is a citizen of the Democratic Republic of the Congo (formerly Zaire) (DRC), in his mid-twenties. He has appealed, with leave, against the determination of Mrs. S M Charlton-Brown, an Adjudicator (**the Second Adjudicator**), who (following a hearing on 25th November 2002 at Hatton Cross) dismissed his appeal under Section 65 of the Immigration and Asylum Appeals Act 1999 against the Respondent's decision of 6th August 2002 to refuse to grant leave to remain under the Human Rights Act 1998. The Respondent proposes to remove the Appellant to the DRC.
2. The Appellant left his country in 1997, at a time when it was known as the Republic of Zaire. The passport which he held at that time was one which had been issued by the Republic of Zaire. His account is that he entered the United Kingdom on 26th October 1997 using a Belgian passport to which he was not entitled. He applied for asylum on 28th October 1997. That application was refused and certified on 23rd August 2000. His appeal against that refusal was heard by Mr. G F Denson, an Adjudicator (**the First Adjudicator**), at a hearing on 18th January 2001 at Taylor House. The First Adjudicator dismissed the appeal but made a recommendation that the Appellant be granted exceptional leave to remain due to the situation in the DRC at that time. This was considered by the Respondent but leave was refused on 1st March 2002, as the situation in the DRC had improved. On 23rd April 2002, the Appellant's representatives submitted a human rights application, raising Articles 2,

3, 5 and 6 of the 1950 Convention for the Protection of Human Rights and Fundamental Freedoms (the ECHR).

**Basis of asylum claim (before the First Adjudicator):**

3. Whilst in Zaire, the Appellant worked for a church. The church collected money for him to be educated and offered him a place to stay and work. He attended university part-time through their funding and, when he completed his university studies, continued to work for the church. In 1997, the regime of President Mobutu was overthrown by President Kabila. The day after Kabila came into power, soldiers from his army went to the church and arrested and detained the Appellant. Other people were also arrested and those who resisted arrest were shot and killed. The Appellant was taken to a military camp in a town called Ceta where he was kept in a large room for three days and subjected to torture. He was then removed from the camp and placed in the back of a jeep, along with five other people. They were guarded by armed soldiers. During the trip, there was an altercation and, whilst the soldiers were involved in this, the Appellant effected his escape. He went to his grandmother's house and, from there, to another village. Whilst in this village, his parents were attacked and his father so severely beaten that he died of his injuries. The house of his parents was then sold and the money enabled the Appellant to travel to the United Kingdom. He left through Kinshasa airport. He feared returning to the DRC because the soldiers of the Kabila regime believe that he is a collaborator with a man named Mr. G. This is because he lived in a house owned by Mr. G where arms were found. In 1990, Mr. G was a minister in the Mobutu government and later became an advisor to the government.

**The First Adjudicator's Determination:**

- 4.1 The First Adjudicator found the Appellant's credibility to be severely undermined by inconsistencies in the story he gave. He gave some examples of these inconsistencies in paragraph 40 of his Determination. The cumulative effect of the discrepancies was such that he did not believe the Appellant's account of his association with the church, the details of his detention and his subsequent escape (paragraph 41 of the Determination). He then referred to the medical report of Dr. Philip Steadman and said (paragraph 42 of the Determination):

*I am satisfied as to the contents of that report that the injuries sustained by the appellant were sustained in the manner stated by him through being beaten while in custody. However, I do not accept the reasons why he was taken into custody due to his lack of credibility nor do I accept the details of how he purportedly escaped from such custody, again due to a lack of credibility.*

- 4.2 At paragraph 44 of the Determination, the First Adjudicator stated:

*As previously stated I accept that the appellant did receive injuries through being beaten but I do not accept the reasons for his detention and subsequent escape.*

- 4.3 At paragraph 46 of the Determination under the heading "Conclusions as to this Appeal", the First Adjudicator stated:

*I find that the appellant has not provided any basis for challenging the assertions in the respondent's letter that he would be persecuted if he were to return to the DRC on account of his claimed relationship to a person closely associated with the Mobutu regime nor does he fall to be in a category of those at risk as advised by the UNHCR.*

- 4.4 At paragraph 43 of the Determination, the First Adjudicator accepted that the Appellant would indeed encounter difficulties as a returnee without a passport and may in fact be detained while enquiries are carried out in relation to his identity. He further found that, if the Appellant were to be detained, his forced incarceration would subject him to such treatment as would amount to torture. At paragraph 47, the First Adjudicator said:

*On the basis of the facts as described above I find that the appellant has not established a claim for refugee status under the 1951 Convention. However I find that if he were to be returned to Zaire at this moment in time he would undoubtedly be detained and face torture that would bring the United Kingdom to be in breach of our obligations under the 1951 Convention.*

- 4.5 The First Adjudicator dismissed the appeal under the 1951 Convention. He then said:

*However I make a recommendation that the appellant be granted exceptional leave to remain in the United Kingdom as by returning him to Kinshasa in the Democratic Republic of Congo at this time would undoubtedly send him to face certain detention and subsequently punishment that would amount to persecution.*

- 4.6 As the Second Adjudicator noted, it appears that the Appellant's previous representatives did not seek leave to appeal to the Tribunal against the First Adjudicator's Determination.

#### **The Second Adjudicator's Determination:**

- 5.1 The Second Adjudicator, who heard brief oral evidence from the Appellant, was clearly in a difficult position. As the grant to leave against her determination states, she coped well with the difficulty of applying Devaseelan in a case where there was a lack of clear findings by the First Adjudicator. She examined his Determination very carefully and properly identified such relevant findings as she could. She considered that the First Adjudicator's Determination shows:

- (i) that, due to the Appellant's lack of credibility, the First Adjudicator did not accept that any period of detention was a result of political activities or association on behalf of the Appellant (paragraph 16 of the Second Adjudicator's Determination).
- (ii) that the First Adjudicator had accepted that the Appellant had been beaten during a period of detention, but he was not apparently satisfied that this was for the reasons the Appellant had stated and in view of his lack of credibility did not accept that he was ever suspected of any political activities (paragraph 30 of the Second Adjudicator's Determination).
- (iii) that the reference in paragraph 47 of the First Adjudicator's Determination to the 1951 Convention is in fact a reference to the 1950 Convention, as this appeared to be the only sensible construction of that paragraph (paragraph 10 of the Second Adjudicator's Determination). Further, that the thrust of the Appellant's case would appear to be that, if the First Adjudicator had been able to allow the appeal on human rights grounds, he would have done so (paragraph 11 of the Second Adjudicator's Determination).

5.2 The Second Adjudicator therefore considered herself bound to accept the First Adjudicator's finding that the Appellant was beaten whilst he was in custody. The Second Adjudicator then made her own comments on this factual matrix, as follows (paragraph 30):

*If he had been detained in the past, it might well be for some minor criminal offence. He has not to my knowledge indicated that he was ever charged with an offence, that it would lead to the keeping of any official records on him.*

5.3 The Second Adjudicator appeared to disagree with the First Adjudicator's finding that the Appellant does not have a passport. The Second Adjudicator noted that, although the Appellant had used a false passport to enter the United Kingdom, he had said, at the hearing before her, that he did in fact have his own passport which had been taken by an Immigration Officer. She therefore determined the appeal on the basis that, if the Respondent was indeed in possession of a genuine passport in the Appellant's name, such a document could be used on his return, rather than the temporary documents provided on his behalf by the Respondent.

5.4 The Second Adjudicator then considered the objective evidence she had been provided with and the Tribunal case-law as to the risk on return to the DRC of failed asylum seekers and concluded that "*there were no substantial grounds for believing that the Appellant was at real risk of*" treatment in breach of Article 3.

5.5 The Second Adjudicator then considered Article 8 (right to private life in the United Kingdom). The evidence before her was that the Appellant had been in the United Kingdom for several years and had a home and a job (paragraph 32 of the Second Adjudicator's Determination). The Second Adjudicator noted that the Appellant appeared to be a single man living in rented accommodation and that, whilst he has friends in the United Kingdom, it did not appear to her that he had ties of a more binding nature. Given that the First Adjudicator had questioned the Appellant's credibility "in almost every other respect", it appeared to the Second Adjudicator to be questionable that the Appellant's father had indeed died or that he has no other family members to whom he could turn to on return. She acknowledged that the housing and employment situation in the DRC may well not be as desirable as that in the United Kingdom. She concluded by saying that it did not appear to her that the Appellant's return to the DRC would be a disproportionate act.

6. **Grounds of application for leave to appeal to the Tribunal:** The grounds of application, in essence, assert that:

- (i) The Second Adjudicator was wrong to conclude that the Appellant could use a current valid passport to return to the DRC, because the passport which he had arrived with was a passport issued by the former Republic of Zaire prior to 1997.
- (ii) The Second Adjudicator had erred in her consideration of the objective evidence and the Tribunal case-law as to the risk on return of failed asylum seekers.
- (iii) The Appellant had asserted that he would face a risk of starvation, ill-health and death, given the evidence of lack of food, clean water, healthcare and shelter in the DRC. This was relevant to both Article 3 and to the question of proportionality in relation to Article 8. The Second Adjudicator had erred in not considering or making any findings on this aspect of the Appellant's appeal.

7. **Leave to appeal** to the Tribunal was granted in a determination sent to the parties on 9th April 2003. Leave was granted on all the grounds mentioned in the grounds of application.
8. It should be noted that the grounds of application do not challenge the factual matrix on which the Second Adjudicator determined the Appellant's human rights appeal, save in relation to whether the Appellant would be returning with a current valid passport and the assertion that (in relation to Articles 3 and 8) the Second Adjudicator had failed to take into account the general living conditions in the DRC which the Appellant would have to endure on return.

**The issues:**

9. There are three issues before us:

Issue 1: Whether, in general terms, a failed asylum seeker is at real risk of treatment in breach of Article 3 simply on account of being a failed asylum seeker *per se* (i.e. the Senga point). This question is focused on whether the DRC authorities take an adverse interest in returnees (regardless of their backgrounds), leading to the detention of returnees and their ill-treatment.

If the answer is yes, then we would simply allow the appeal. If the answer is no, then we would go on to consider the next issue, which is:

Issue 2: Whether the Appellant's background is such that he would be of adverse interest to the DRC authorities on his return.

Issue 3: Whether the general humanitarian condition in the DRC is such that the Appellant's removal would be in breach of his rights under Article 3 and/or Article 8.

**Documents before the Tribunal:**

10.1 Documents submitted on the Appellant's behalf:

- (i) Extracts from the Danish Immigration Service Report on the roving attaché mission to Kinshasa dated January 2000;
- (ii) Extracts from the report of Oxfam GB "No end in sight" dated August 2001;
- (iii) Expert report of Erik Kennes dated 19th June 2002;
- (iv) Letter from Amnesty International Netherlands to the Ministry of Justice, The Hague, dated 9th July 2002, with translation.
- (v) Two reports of Docu Congo with translations, each dated 16th May 2003;
- (vi) Letter from UNHCR dated 22nd May 2003;
- (vii) AFP News Report dated 26th May 2003; and

- (viii) Transcripts of the following Determinations of the Tribunal submitted to the Second Adjudicator:

Andre Bashiya [2002] UKIAT 00186 (heard on 21st January 2002)

Jean Marie Kalala Nibanga [2002] UKIAT 02369 (heard on 19th April 2002)

Akoye Mozu [2002] UKIAT 05308 (heard on 7th October 2002)

#### 10.2 Documents submitted on the Respondent's behalf:

Due to administrative problems, Mr. Deller was not able to lodge any documents before the Tribunal. However, we have the documents which were submitted before the Second Adjudicator, which are:

- (i) The CIPU Report dated October 2002;
- (ii) The CIPU Bulletin dated 1/2002, dated 1st May 2002; and
- (iii) Transcripts of the Determinations of the Tribunal in the following cases:

Blandine Kama-Museu [2002] UKIAT 00747 (heard 28th February 2002)

Ngunga Nzakimuena [2002] UKIAT 01961 (heard 24th May 2002)

#### **Issue 1 - Risk as a failed asylum seeker:**

- 11.1 We would say at the outset that we are considering the situation of failed asylum seekers returning to the DRC whose claims have been properly assessed and whose backgrounds have been found to be such that there is no real risk that they would draw the adverse attention of the DRC authorities. We entirely accept that anyone whose background is such that there is a real risk that they would, on arrival or subsequently, draw the adverse attention of the DRC authorities, would be very harshly treated indeed. They, however, would succeed in their asylum and human rights claims (Article 3).
- 11.2 We have no reason to doubt the expertise of Mr. Kennes to comment on the situation in the DRC. The copy of the report we have been given is a generic one, dated 19th June 2002. We are conscious of the fact that the Tribunal in Bashiya heard evidence from Mr. Kennes and that the Tribunal accepted his evidence. We are conscious also that the Tribunal in Mozu and Nibanga also accepted the report of Mr. Kennes, it seems without question. However, for the reasons we give in paragraphs 11.7 and 11.10 below, we do not place as much weight on Mr. Kennes' report as the Tribunal in these cases apparently did.
- 11.3 Section C of Mr. Kennes' report (pages 20 and 21 of the report, on pages 44 to 45 of the Appellant's bundle), deals with the fate of returned asylum seekers the DRC. It is appropriate that we set out Section C in its entirety:

#### C. The fate of returned asylum seekers in the DRC

No systematic studies have been done on the fate of returned asylum seekers, nor on the Kinshasa government policy. We must rely on two letters and two press articles.

The first press article is a statement of a former official of the Minister of the Interior, inspector of the immigration police. According to his statement, returned failed asylum

seekers are immediately arrested at the airport and subsequently imprisoned. No other source of information is known about this alleged practice, and it has not been independently verified.

The second press article is about an official statement by the immigration office. On May 24, 2001, the newly appointed director general of the Congolese immigration services, Mr. Leyka Moussa Nyembo, delivered a speech in Hotel Memling (Kinshasa) where he outlined his immigration policy. Mention was made of the attitude of his services and the government towards returned political asylum seekers. Mr. Leyka declared he wanted to dismantle underground emigration networks, who operate under the cover of applications for political asylum in western countries. One of the instruments of his policy would be the creation of "migratory detention centres" in Kinshasa. In the press reports about this speech, it was not clear what the role would be of these centres.

During a telephone conversation with the author of his report, Mr. Leyka made it clear that the "migratory detention centres" are not centres of imprisonment. The aim of the centres is the screening and identification of returned asylum seekers, with the view of their reintegration into society. Information is gathered about the individuals behind the underground networks, to be able to put them before justice. According to the assistant to the director general, some of these centres are already operational.

According to this official version, the "migratory detention centres" are just a screening agency. There is no problem with it as long as the returned asylum seekers are effectively members of an underground migration network. When the centres harbour returned asylum seekers who were entitled to political asylum but were unjustly refused, then the authorities immediately have their opponents at hand to interrogate them and put them into jail. The real function of the detention centres is thus linked to the overall government policy towards opposition. The government policy towards political opposition cannot be considered without taking into account the workings of the judicial system, and more specifically, the workings of the Military Court.

The first letter is made up by the Amnesty International London office and states that Amnesty had received reports in August 2000 about three returned asylum seekers who have been imprisoned in Makala prison, Kinshasa.

The second letter is the most crucial document. In a letter written by Mr. Wanigasekara (UNHCR London) to Mr. Zohreh Neinzi of the Devon law Centre, dated November 20, 2001, it is said

It is important to consider that the overall security situation remains volatile and is a matter of general concern to everyone resident in the DRC. Despite ongoing efforts and negotiations between the opposition parties, armed movements and the government, fighting still continues between the rebel and the government forces in the eastern and southeastern regions as well as the Equateur province, resulting in human rights violations.

Against this backdrop, persons originating from rebel-held territories (...) are held in suspicion and liable to adverse attention – sometimes amounting to persecution – from the authorities in Kinshasa (...)

According to information available to UNHCR, agents of the security services frequently interrogate Congolese returning to Kinshasa from abroad, particularly those who are known to have sought asylum. UNHCR is aware of instances where interrogation at the airport has been followed by arbitrary detention and serious ill treatment by DRC security agencies. If the returnee is not already known to the DRC authorities, there is a strong likelihood that were he to be returned to Kinshasa, his background would be revealed in the course of interrogation upon arrival.

We may add to this element that returned asylum seekers from the UK will be met with more suspicion than others, because of the support given by the British government to the RCD rebel movement in the East, and more specifically to the governments of Rwanda and Uganda.

11.4 We noted that the *first press article* is attributed, according to footnote 52 on page 20 of the report (page 44 of the Appellant's bundle), to a release dated 13th October

2000 – which is nearly 2 ½ years ago. Furthermore, Mr. Kennes himself states, in relation to the *first press article*, that no other source of information is known about the alleged practice of immediately arresting returned failed asylum seekers at the airport and imprisoning them, and that the alleged practice has not been independently verified.

- 11.5 The *second press article* (having been issued in May 2001) is more recent than the *first press article*. The *second press article* was an official statement issued by the immigration service. We acknowledge that official statements from the DRC authorities suggesting that returned asylum seekers would be properly treated should, bearing in mind the appalling general human rights record of the DRC government, be viewed with great suspicion. We noted, however, that the *second press article* states that persons whose asylum claims have been “unjustly refused” would be interrogated and imprisoned. It is not clear, from Mr. Kennes’ report, who is supposed to have said this. If this was said by the official in question to Mr. Kennes, then such a candid admission on the part of the official endows the remainder of what he is quoted to have said above with greater credibility than might have been the case if he had denied that the DRC authorities would mistreat such persons. However, we still only place very little (indeed, if any) reliance on official statements from the DRC authorities that they would not in general interrogate and imprison returnees. If, on the other hand, the assertion that there are no problems with the migratory detention centres unless the DRC authorities are dealing with persons who have been “unjustly refused asylum” is attributable to Mr. Kennes himself, then the Appellant’s evidence itself shows that it is safe to return failed asylum seekers to the DRC, provided their claims have been properly assessed.
- 11.6 We also noted that the Respondent’s May 2002 CIPU Bulletin refers to the speech mentioned in the *second press article*. It states that the British Embassy have provided information about the speech. The Embassy indicated that the news network which issued the report was not an official government website but one which is run by pro-opposition journalists; that the news report is mainly about the increasing problem of illegal immigration into the DRC by Africans from other countries seeking work or entering the country to commit crimes, that foreign nationals and Congolese travelling to and from the country with forged or illegally obtained travel documents may be detained in the proposed immigration detention centres until their identity and legal status is determined by the authorities.
- 11.7 Mr. Kennes was either not aware of the information mentioned in the preceding paragraph or chose not to refer to it in his report in conjunction with the second press article. We note that May 2002 Bulletin states that there is no suggestion that Congolese returning to the country with proper travel documents would be detained simply because they had been refused entry into a country or because they have had their asylum applications rejected. We considered that some weight should be attached to this.
- 11.8 The *second letter* (from the UNHCR) is dated 20th November 2001. We noted that this letter was addressed to Mr. Zohreh Neinzi of the Devon Law Centre. We do not know whether this letter was prepared in respect of a specific proposed returnee. However, even if this letter is of general application, the letter only states that the UNHCR is aware of “instances” where interrogation at the airport has been followed by arbitrary detention and serious ill-treatment. The standard of proof for showing that returned failed asylum seekers would receive treatment in breach of Article 3 is that of a real risk or a real likelihood. Of course, guarantees cannot be given. The fact that there are “instances” where interrogation at the airport has been followed by

arbitrary detention and serious ill-treatment simply is not sufficient to discharge the low standard of proof.

- 11.9 We considered that the final sentence of the UNHCR's letter would only apply if the returnee's background is such that there is a real risk that he or she would be of adverse interest to the DRC authorities. As we have already stated above, we are here considering the risk on return for persons whose backgrounds have been found to be such that there is no real risk of adverse attention from the DRC.
- 11.10 Whilst we are on the subject of the UNHCR letter dated 20th November 2001 to the Devon Law Centre, we have noted that the Tribunal in Ngunga Nzakimuena [2002] UKIAT 01961 referred to the same letter in paragraph 16 of its Determination. However, paragraph 16 of that Tribunal's Determination states that the UNHCR made it clear that the UNHCR is not opposed to returning failed asylum seekers to the DRC provided that they have had access to a full and fair hearing, that the decision should be reached on the basis of the circumstances of each claimant and with regard to the "ever changing and political security context for the DRC". It is most unlikely that the UNHCR would have written two separate letters on the same date to the same addressee. Mr. Kennes was either not aware that more than one letter existed or of the full text of the letter he quoted or he chose not to mention UNHCR's position in principle concerning the return of failed asylum seekers to the DRC.
- 11.11 The *first letter* (from Amnesty International) is dated 29th January 2001. The letter does not provide details such as whether persons other than the three who were detained at Makala were returned to the DRC and what happened to the others. Neither does the letter provide any details about the background of the three persons who were detained. Are they, for example, persons whose asylum claims ought to have been allowed but who somehow "slipped through the net" and therefore persons who (in the words used in the *second press article*) were "unjustly refused asylum". We considered it inconceivable that, if there was a real risk of persecution in the DRC for returning failed asylum seekers in the DRC, the letter from the UNHCR (which post-dates the letter from Amnesty International) would not have made this clear.
- 11.12 We noted that Mr. Kennes' report makes references to the following:
- (i) Paragraph 82 of the report of the Special Rapporteur of the United Nations Economic and Social Council – Commission on Human rights, dated February 2001 (on page 19 of Mr. Kennes' report, page 43 of the Appellant's bundle) which refers to ten UDPS leaders being transferred to unknown detention centres. We cannot conceive that, given the procedures and appeal rights which are in place in the United Kingdom for refugee status determination and given the current objective evidence, UDPS leaders would feature amongst failed asylum seekers being returned to the DRC by the United Kingdom. The context suggests that the UDPS leaders were in detention following arrest within the DRC.
  - (ii) The extract from the Amnesty international report of 26th June 2001 quoted at page 14 of Mr. Kennes' report on page 38 of the Appellant's bundle which refers to torture being routinely used by the DRC government forces against *known or suspected government opponents*.

- (iii) (On pages 14, 15 and 16 of the Mr. Kennes' report) the arrests and detentions of persons such as –

two persons who were leaders of a human rights organisation;  
 a director of a well-known journal;  
 two journalists;  
 the president of the UNAFEX political party

It is easy to see how, within the context of the repressive environment in the DRC, journalists and those involved in the media can, depending on the content of their media-reporting, come to the adverse attention of the DRC authorities. Indeed, we note that, in relation to the arrests of the two leaders of the human rights organisation, the authorities prohibited the publication of a journal of the organisation. We note, in relation to the arrest of the president of the UNAFEC political party, that he was interrogated about the strategies of his party.

We considered that the information mentioned above does not assist in determining whether failed returned asylum seekers, regardless of their background, are at real risk of treatment amounting to persecution or in breach of Article 3. It is, however, in line with the UNHCR's general advice that each case must be carefully examined.

11.13 We have noted the letter from Amnesty International, Netherlands, dated 9th July 2002 relating to group removals from the Netherlands (page 56 of the Appellant's bundle). This refers to "several accounts" of returned asylum seekers being made on arrival to give their names and addresses and states that the security services then subsequently began within a few days to systematically and repeatedly visit these addresses to enquire after the returnees. In addition to the fact that the letter does not provide details of the backgrounds of the returnees in question and the numbers who experienced these difficulties, there is no suggestion, even in this letter, that those returnees who were visited repeatedly were subjected to treatment amounting in breach of Article 3.

11.14 We noted the letter from Docu Congo dated 16th May 2003 addressed to Mr. Stefan Vnuk of Fisher Meredith Solicitors in the United Kingdom (pages 58 and 59 of the Appellant's bundle, translations on pages 64 to 66 of the Appellant's bundle). This letter states that Docu Congo experiences difficulties in attempting to make contact with returnees. This letter refers to those returnees with whom Docu Congo were able to speak being terrified by the "harassment" they experience at the hands of the secret services and disappearing soon afterwards. We noted that this letter refers to "harassment" and, again, we noted that we are not provided with details of the returnees' backgrounds and the proportion of the returnees who experienced these problems.

11.15 There is another letter from Docu Congo, also dated 16th May 2002 addressed to the same Mr. Vnuk (pages 60 to 63 of the Appellant's bundle, translations on pages 67 to 70 of the Appellant's bundle). The first paragraph under the heading "A" states:

*Most people who are sent back to the DRC Congo which we have been able to follow over a period of time involve insecurities and even unlawful and arbitrary detention. Here are some precisions:*

We are not told how many people were returned to the DRC, the number of people Docu Congo spoke to and the number of people who alleged "insecurities" or "unlawful and arbitrary detentions". What follows this paragraph by way of

“precisions” quotes from 5 sources. The picture which these convey is a mixed one. Under the heading “testimonies”, specific examples of various people are given but, in the main, we are not told about the backgrounds of the individuals concerned, except, for example, for:

- the person mentioned in paragraph g. on page 69 of the Appellant’s bundle. However, we note that he was an active member of an opposition party.
- the person mentioned in paragraphs d. on page 68 of the Appellant’s bundle. However, we note that he was accused of treason and of being an active member of an opposition party.
- the person mentioned in paragraph h on page 69 of the Appellant’s bundle. We note that he was accused of “having come on behalf of the rebels”.

These examples do not show that returnees, regardless of their backgrounds, are at real risk of persecution or Article 3 ill-treatment simply on account of being failed asylum seekers. They do, however, show (once again) that the backgrounds of the individual returnees have to be carefully examined.

11.16 The Second Adjudicator referred to a report of the Danish Immigration Service dated August 2001. This was referred to in the CIPU Bulletin of May 2002. She had also been provided, on the Appellant’s behalf, with a copy of the report of the Danish Immigration Service dated August 2001. She appeared to criticise Mr. Ward for not having submitted a copy of the more recent report. At the hearing before us, Mr. Ward assured us that he had searched the website of the Danish Immigration Service and could find no trace of a report of August 2001. Mr. Deller assured us that he would check, for future reference, whether there had been a typographical error in the May 2002 CIPU Bulletin. We mention this simply for the record. We have to determine this appeal on the basis that the only report of the Danish Immigration Service is the one dated January 2000.

11.17 Section 6 of the Danish Immigration Service Report dated January 2000 (pages 1 to 5 of the Appellant’s bundle) deals separately with those who are forcibly returned and those return voluntarily. In the case of voluntary returns (page 4 of the Appellant’s bundle), the President of the Committee for the Defence of Human Rights in Kinshasa considered that such persons would not be at risk of persecution if they did not resume their political activities; however, if the returnee was known to have been politically active abroad, this might lead to a risk of arrest and possibly persecution. An anonymous source stated that, if the authorities were aware that the returnee had tried to obtain asylum abroad, he would probably be questioned about his stay abroad and his reason for seeking asylum; the source did not believe that generally returnees were suspected of supporting or collaborating with the rebels or of any other serious offences. In the case of involuntary returns (pages 4 and 5 of the Appellant’s bundle) (which is what Mr. Ward relied on), the report states that an anonymous source in an international organisation considered that a refused asylum seeker from the DRC who did not return to the DRC voluntarily and was therefore escorted to Kinshasa airport by foreign police would be arrested on arrival “almost without exception”, “very probably be imprisoned” without the right to see either a judge or a lawyer. Mr. Muila Kayembe, the Secretary General of the BLACK TOGAS (International Association of Lawyers and Magistrates Committed to Defending Human Rights, Kinshasa) also said that a person who was escorted home to Kinshasa by foreign police would be arrested on arrival in what was described as the “normal way” and would be questioned and, further, that the duration of his detention

might depend on the extent to which he was able to bribe the authorities. We considered that this is not consistent with another statement attributed to Mr. Kayembe in the same section of the report – that is, the section dealing with forcible returns. Mr. Kayembe is said to believe that a UDPS member who had been refused asylum abroad and was returned to the DRC would not necessarily have problems on returning to Kinshasa, although this would depend on whether he was a “known face” or had been accused by anyone after his return of having worked against the regime in the DRC. In any event, in considering the weight to be attached to the Danish Immigration Service Report dated January 2000, we bear in mind that:

- (a) what is said in that report is based on information gathered for the purposes of a report published in 2000; and
- (b) the UNHCR letter of 20th November 2001 states that the UNHCR is not opposed to the return of failed asylum seekers to the DRC provided that they have had access to a full and fair hearing.

We consider ourselves entitled to place great weight on the advice of the UNHCR, being a non-partisan body and which takes its responsibility of monitoring the fate of asylum seekers seriously.

11.18 We place no weight on paragraph 5.33 of the CIPU Report dated October 2002. This states that information from the British Embassy in Kinshasa in 2001 indicates that embassy officials there are “not aware” of any reports that indicate failed asylum seekers returned to the DRC via Kinshasa are subject to detention or persecution. In essence, Mr. Ward submitted that all this shows is that the British Embassy simply had no knowledge about the matter and, accordingly, the Second Adjudicator was wrong to regard this as “evidence”. Mr. Deller entirely accepted this assertion and we also agree. We accordingly place no weight on paragraph 5.33.

11.19 The letter from the UNHCR dated 22nd May 2003 addressed to Mr. Vnuk is at pages 71 and 72 of the Appellant’s bundle. Although we are able to tell that this letter was produced for a particular asylum seeker, the text of the letter is in general terms. It is appropriate for us to quote the main body of the letter:

*UNHCR can make the following comments on the return of unsuccessful asylum seekers to the DRC. The current situation in the Democratic Republic of Congo (DRC) is characterised by serious deterioration on both protection and security fronts. This raises questions as to whether unsuccessful DRC asylum seekers may be returned without security and protection risks.*

*Whilst maintaining that rejected asylum seekers may be returned to the DRC as a general rule, UNHCR would advise that humanitarian considerations should be given the broadest possible interpretation whenever return is envisaged. In this regard, it has to be borne in mind that the overall humanitarian situation in the DRC continues to be of concern, mainly due to human rights violations, epidemic outbreaks, major nutritional and health problems and restrictions on humanitarian access that are exacerbated by the ongoing hostilities. Over 2.5 million of the estimated 50 million Congolese citizens are now displaced. Over 500,000 people were displaced in 2002 alone, mainly due to intensified violence and renewed fighting. Almost a million of them have not received any aid because of the unstable security situation, especially in the eastern provinces of DRC.*

*With the above considerations in mind, UNHCR would caution against any forcible returns to areas outside Kinshasa. Persons originating from Kinshasa, and who are*

*not in need of international protection, may be returned there, provided that family links and economic support in the capital are ascertained.*

*In addition, asylum-seekers with certain profiles should receive particularly careful consideration prior to return. Issues such as the individual's place of origin, last place of habitual residence, family relations, ethnic group and profession should be considered before the person is removed. An individual approach is therefore required on the basis of the circumstances of each case and careful consideration of the changing political and security context in the DRC.*

*First hand accounts and reports from local human rights NGOs suggest 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 has sought asylum abroad owing to a political or military background, such person may be at risk of arbitrary detention and ill-treatment. **There have also been reports** of abuse of power by security offices at Ndjili International Airport (Kinshasa). It is alleged that they intimidate deportees to extort money, and send them to detention centres in cases where neither they nor their families can pay.*

*However, the DRC authorities maintain that the deportee who returns with a travel document "tenant lieu de passport" is required to complete immigration formalities upon arrival in order to confirm his or her Congolese nationality. He is not detained and is allowed to leave immigration premises once Congolese nationality is confirmed. The problem in the deportation procedure may occur when the deportee is not a Congolese national and has acquired a DRC passport in a fraudulent manner. In such cases, there have been reports that persons suspected of being nationals of countries considered as "unfriendly" (e.g. Uganda, Rwanda) may be arbitrarily detained and face ill-treatment. Nationals of other countries would normally be released after interrogation. It is therefore recommended that the nationality of rejected asylum seekers be carefully ascertained before they are processed for return to the DRC.*

*DRC authorities maintain that the information in the preceding paragraph correctly reflects the procedure in place to receive deportees. The UNHCR (UN High Commissioner for Human Rights) **has nevertheless received reports** about deportees transferred to the DRC security services such as ANR (Agence Nationale des Renseignements) and DEMIAP (Detection Militaire des Activites Anti Patrie) for interrogation. The Minister of Interior recently announced that these two security services no longer officially operate at Ndjili International Airport. Officially, only the police and the DGM (Direction Generale des Migrations) are currently operating at this airport. Reports suggest, however, that the remaining security services have not in fact ceased their operations and continue to maintain an unofficial presence at Kinshasa Airport.*

(the emphasis in bold is ours)

- 11.20 In this most recent letter from the UNHCR, the UNHCR are still maintaining that rejected asylum seekers may be returned to the DRC as a general rule. It cautions against forcible returns to areas outside Kinshasa but persons originating from Kinshasa may be returned there. Although in the case of persons originating from Kinshasa, UNHCR states that an individual's family link's and economic support in the capital should be ascertained, it does not state that the lack of such family links and economic support would mean that there is a real risk of the deportee receiving treatment amounting to persecution or in breach of Article 3. Indeed, if there was such a risk, the UNHCR would not maintain that, as a general rule, rejected asylum seekers may be returned to the DRC. The words which we have emboldened in the

quote above simply are not sufficient to discharge to the low standard of proof that failed asylum seekers are, per se, of adverse interest.

- 11.21 We note that Mr. Kennes states that returnees from the United Kingdom are viewed with more suspicion. We have no reason to take issue with this. However, if returning failed asylum seekers from the United Kingdom are at real risk of persecution after arrival in the DRC, we considered it inconceivable that the UNHCR would not say so.
- 11.22 We have no reason to suppose that the Respondent would seek to remove any failed asylum seekers to the DRC without valid identification and travel documentation. Indeed, we are aware from our own experience in dealing with these appeals that the Respondent does not effect returns to the DRC unless the returnee has been issued by the DRC Embassy in London with a valid travel document.
- 11.23 We have carefully considered the Tribunal cases relied upon on the Appellant's behalf. Of course, these decisions are not binding on us. However, we note as follows:
- (i) Mozu is a case which was decided on its own facts. Furthermore, the Tribunal in Mozu proceeded on the basis that Mr. Kennes' report was to be accepted without question. We have already explained above why we have concerns about Mr. Kennes report. In addition, it is not clear which UNHCR letter (referred to in paragraph 12 of the Tribunal's Determination) was referred to the Tribunal and whether (if it was the UNHCR letter of 20th November 2001 mentioned as the second letter in Mr. Kennes' report), the Tribunal's attention was drawn to the full text of the letter, or merely to the abridged version contained in Mr. Kennes' report. Mozu should not be regarded as authority for the proposition that failed asylum seekers are, per se, at risk of treatment amounting to persecution or in breach of Article 3 (if it ever was) and should no longer be cited.
  - (ii) Bashiya was a case where the Adjudicator had found that the Appellant was arrested and tortured in prison and the Tribunal determined the appeal on the basis that the cause of his arrests was his support for the MLC. We are aware that the Tribunal received evidence from Mr. Kennes but there is no indication, from the Determination itself, that the Tribunal was referred to the full text of the UNHCR's letter of 20th November 2001.
  - (iii) Nibanga was a case where the Adjudicator accepted that the applicant was an escapee from possible prosecution for assault and that he had had a very minor role in the UDPS. We are aware that the Tribunal considered many of the documents which we ourselves have been referred to. However, two things, in our view, stand out particularly – firstly, the Tribunal made no mention of the UNHR's letter of 21st November 2001; secondly, it is evident, from paragraph 17 of the Determination, that the Tribunal was not considering whether failed asylum seekers, regardless of their backgrounds were at risk on return. This is evident from the following extracts of paragraph 17 of the Determination:

*..... we take the view that the clear evidence shows ongoing harassment of UDPS members whether one endeavours to categorise them as active prominent, less prominent or simply members.*

and, at paragraph 19:

*We find that there is a real risk that mistreatment could take place and the reason being the appellant's political activities even at the low level.*

- 11.24 We, on the other hand, have specifically addressed ourselves to the question as to whether failed asylum seekers are, regardless of their backgrounds, at such risk.
12. We have concluded, on the whole of the evidence before us, that failed asylum seekers are not at real risk of being subjected by the DRC authorities to treatment which amounts to persecution or in breach of Article 3, *simply because* they are failed asylum seekers. It is patently clear, from all of the documents, that the circumstances of each individual should be carefully examined. As indicated in the UNHCR's letter of 22nd May 2003, there will need to be a careful examination, within the context of the changing political and security situation in the DRC, of factors such as the individual's place of origin, last place of habitual residence, family relations, ethnic group and profession and whether the individual has a political or military profile.
13. In our analysis above, we have, of course, referred to both persecution and Article 3, because treatment which amounts to persecution also amounts to treatment in breach of Article 3. In the appeal before us, only Article 3 is relevant.

### **Issue 2:**

14. Whilst we accept that, on his return, the Appellant will be questioned and possibly detained for a short while whilst his identity is checked, we find, on the totality of the evidence, that he will not be of adverse interest to the authorities. He was only detained and beaten on one occasion; this happened some 6 years ago. His detention was not on account of any political activity or association with any persons (paragraph 5.1(i) above). He was not suspected of any political activities (paragraph 5.1 (ii) above). His detention might well have been for some minor criminal offence; he has not indicated that he was ever charged with an offence (paragraph 5.2 above). He has not claimed to have been engaged in any political activity in the United Kingdom. We have, of course, taken note of the fact that he is from Kinshasa and that he would be returning from the United Kingdom. Although he no longer has a current valid passport (his Zairean passport issued when the Mobutu regime was in power having expired), his return to the DRC will not be effected until a travel document has been obtained from the DRC Embassy in London. We have also taken note of the fact that, as pages 73 and 74 of the Appellant's bundle show, the peace process in the DRC is stalling and the general situation in the DRC is deteriorating further. Of course, we give no guarantees but we make it clear that we have determined whether the Appellant would be of adverse interest to the DRC authorities on the low standard of a real risk.

### **Issue 3:**

#### **Article 3:**

- 15.1 It is undoubtedly the case that, quite apart from the security situation, the general humanitarian situation in the DRC is appalling. It has been rightly described as a humanitarian crisis, and one of the worst such in the world. This is evident from the Oxfam report, Mr. Kennes' report and the Docu Congo report at pages 67 to 70 of the Appellant's bundle. There is a lack of food, water and healthcare, to name but a few of the problems. In his report of 19th June 2002, Mr. Kennes states that he has never before seen so many emaciated mothers as he witnessed in Kinshasa (page 7 of the report on page 31 of the Appellant's bundle). He says that, even in Kinshasa,

formerly well-to-do families are often compelled to breed rats for food to avoid starvation. Mr. Ward did not seek to suggest that everyone in Kinshasa is living in inhuman or degrading conditions but submitted that a significant number clearly do. The Docu Congo report at page 70 of the Appellant's bundle states that eating, even if only once a day, is currently considered a miracle of God in Congo. It also states that a person who has lived for a while in Europe is incapable of adapting to this life.

- 15.2 All of this evidence has to be set against the fact that the UNHCR has not advised against the return of individuals who do not meet the criteria under the Refugee Convention to the DRC, although we noted that the UNHCR letter dated 22nd May 2003 refers to epidemic outbreaks, major nutritional and health problems and restrictions on humanitarian access. We are aware that the UNHCR does take a wider view of the overall humanitarian situation in a country and, where the circumstances warrant, has in the past advised against the forcible return of persons who do not qualify under the Refugee Convention. For example, in the case of Kosovo, the UNHCR did recommend that signatory states ought to consider allowing individuals falling within certain categories to remain. In the case of Afghanistan, UNHCR did advise against the return of Afghan nationals to Kabul for some time after the fall of the Taliban, on account of the humanitarian situation in Kabul. In the case of the DRC, the UNHCR have not issued such general advice. In the case of persons originating from Kinshasa, the UNHCR's advice is that persons who are not in need of international protection may be returned there, provided that family links and economic support in the capital are ascertained. In this case, the Second Adjudicator considered it questionable that the Appellant's father had died or that he has no other family members to turn to on return. We assume that he has no one he could turn to. In addition, to the general problems we have already referred to, he will experience problems in obtaining accommodation and employment.
- 15.3 However, the threshold for a breach of Article 3 to arise is a high one. We are mindful of the fact that the Appellant has now spent some 6 years in the United Kingdom. Mr. Ward submitted that his 6-year residence in the United Kingdom, coupled with the fact that he works for a large department store in London, would not equip him for the struggle to survive in the general conditions in the Kinshasa. Although we recognise that much in the DRC has changed since he left his country, the Appellant was born and brought up there. He was in his late teens when he left the DRC; he is now in his mid-twenties. Our attention has not been drawn to anything which suggests that he has health problems and is not fit and healthy. We do not accept that he would not be able to readjust to life in the DRC, although we accept that he will find the conditions very harsh.
- 15.4 We find, on the evidence before us, that the general humanitarian condition which the Appellant would have to endure on his return to the DRC is not such that Article 3 threshold is reached.

Article 8:

- 16.1 No evidence has been adduced to suggest that reliance is placed on the right to family life, as opposed to private life.
- 16.2 To the extent that reliance on the right to private life is placed solely on the general humanitarian condition in Kinshasa, the claim fails, given our finding that the threshold for a breach of Article 3 is not reached and given the Court of Appellant's judgement in Ullah & Do [2002] EWCA Civ 1856.

- 16.3 With regard to the Appellant's right to his private life in the United Kingdom, the Second Adjudicator noted that the Appellant appears to be a single man living in rented accommodation and that, whilst he has friends in the United Kingdom, he did not appear to her to have ties of a more binding nature. However, we note that he has been in the United Kingdom for some 6 years, which is a considerable length of time.
- 16.4 We are prepared to determine this appeal on the basis that, during his six years in the United Kingdom, he will have formed some connections and associations which would qualify as private life under Article 8.
- 16.5 It is not in dispute that any interference with the Appellant's right to his private life in the United Kingdom is in accordance with the law and that the reason for the interference comes within one of the (exhaustive) list of reasons in Article 8(2) (namely, the exercise of legitimate immigration control on the part of the United Kingdom).
- 16.6 The question therefore is whether the interference with the Appellant's right to his private life in the United Kingdom by his removal would be proportionate to the legitimate aim of immigration control. In this connection, the general humanitarian condition in the DRC is relevant, as are the facts mentioned in paragraph 16.3 above. Immigration control is a very weighty consideration and cannot be lightly overridden. Cases where the general humanitarian condition is not found to give rise to an Article 3 breach but where removal is nevertheless disproportionate under Article 8 will be rare, rather than the norm. In this particular case, we are satisfied that the Appellant's removal is proportionate to the legitimate aim of immigration control.

### **Decision**

**The appeal is dismissed.**

Ms. D. K. GILL  
Vice President

Date: 6<sup>th</sup> June 2003