

IMMIGRATION APPEAL TRIBUNAL

Dates of Hearing: 7 October 2003 and 17 December 2003

Date Determination notified.....28/01/2004.....

Before:

Dr H H Storey (Chairman)

Mr G Warr

Mr A Jordan

Secretary of State for the Home Department

APPELLANT

and

RESPONDENT

DETERMINATION AND REASONS

1. This case is a country guideline (CG) case on the issue of whether failed asylum seekers per se face a real risk of serious harm upon return to the Democratic Republic of Congo (DRC). As such it is intended as definitive unless there is a change of circumstances materially affecting the treatment of failed asylum seekers upon return to the DRC. Originally heard on 7 October 2003, it was reconvened on 17 December 2003 in order to hear further submissions from the parties on materials which had come to hand since the original hearing. Having been tasked with reaching an authoritative decision on this issue, we saw it as essential to ensure we took cognisance of all materials having a bearing on the issue.
2. The appellant, the Secretary of State, has appealed with leave of the Tribunal against the determination of an Adjudicator, Mr M.T. Sykes, allowing the appeal by the respondent ("claimant"), a national of Democratic Republic of Congo (DRC), against the decision of the Secretary of State refusing to grant leave to enter on asylum grounds.

Mr C. Buckley appeared for the appellant. Ms S. Malik of Counsel instructed by Birchfields Solicitors appeared for the respondent at the first hearing. Mr F Aziz, a solicitor in this firm, represented at the second hearing.

3. This case had been listed some time ago to be a country guideline case in order to resolve a conflict at that time between Tribunal decisions, several on the one hand finding that failed DRC asylum seekers were not at risk and two – Mozu [2002] UKIAT 05308 and B [2003] UKIAT 00012 (DRC)) - finding that they were. However, since then there have been several reported Tribunal decisions specifically addressing this conflict and resolving it in favour of the view that failed asylum seekers per se are not at risk. They include K [2003] 00032, N [2003] UKIAT 00050, L [2003] UKIAT 00046, M [2003] UKIAT 00051, [2003] UKIAT 00058, M [2003] UKIAT 00071, D [2003] UKIAT 00112 and [2003] UKIAT 00136. It can be seen that there are two cases bearing the letter “M” : 00051 and 00071. We shall hereafter refer to M 00071 simply as M, in view of the fact that we cite it more than any other case.

4. We consider that these decisions, the decision of M in particular, based as it is on a comprehensive analysis of the relevant evidence, give valid reasons for rejecting the view that failed asylum seekers per se are at risk. Since we adopt the analysis and reasoning given in M in particular, we see no necessity or virtue in re-examining the same body of evidence and essaying our own separate analysis of it. As the Court of Appeal stated in S & Others [2002] INLR 416 at para 28, there is

“no public interest, nor any legitimate individual interest, in multiple examinations of the state of the backdrop [of general country conditions] at any particular time. Such revisits give rise to the risk, perhaps the likelihood, of inconsistent results; and the likelihood, perhaps the certainty, of repeated and, therefore, wasted expenditure of judicial and financial resources upon the same issues and the same evidence”. (See to similar effect, Indrakumar [2003] EWCA Civ 1677, 13 Nov 2003 at para 13).

5. However, before us there were several new items of evidence that had not been considered in previous cases. The most important of these were:

- evidence relating to new Home Office procedures in respect of removals to the DRC;
- a UNHCR fax dated 15 December 2003;
- an important new report by Dr Erik Kennes;
- materials assembled by Bail for Immigration Detainees (BIDS) and put into the public realm in late 2003 in ILPA publications. These

included details of two cases referred to as AB and DE, both of whom were said to have been ill treated in the DRC following removal from the UK in late 2003.

6. Before proceeding further, two general observations need to be made about the inclusion of the last two items just mentioned. The recent report by one of the leading recognised experts on the DRC, Dr Kennes, was not adduced by either of the parties in this case. The Tribunal became aware of it in the course of dealing with another case which had to be remitted. However, given that it dealt with generic issues and included a statement that he was aware its contents would be used in an immigration appeal and, given that no objection was made by the representatives in that other case to its use by the Tribunal in this, we considered it right to refer to it. We made the parties aware of our intention to refer to it and invited them to make submissions on it.
7. In the case of the BIDS materials, which we shall particularise more precisely later, these became known to other Tribunal panels in cases heard since the original hearing. Having noted that they had been published by ILPA and placed thereby into the public realm, we decided to take account of them. As already noted, we reconvened the hearing in order that the parties had proper opportunity to make submissions as to their relevance to the issue central to this case.
8. The steps we have taken in respect of these two items of evidence are unusual but fully justified in our view by the task we were set of reaching a decision to be treated as a country guideline case. As Laws LJ observed in S & Others [2002] INLR 438 at para 15, where a case is selected in order to produce a decision which is to be taken to be factually authoritative,

“the exercise upon which the IAT is engaged assumes something of an inquisitorial quality, although the adversarial structure of the appeal procedure of course remains... It is important not to lose sight of the fact that the jurisdiction of the IAT is as pragmatic as any other.”

9. At paragraph 29 Laws LJ added:

“... when it determines to produce an authoritative ruling upon the state of affairs in any given territory, it must in our view take special care to see that its decision is effectively comprehensive. It should address all the issues in the case capable of having a real, as opposed to fanciful, bearing on the result and explain what it makes of the substantial evidence going to each such issue.”

10. In Shirazi [2003] EWCA Civ 1562 the Court of Appeal re-affirmed the observations. Once, therefore, the Tribunal embarks upon the task of making a country guideline decision, in the sense identified by the Court of Appeal in S and Others, it is not only valid but also in everyone's interest that it does all in its power to ensure it has before it all known materials having a material bearing on the relevant issues. It would defeat the object of the exercise if the Tribunal were to confine itself to the body of evidence adduced by the parties even when it is aware that that body of evidence omits potentially material evidence.

The claimant's case

11. It is salient next to set out the facts of this particular case. The claimant was a national of DRC born in the town of Bukavu on 9 September 1975. She and her husband were market traders who lived in Kinshasa. She had joined the Union of Democracy Social Progress Party (UDPS) in 1996 and was active in the women's section. In 1999 her husband began working as a driver for a Lebanese businessman. In January 2000 former President Joseph Kabila was assassinated. She claimed that her husband had been arrested in February 2000, being suspected, along with the Lebanese businessman, of involvement in the assassination of President Kabila. He had been detained in Makala prison for 10 months. He fell ill and was then released, being required to report every day on probation. In July 2001 police raided their house and arrested the claimant and her husband. She was interrogated about her husband and the people for whom he drove. She told them he was only a driver. She was raped by several police officers. They released her after two weeks because she was ill. She was re-arrested later in July and again beaten, tortured and interrogated. She was released again after a further two weeks but told to report every day. She went into hiding and then fled the country.
12. She claimed that her UDPS membership would put her at risk on return. However, the principal basis on which she put her claim was that she would be at risk because she and her husband had fallen under suspicion of involvement in the assassination of President Kabila.

The Adjudicator's assessment

13. The Adjudicator accepted that she had been a UDPS member albeit a low-level one. However, he did not consider the objective country materials bore out that low level UDPS members were at risk in the DRC. As regards the claimant's account of falling under suspicion of being involved in the assassination of President Kabila, the Adjudicator did not find it credible. He rejected her account of her husband's arrests and detentions.

14. We do not need to go into the Adjudicator's reasons for accepting part of the claimant's evidence but rejecting other parts. There was no attempt at a cross-appeal and no service of a respondent's notice under Rule 19 of the Immigration and Asylum Appeals (Procedure) Rules 2003. Neither party has sought to persuade us to go behind these findings and in any event we consider they were based squarely on the evidence. However, insofar as his conclusions based on these findings dealt with risk arising from UDPS membership, we shall need to return to them later. And, of course, we have also to examine the sustainability of his conclusion on the generic issue of risk to failed asylum seekers, which he stated as follows:

"22. There is no Article 3 claim in this case but the appellant is now towards the very end of her pregnancy and, if returned, is likely to be sent back with a very young child. Having regard to the Tribunal's findings in Mozu, I find that there is a real risk of imprisonment and rape on her return and of consequent harm to her child. The CIPU Report deals with prison conditions at paragraphs 4.14-4.37. I need only cite paragraphs 4.14:

'The present regime operates 220 known prisons and other places of detention, and in all such facilities, conditions are harsh, unsanitary and life-threatening ...Prisoners reportedly are beaten to death, tortured, deprived of food and water and die of starvation.'

23. I conclude that if returned the appellant is at real risk of being detained and subjected to persecution or to torture, or inhuman or degrading treatment or punishment. This would be for a Convention reason – the political opinion imputed to her from her having sought asylum in the UK.'

The grounds of appeal and submissions

15. The grounds of appeal to the Tribunal were essentially twofold. Firstly, it was argued that the Adjudicator fell into procedural error by unfairly denying the appellant the opportunity to present his case or seek to rebut the point relied upon by the Adjudicator. This argument arose because the Adjudicator said prior to the commencement of closing submissions that he would place heavy reliance on the Tribunal

determination of Mozu [2002] UKIAT 05328. The grounds stated that although the Adjudicator gave the respondent a short time to obtain instructions, the latter

‘was unable to provide the Adjudicator with any hard evidence due to the fact that the fax machine at Salford Magistrate’s Court was not working. The HOPO offered to provide relevant documents at the first available opportunity but this was denied and the Adjudicator said that he would only accept what was in front of him.’

16. We have not been provided with the Adjudicator's comments on the proceedings; but since the determination mentions supplying a copy of Mozu to the representatives, and since it is clear that an offer to provide relevant documents in response was made, we have enough information before us to decide this matter. We quite understand a decision not to adjourn except for a short time in such circumstances. However, given that the Adjudicator e himself invoked Mozu as authority, it is most unfortunate he did not allow the parties a short time *after* completion of the hearing to submit any more recent cases. The fact of the matter was that at the date he heard this case (10.3.03) there were several reported Tribunal decisions postdating Mozu which expressly held that this decision was not to be followed and, since it was his own research which had located Mozu, that same research should have taken care to check whether Mozu was representative of the current position of the Tribunal on this issue. In this regard we would emphasise that since the issue was plainly one which potentially affected a significant number of cases, the procedural duty of care on the Adjudicator was even greater. Further, the result of refusal to allow time for the parties to adduce further cases was a wholly artificial one. By default Mozu was wrongly taken to reflect the current position of the Tribunal as a whole.
17. The second ground of appeal was that the Adjudicator was wrong to conclude that failed asylum seekers were at risk upon return to the DRC.
18. In amplification of this ground of appeal Mr Buckley contended that the objective evidence did not demonstrate a real risk of serious harm facing failed asylum seekers per se. That was not the UNHCR position as can be seen from their letter of September 2003 and their very recent fax. Although their recent statements represented a shift in view from their June 2002 position, they did not go as far as saying that all failed asylum seekers were at risk. Furthermore, whatever the position previously, there had been a recent change in the procedure adopted

by the Immigration Service Documentation Unit (ISDU) in respect of DRC nationals, which reduced even further the risk of their being viewed adversely on return.

19. Prior to September 2003 there had been difficulties with securing documentation from the DRC Consulate. Since September 2003, whilst the DRC still does not accept an EU travel document, they will issue, where satisfied of identity and eligibility, an emergency travel document. There is an application form which requires four photographs and evidence of any ID card etc. The Home Office forwards the completed application form with a covering letter to the DRC authorities who, if satisfied as to identity and eligibility, will issue emergency travel documents. If the DRC authorities here are not satisfied, then reference can be made back to the DRC to see if eligibility can be established from there. In the short period since this procedure has been in place, the Home Office was not aware of any situation where, a completed form having been forwarded, a travel documents was refused. The upshot of this new procedure was, said Mr Buckley, that if a DRC national was returned, leaving aside the cases where they already had valid documents, they would carry emergency travel documents.
20. This new procedure, added Mr Buckley, answered some of the concerns expressed by UNHCR and Dr Kennes, who highlighted problems for persons returned without travel documents.
21. Whilst the UK did not monitor returns, he added, the experience of other EU countries indicated that returns to the DRC were unproblematic. It was true that the Dutch had at one stage temporarily suspended removals, but this was due to complaints about the manner in which returnees were transported to the airport (keeping them incarcerated with Cameroonians). These concerns were not related to conditions on return.
22. Mr Buckley also sought support from the latest CIPU materials, the April 2003 and October 2003 Assessments in particular. The criticism made of CIPU that it had not appended the Dutch and Belgian reports with their Bulletin was misplaced: the Bulletin was referenced and in any event both documents had been provided to the Tribunal. The fact of the matter was that the Belgian authorities had monitored returns; what they found had therefore to be given serious weight. Regarding the criticism made that CIPU was selective, even if that were true (which he did not accept) the Tribunal in this case had been provided with all the relevant source documents themselves.

23. As regards the position taken previously by the Tribunal, he pointed out that apart from Mozu and B, the consistent Tribunal position had been that failed asylum seekers were not at risk. He referred to M as a recent example.
24. In relation to the BIDS materials Mr Buckley urged us to be very circumspect in attaching any weight to them. In his view they largely consisted of hearsay, unsubstantiated allegations and assertions and did not provide proper evidence from the people said to have been mistreated on return. It was virtually impossible to challenge the evidence presented relating to AB and DE since no proper statement of evidence had been submitted in relation to either. Both accounts had evident shortcomings in any event: it was highly implausible that a DRC guard would allow someone detained a mobile phone so he could contact parties in the UK.
25. Mr Buckley submitted that the BIDS evidence was also at odds with the evidence from the authorities of two countries (Belgium and the Netherlands) based on actual returns which had taken place. The letter from the Dutch Embassy in London dated 21 July 2003 gave figures for the number of failed asylum seekers returned to the DRC between 2000 - May 2003 and stated that the Dutch Embassy in Kinshasa is not aware of failed asylum seekers having any problems with the security services upon return. The letter from the Belgian Embassy dated 22 July 2003 also gave figures for return of failed asylum seekers on a non-voluntary basis between 2000 - July 2003 and stated that both the Belgian Embassy in the DRC and officials from the Belgian Immigration Department monitor the safety of failed asylum seekers returned to the DRC from Belgium. It stated that officials from this Department regularly go to the DRC on fact-finding missions to obtain information on subjects that feature in asylum applications. It concluded: "None of these officials have seen or heard of any reports of failed asylum seekers being persecuted for being failed asylum seekers - either before or since November 2002". The Home Office was not aware, said Mr Buckley that since these two countries had written regarding their experience of returns either had ceased removals because of any concerns about risk on return. BIDS' representation of the Irish position was incorrect. The Home Office had ascertained from the Irish counterpart of CIPU that that country did not have a policy of non-return and the only obstacles to returns were now practical and financial. It had not been possible to check what was the Canadian position, but it was well-known that the Canadian policy adopted criteria broader than that of serious harm under the Refugee Convention. CIPU was quite accurate to state that it was not aware of any corroborated evidence of persons being ill treated on return to the DRC.

26. The DocuCongo evidence, said Mr Buckley, had the same shortcomings as the other BIDS' materials and it stated that they are unwilling to divulge their particular sources.
27. Miss Malik considered that there was a real risk on return of transfer to migratory detention centres by the intelligence services. If such a transfer does take place, there would be a real risk of serious harm because of conditions in these detention centres. The fact that the Dutch did not monitor returns meant their conclusion that there were no reported problems lacked an empirical basis. Even though the Belgians said they monitored, they too relied largely on a lack of adverse reports. They did not explain how they monitored returns. The 22 December 2002 British Embassy letter did not explain what evidence it relied on. Dr Kennes' recent report lacked clarity and what was "believable" was subjective to each individual. The new Home Office procedure raised as many doubts as it answered, since it envisaged that in some cases checks would be made with the authorities in the DRC who could in certain cases have ulterior motives for confirming an individual could be issued with travel documents.
28. At the resumed hearing Mr Aziz initially requested an adjournment in order to have more time to submit further evidence. We gave that request careful consideration but rejected it. It is true the hearing was resumed at relatively short notice, but prior to the morning of the hearing no adjournment had been requested and it seemed plain to us that some of the enquiries Mr Aziz now said he needed to pursue, for example contacting BIDS, could have been pursued on 10 December, when he was told that a further hearing would take place and when he confirmed he was able to attend and represent.
29. Mr Aziz submitted that the recent UNHCR fax confirmed that the situation in the DRC was fluid and the risks for returnees high. If the failure of UNHCR to state that all returnees were at risk was to be relied on, the Tribunal should bear in mind that UNHCR is scarcely in a position to give first-hand reports. DocuCongo merited consideration as an independent organisation. In the light of the recent IAS critique of CIPU, extracts from which had been put before the Tribunal, we should be slow to attach weight to their assessment. Mr Buckley's claim that, as a result of recent Home Office procedures agreed with the DRC Consulate, there would be less risk for returnees, as they would now have validated travel documents, overlooked the fact that both "AB" and "DE" were persecuted despite having travel documents.
30. In relation to the BIDS materials, the Tribunal, he said, should take note of the fact that despite various letters from BIDS to the Home Office in

July, August, September and November 2003, nothing had been done regarding the cases that had been brought to their attention.

The issue of failed asylum seekers

31. We have already noted the obvious point that cases which raise the issue of failed or rejected asylum seekers are in an unusual category because they potentially affect all or many claimants who are nationals of the country concerned. It is particularly important, therefore, that care is taken with such cases and that parties and Adjudicators ensure reference is made to all previous relevant decisions of the Tribunal and courts. In doing so it is also imperative that greater weight is attached to recent treatments, so as to ensure that the guidance relates to the current and not simply the historic position in a country, although in the absence of significant changes older decisions may well still contain valid guidance.
32. The issue of failed asylum seekers is often referred to as the "Senga" point after the unreported case *R V Immigration Appeal Tribunal ex p Senga*, 9 March 1994 in which Laws J (as he then was) accepted that the mere fact of having claimed asylum in another state might in some circumstances put the person at risk for a Convention reason. Of course, theoretically it is relevant in every asylum appeal. Even if a claimant is found wholly lacking in credibility so that nothing is accepted other than that he is a national of country X, it is always possible that he would still face a real risk of serious harm upon return, if the authorities of his country would take an adverse view of anyone returning from the country where he has claimed asylum. However, refugee law deals with issues of practical, not theoretical risk. Whilst one can easily think of an imaginary case in which a country may have some valid reason for applying serious sanctions against returnees they know have applied for asylum in other countries, e.g. if the only nationals of country X who have gone to country Y are persons who have committed some serious non-political crime, then one could at least understand if the authorities in country X adopted blanket sanctions against all returnees from country Y. But in the modern world in which international travel is intense, such a case is unlikely ever to arise. In practice, for a country to seek to persecute or inflict serious harm upon all failed asylum seekers as a blanket category is usually an index of the fact that it is a highly repressive one in which the authorities have reached the stage of arbitrarily labelling broad categories of its nationals as its enemies and riding roughshod over basic human rights and fundamental freedoms.
33. Because it reflects a highly unusual state of affairs, it is not in our view an issue which Adjudicators need to routinely address, even in the case of countries with a poor human rights record. Thus the Senga point is

only relevant in the case of countries where there is some significant body of objective evidence indicating that the authorities do (or would) view failed asylum seekers adversely.

34. Of course, the reason why they take that view may vary. It may be important in certain types of cases to particularise why the authorities are said to react adversely to failed asylum seekers. It may be that they consider all returnees adversely. It may be they only view adversely returnees from certain countries (e.g. because of foreign policy conflicts). It may be they only view adversely returnees whom they know or perceive to be failed asylum seekers. In some cases it is suggested that their manner of return (e.g. by escort or charter flight) may serve to signpost them as failed asylum seekers. It may be that time is a relevant factor: it is sometimes argued that nationals returning after a lengthy period are more at risk of being labelled as failed asylum seekers/persons disloyal to the regime. Such variations may be more or less important depending on the country and the prevailing circumstances in relation to which the issue arises. But whatever the reasons and in whatever form it arises, the issue of failed asylum seekers per se should only be considered if there is a significant body of evidence which can be adduced in its support. One, albeit not the only, source whose assessment will always require serious consideration, is UNHCR by virtue of the fact that it maintains a presence and network of contacts familiar with refugee issues in a great many countries.

The DRC context

35. Having noted that the failed asylum seeker issue always needs to be considered in its particular country context, we need to ask whether there are any significant variables in the DRC context. We note first of all that there is some evidence to indicate that the DRC authorities view returnees from the UK differently from returnees from other EU Countries. Dr Kennes has mentioned this in a number of reports. BIDS for one has maintained that since the Human Rights Watch report of July 2003 records that Britain is indirectly supporting Ugandan and Rwandan rebel forces present in the country, it is a potential consequence that an asylum seeker returned from the UK may be the subject of greater suspicion on that basis. However, for reasons we go on to give, we do not think that there is sufficient evidence to show that any greater suspicion on the part of the DRC authorities leads them to perceive returnees from the UK as persons they should ill- treat. The evidence in our view establishes that an adverse interest by the DRC authorities in DRC returnees is likely to be taken only in specific categories of cases, e.g. those with a military or political profile, without reference to the sending country, certainly where it is an EU country. Nor do we consider that being returned by means of a charter flight would significantly increase the level of risk on return, since, in

the UK context, only persons who have obtained travel documents verified by the DRC Consulate are returned.

36. We note further that returns from the UK are to Kinshasa. This is relevant when it comes to considering claims from persons who come from the east or rebel-held areas. Unless there is some reason to consider that they cannot remain in Kinshasa, or that the authorities would view them adversely because of where they come from, they will not necessarily succeed in their claim by showing they would face serious harm in their home areas.
37. With reference to the new items of evidence listed earlier, we shall deal with new Home office procedures and the UNHCR fax in the course of our later assessment. However, it is helpful if we give more detail at this stage concerning the report of Dr Kennes and the BIDS materials.

The Kennes report of 29 September 2003

38. This report specifically addresses the issue of risk to failed asylum seekers and makes the same point as UNHCR does about the fluid and unstable situation in the country. He states that since there is much “manipulated information” circulating about asylum seekers, he has sought to rely on cases interviewed by Kinshasa-based researchers under his supervision. His overall position is categorical:

“In the Democratic Republic of Congo, the failed returned asylum seekers are as such not a persecuted category. This means that a failed returned asylum seeker as such will not automatically be arrested at the airport (p.2).

...

The mere fact of being a failed returned asylum seeker on (sic) itself does not create a security risk. The aggravating factors are the possession of valid travel documents, and the existence of a case against this person (p. 8).”

39. However, his report qualifies this position by reference to a distinction between “returned asylum seekers who had a genuine claim to political asylum but were unjustly refused in the country of asylum” and those who did not have a genuine claim. In regard to the former, he mentions three cases, one concerning a middle-level civil servant, one a special police services employee and one a former DSP member. In each case they had fallen foul of the DRC authorities before they left and in each case met persecution on return. But in regard to the latter, he states, with reference to several cases:

“ If somebody invented a story and returns to the country with valid travel documents, there will be no problem for him/her at the airport. He will enter the country as anybody else.

If, however, no valid travel documents can be presented, the person will experience difficulties. In this case, the returnee is put under custody with the aim to squeeze money out of his or her pockets... If the person or his family is unable to pay, the returnees will be transferred to CPRK (Makala) prison until he or she pays, most likely a higher fee than initially requested. “

40. His report also discusses “migratory detention centres” concluding that whilst these are not the simple screening agencies described by the authorities, they are only partly operational and do not involve persecution except for those already identified for persecution before they left. “The real function of the detention centres”, he writes, “is thus linked to the overall government policy towards opposition”. In the context of an analysis of Amnesty International correspondence and UNHCR documents, his report goes on to consider what are the risk categories in the DRC currently. His report includes returnees without valid travel documents, persons known or perceived to have a military or political profile/background, persons who have other nationalities than Congolese (e.g. Rwandan or Ugandan) and Tutsi or Tutsi-like groups. He confirms his view that despite the announcement by the Minister of Interior that the Agence Nationale des Renseignements or ANR (security services) and Detection Militaire des Activites Anti patrie or DEMIAP (military security) services were no longer operating at the airport, it is obvious they are still covertly active there.

The BIDS materials

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.
46. The BIDS materials also make reference to some Amnesty International materials. Adding to earlier Amnesty International evidence about

detention and mistreatment of DRC nationals returned to the DRC from Congo (Brazzaville), Amnesty International (Netherlands) has had reports of persons who, having been removed from Holland by charter flight, found themselves subjected to frequent visits to their home addresses by the authorities.

47. Also in the BIDS bundle is a letter from Amba Bongo, Project Director of an NGO called Active Women, chronicling a field trip she made between August and September 2003. It cites "my own source, Mr X, officer of the Agence Nationale de Renseignements (ANR) assigned to N'djili Airport" claiming that failed asylum seekers are ill treated and persecuted on arrival at the airport regardless of their gender, or the fact that they are returned with children or not.
48. BIDS also contains commentary on the policies and practices of other governments as regards the return of failed DRC asylum seekers. According to BIDS the Irish government has a policy of "not considering returning failed asylum seekers to the DRC", Canada does not return DRC nationals and, although Holland and Belgium do conduct returns, their own monitoring procedures suggest that there remain doubts among Dutch and Belgian authorities about whether DRC nationals will be safe on return. BIDS also complains that but for a failure to properly investigate the results of UK returns, the Home Office would have recognised that failed asylum seekers have been and continue to be at risk.
49. Earlier letters from BIDS (also in the bundle of BIDS materials) seek to rely on the ACCORD/UNHCR Report of June 28-9 2002 and UNHCR concerns as set out in a letter of 23 January 2003 about the risks to returnees of being sent back by charter flight. Although recognising that UNHCR has stopped short of advising against blanket returns, BIDS says the body has shown increased levels of concern since January 2003. BIDS also raises concerns about the role in assisting the (UK) Home Office with verifying the DRC nationality of certain potential returnees of a Mr Kabwe, an agent for the DRC government.

Assessment

50. In M the Tribunal reached two main findings: (1) that failed asylum seekers per se are not at risk; but that (2) since the situation in the DRC remains one in which there are serious concerns about the ongoing level of human rights abuses committed by the government and other organisations, great care has to be taken to recognise that there are specific risk categories, in particular persons (we rephrase slightly) having or perceived as having nationality of a country hostile to the DRC and persons who have or are perceived to have a military or political profile. M reminds us that the DRC has a highly unstable political past and political present and that sight should not be lost of

the fact that “some 3 million people are estimated to have been killed during the course of the civil war, making it the largest conflict, in terms of loss of life, since World War 11” (paragraph 12).

51. In seeking to assess the new evidence to hand since M, we have asked ourselves the following question. What sources among the many placed before us can we attach most weight to and why? In our view there are three sources which merit very considerable weight being placed upon them. They are UNHCR, European governments and the September 2003 report of Dr Kennes.

The UNHCR position

52. We consider the Tribunal has been entirely right to place considerable weight on the UNHCR position. As was noted in M, what is clear from recent UNHCR letters, that of 2 September 2003 in particular, is that although they no longer endorse routine returns of DRC nationals who are failed asylum seekers, they do not support the view that failed asylum seekers per se are at risk either. Rather they favour a case-by-case approach, looking at factors which may be relevant in predicting the attitude likely to be taken by the DRC authorities to the claimant on return (we shall return to the subject of specific risk categories later).
53. We now have before us a further fax from UNHCR elicited by a query from the solicitors acting in this case. It is dated 15 December 2003. It confirms that information obtained from its Headquarters in Geneva had not altered the position taken by the UNHCR in its 2 September 2003 letter. Since Mr Aziz has sought to cast doubt on UNHCR’s ability to know what actually happens in Kinshasa to returnees, it is pertinent to note that this fax confirms what was made clear in the earlier ACCORD/UNHCR report of June 2003, which likewise did not support the view that failed asylum seekers per se were at risk. The fax states:

“Our September assessment was drafted on the basis of information which was sourced directly from our field office in the DRC and cleared by our Headquarters in Geneva.

UNHCR’s view on country of origin information are a primary source as they are based on first-hand reports from its field presence around the world.

...

We make continuous efforts to ensure that our positions mirror the current situation in the country concerned. In line with this, given the particularly fluid political situation in the DRC during the past months, our position on the DRC has seen changes when the need arose”.

54. This fax reinforces our view that the UNHCR position is properly to be regarded in the DRC context as a primary source based on first hand reports evaluated by persons with particular awareness of the Refugee Convention criteria. To the extent that BIDS and the representatives in this case have argued that the UNHCR position supports their own view as regards failed asylum seekers, they are simply incorrect. Unless and until UNHCR concludes that all failed asylum seekers are at risk, we expect representatives in DRC cases to cease wasting judicial time by trying to argue that the UNHCR position does not mean what it says.
55. One other matter we should note is that UNHCR has not maintained the concern expressed in its January 2003 letter that returning persons on charter flights adds to the risk factors, by drawing attention to their failed asylum seeker status.
56. Even though UNHCR has apparently maintained its concerns about reports of abuse of power by security officers at Ndjili international airport, in the form of intimidation of deportees to extort money and send them to detention centres where neither they nor their families can pay, it is clear that they do not consider this a widescale enough problem to place returnees generally at real risk of such treatment. In any event we entirely agree with the assessment of this problem made at paragraph 37 of the Tribunal determination in M.

Policies and practices of other countries, EU governments in particular

57. Although the Tribunal has previously considered evidence relating to the recent experiences of the UK and EU countries, the Netherlands, Belgium and France in particular, it is important that we deal with it here, in view of the assertion by BIDS that the experiences of other countries generally is demonstrative of a real risk to failed asylum seekers on return.
58. Let us first turn to the evidence from the British Ambassador to the DRC who stated in November 2002 that he had not seen any evidence to indicate that failed asylum seekers are persecuted on return. Ms Malik and Mr Aziz, echoing BIDS's contentions, have argued that there is nothing to show that the British Ambassador has any firm empirical basis for this statement. We would agree the letter from the Ambassador does not specify his sources. We are also aware that the Tribunal in M [2003] 00051 decided to "place no weight" on this evidence. However, it is clear that since early 2000 if not earlier, the UK authorities here and abroad have been aware of concerns expressed about returns and we may at least infer, therefore, that this statement by the British Ambassador was made by reference to real checks made

in Kinshasa itself. Furthermore, as the Tribunal noted in M, this statement is supported by the comments of Mr Byaruhanga, Central Africa Researcher, of Amnesty International, London who stated in the ACCORD/UNHCR report of June 2002 that he was not aware that people have been detained solely for seeking asylum.

59. Whilst dealing with the evidence from the British Ambassador, it is pertinent to address the evidence concerning recent changes in Home Office policy since early September 2003 regarding removals to the DRC. Bearing in mind the importance attached by UNHCR and by Dr Kennes (the latter on the basis of research carried out under his auspices in Kinshasa), to the possession of travel documents (see below), we consider that these changes are particularly significant. Their effect is that no-one will be returned to the DRC without valid travel documents. According to Dr Kennes, possession of a travel document not only obviates risk of adverse attention on return (except for those already targeted), but also greatly reduces the risk of extortion at the hands of DRC officials demanding bribes.
60. Mr Aziz highlighted concerns raised by BIDS regarding Home Office liaison with a DRC Ministry of Interior representative, a certain Mr Kabwe, who is said to have visited London in order to validate travel documents. The BIDS letter voices concern that the result of Home Office facilitation of this man's interviews with DRC nationals held in detention centres in the UK could be that information that could endanger returnees is divulged to the DRC authorities. Insofar as BIDS may be referring to persons whose asylum claims are still being processed, they are not a matter for this Tribunal. We are only concerned with persons whose claims to asylum have failed and who have reached the end of the appeal process. To allege, in respect of persons in this category, that there is something untoward in the UK government seeking to take practical steps for their removal by means of liaison with the DRC authorities here and in Kinshasa, is in our view quite unfounded. In any event, we gather from Mr Buckley that the data sought from the persons concerned goes no further than basic particulars or "biodata".
61. Mr Aziz prayed in aid the existence of a Canadian policy of non-return set to remain in place until March 2004. He helpfully referred us to the BIDS summary of this as contained in Mr Baster's letter of 25 November 2003 which cites a Canadian Council of Refugees source stating that:

"the basis for the suspension is in the Immigration and Refugee Protection Regulations (230(1)) which states: 'The Minister may impose stay on removal orders with respect to a country or place

if the circumstances in that country or place pose a generalised risk to the entire civilian population as a result of a) an armed conflict within the country, b) an environmental disaster resulting in a substantial temporary disruption of living conditions, c) any situation that is temporary or generalised”

62. The evidence such as we have relating to the Canadian position is limited, but it is plain from the passage just cited that their non-return policy is not based on the test of real risk applied in the UK. Both under the Refugee Convention and under Art 3, the UK courts and Tribunal have consistently held that exposure to the normal incidents of armed conflict/civil war or to generalised violence is not enough to establish a real risk of serious harm: (see Adan [1997] 1 WLR 1107, Vilvirajah v UK (1991) 14 EHRR 248. At best, therefore, the Canadian evidence is of neutral weight.
63. We face a difficulty in regard to the evidence relating to the position of the Irish authorities. The BIDS letter contends that on the strength of a recent letter from the Refugee Documentation Centre in Dublin the Republic of Ireland “currently operates a policy of not considering returning failed asylum seekers to the DRC”. Since there is nothing to indicate on what evidence the Irish authorities base their view on DRC returns , this information needs to be treated with some caution. But in any event, Mr Buckley stated at the December hearing that his own enquiries of the Refugee Documentation Centre had produced a different answer, namely that there was no policy of non-return and returns were only not currently taking place for practical and financial reasons. At best, therefore, evidence relating to the Irish position is inconclusive and not self-evidently based on any DRC-based source.
64. That brings us to the evidence provided by the Belgian and Dutch governments. The Tribunal in considering this evidence in recent decisions has afforded it considerable importance. We confirm our view that they have been right to do so. We have before us their letters in full. However, the contents of these is accurately summarised at paragraphs 6.45 – 6.46 of the October 2003 CIPU Assessment as follows:

“6.45. It is possible for failed Congolese asylum seekers to be returned to the DRC provided they have valid travel documents. The British Ambassador stated in a letter of November 2002 that he has not seen any evidence to indicate that returned failed asylum seekers are persecuted on arrival in Kinshasa. He also stated that the French, Belgian and Dutch governments regularly return failed Congolese asylum seekers to the DRC.

- 6.46. The Belgian and Dutch governments have also not seen any evidence to indicate that returned failed asylum seekers are persecuted. A letter from the Belgium Embassy in London of July 2003 states that the Belgian government enforces the returns of failed Congolese asylum seekers to the DRC. Both the Belgian Embassy in Kinshasa and the Belgian Immigration Department monitor the treatment of returned failed asylum seekers to the DRC from Belgium and have not seen any evidence to indicate that returned failed asylum seekers are at risk of persecution. A letter from the Dutch Embassy in London of July 2003 states that the Dutch Government enforces the returns of failed Congolese asylum seekers to the DRC and that the Dutch Embassy in Kinshasa has not seen any evidence to indicate that returned failed asylum seekers are at risk of persecution, although they do not monitor the treatment of returned failed asylum seekers as a matter of policy”.
65. We do not have more detailed evidence from the Dutch authorities themselves about their procedure, but, according to BIDS, a letter from the Dutch Ministry of Justice to DocuCongo of 24 September 2003 stated that:
- “Upon arrival in Kinshasa a so-called reception committee is present. This committee is mainly made up of representatives from the IND, the Royal Military (Kmar) and if necessary an official from the Dutch Embassy in Kinshasa. In addition, the Director of the DGM sits on the committee. Family members of the person being returned to the DRC can also make up part of the committee, as well as workers from the International Red Cross. Furthermore, there is a Deportations Supervisory Board, which is made up of officials from the Kmar and a professor from the Royal University of Brabant. This committee oversees the procedure followed if the person in question disappears.”
66. Mr Aziz, echoing BIDS, criticises this procedure as insufficient and in any event indicative that there are real concerns on the part of both the Dutch and Belgian governments that returnees will face real risk unless the authorities know they are monitored.
67. Mr Buckley, reverting to BIDS’s criticism of the UK government for failing to install monitoring procedures in Kinshasa, argued that from the point of view of BIDS and others associating with them on this, “one is damned if you do and damned if you don’t”. Whether he is right in that response, we are satisfied that, as a result of Dutch and Belgian initiatives, it is clear that the authorities in Kinshasa have put in place a number of procedures, mindful of external scrutiny, including

from the International Red Cross. On balance, we consider that tends to demonstrate that there is no systematic policy of persecuting returnees, monitored or unmonitored, even if there may be individual breaches of procedures.

68. Before moving on from the Dutch and Belgian evidence, we should address the argument also referred to by Ms Malik and Mr Aziz that there is evidence that the Dutch at one point suspended removals on an emergency basis. That appears accurate. However, as Mr Buckley has correctly identified, there is no evidence to show that there was any other reason for this than concerns that had been raised about the detention conditions in which certain DRC and Cameroonian returnees had been kept by the Dutch authorities on the way to the airport in the Netherlands.
69. We note further that there is no evidence before us that any other European government has deemed it necessary on the basis of their own experience to adopt a policy of non-returns based on concerns about the risk of persecution on return to the DRC.
70. We conclude, therefore, that the evidence from European governments lends strong support for the view that failed asylum seekers per se are not at real risk on return. It considering what weight to attach to such evidence we bear in mind that the authorities in EU countries are under a legal obligation to ensure that they do not act contrary to Art 3 of the ECHR or to the Refugee Convention. We do not think that either Mr Baster or the representatives in this case have in any satisfactory way demonstrated that these authorities have been derelict in fulfilling their international obligations in relation to DRC returnees. We would add the comment that the denunciatory tone of some of the BIDS letters does not assist the task of weighing evidence impartially.

Expert evidence and the latest report of Dr Kennes

71. As the Court of Appeal said in S & Others

“In this field opinion evidence will often or usually be very important since assessment of the risk of persecutory treatment in the milieu of a perhaps unstable political situation may be a complex and difficult task in which the fact-finding tribunal is bound to place heavy reliance on the views of experts and specialists”.

72. Nevertheless, we have some, albeit limited, difficulties with the expert evidence relating to the central issue before us in this case. Whilst the Tribunal has previously paid considerable deference to past reports by Dr Erik Kennes, it has identified some limited shortcomings (see in

particular M [2003] 0051 at paras 11.2 – 11.5) and for a number of reasons the Tribunal generally was not persuaded by his reports that asylum seekers per se were at real risk. We do not propose to revisit his past reports, save to note that on the issue of detention centres for migration, there now appears to be further doubt (over and above those identified in M 00051) that he was right to identify this as a real source of risk. We put it no higher than saying “further doubt”, since we go only by the DocuCongo evidence, to which we generally attach very limited weight. Their 23 September letter takes issue with Dr Kenne’s reliance on statements made by then Director of Immigration in the DRC, Leyka Moussa Nyembo. It suggests that Dr Kenne’s reliance on what he had been told about these centres was misplaced. In May 2001 Mr Leyka had announced, according to the DocuCongo letter, the creation of “detention centres for migration where all foreigners facing expulsion will be detained provisionally. As well as nationals who were kicked out of the West”. Dr Kennes reported being told by Mr Leyka’s assistant in a telephone conversation that some of these centres were already up and running. But according to the DocuCongo letter, they had been unable to find any trace of these centres and “we believe that the centres that Mr Leyka talked about were never created...In fact, Mr Leyka was dismissed from his job by decree 064/2002 on 6 June 2002.”

73. However, we now have before us a more recent report by Dr Kennes. The latter report was not prepared with this case in mind: as already explained, we ourselves put it into evidence in this case, in view of the fact that it dealt with a generic issue. We do not propose to describe its contents in any detail except to note that much of it covers recent events and recent items of evidence. In broad terms we consider we should attach significant weight to this report. It is true that at least in respect of migratory detention centres it largely repeats what is said in the December 2002 report -and in this respect we must apply the “further doubts” we expressed earlier about reliance on information from or on behalf of Mr Leyka. However, what is important so far as the issue before us is concerned, is that in this report Dr Kennes clearly resiles from his previous apparent position that failed asylum seekers per se are at risk and that he does so having drawn in part on recent evidence which includes interviews conducted by academic researchers in Kinshasa under his supervision.
74. Ms Malik urged us to place very limited weight on this recent report, particularly in view of the fact that Dr Kennes’ own elaboration of risk categories was based on far too subjective criteria. We do agree with Ms Malik that it is far from clear how to translate what he means by “unjustly/justly refused asylum seekers” into a risk category based on how the DRC authorities would view someone on return. However, it

is sufficiently clear from his development of the distinction that he considers that those unjustly refused are persons who have had “ a case against them in the DRC”, i.e. (as we understand it) persons already targeted by the DRC authorities.

75. We reiterate the point that insofar as he presents his reasons for concluding that failed asylum seekers per se are not at risk, his report is clearly based on his own investigations and research and should be accorded due weight.
76. In deciding to attach most weight to the three sources dealt with above (UNHCR, European governments and the latest report from Dr Kennes), we need conversely to explain why we have decided to attach little or no weight to other sources relied upon by Ms Malik and Mr Aziz in this case.
77. Turning first to the BIDS letters, they do not support their assertions with evidence in the form one would expect of an NGO familiar with the rules governing presentation of evidence to public bodies in the UK. We quite understand their concern not to furnish evidence (via ILPA) to the public at large in an “open letter” giving personal particulars. It is only right that they act as they see it to maintain confidentiality and ensure the safety of the individuals concerned. However, we cannot fathom any valid reason for them not furnishing well before now better particulars to the Home Office. It is not suggested that the individuals themselves have any objection in principle to giving full particulars so long as confidentiality is ensured. BIDS is or should be perfectly aware that the Home Office is under a duty of confidentiality in relation to a person’s asylum particulars. Even if they have now sent the Home Office the fuller particulars – and Mr Buckley said none had been sent that he was aware of – we have not seen them. Mr Aziz had seven days to approach BIDS to see if such particulars could be made available to the Tribunal in this case, but mentioned no efforts to do so. We must base our assessment, therefore, on the summaries provided by BIDS. Whilst that is less than ideal, we note that BIDS plainly sought in its letters to present the evidence, subject to the above constraints, at its strongest.
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.

84. In addition to these cases the BIDS materials included DocuCongo letters detailing several cases of persons returned by the Dutch and German authorities who were also said by them to have been detained and ill treated on arrival.
85. There are obvious criticisms that could be made of the manner and form of the BIDS, DocuCongo and Active Women evidence. However, we are conscious that all three have limited resources and understandably seek to act on whatever evidence appears to them to have relevance. Hence we would not seek to discount such evidence for merely technical reasons. But in approaching our task of deciding whether the Adjudicator was right to find that the claimant would face a real risk of serious harm under the Refugee Convention and Art 3, it remains that we have to bear in mind a number of things. Firstly, in assessing the issue of real risk to failed asylum seekers per se, it is necessary to ask, not simply are cases occurring of ill treatment on return, but also are they occurring in such a way as to show a consistent pattern of gross and systematic abuses of the human rights of returnees. This is important because it is plain that there continues to be significant levels of human rights abuses committed by DRC officials of all kinds and thus that there is a certain level of arbitrary and improper conduct on their part. It would be naïve to think that, amongst DC officials involved in the processing of returnees to Kinshasa, there was not a similar level of individual acts of misconduct. But that is different from evidence of a consistent pattern of gross and systematic violation of basic human rights.
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.

87. In relation to the DocuCongo cases, similar although not identical considerations apply and in any event we are even further away from having direct tested evidence than in relation to the BIDS cases. It is not clear either to what extent the problems in some of the DocuCongo cases stemmed from those concerned returning without identity documents - something which would not arise in the context of UK removals.
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 (e.g. 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.
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.

90. With reference to the BIDS materials and a recent IAS critique of CIPU reports (Natasha Carver (ed) 2003, Home Office Country Assessments: an Analysis, London IAS), Mr Aziz criticised the CIPU assessments as set out in the April 2003 and October 2003 reports concluding that failed asylum seekers per se are not at risk. However, as Mr Buckley has rightly observed, several of those criticisms have no application to this case, since we do have the Dutch and Belgian letters before us and it has not been suggested the evidence before us was selective. We are not in a position to know the extent to which the CIPU assessments of the failed asylum seeker position were based on multiple sources. However, since its position accurately reflects the position taken in other major sources identified elsewhere in this determination, we see no valid reason for discounting it.
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.

Risk Categories

93. Our essential focus in this determination has been on the issue of failed asylum seekers. However, the adjudicator in allowing this appeal made reference to one further risk factor, namely, being a woman with a very young child: see paragraph 22. In view of the analysis set out in M and in preceding paragraphs of this determination, we also have to consider whether there was another possible risk category into which she would fall, with reference to identification by the Tribunal in M of two definite risk categories as follows:

- a) Nationality or perceived nationality of a state regarded as hostile to the DRC (in particular those who have or are presumed to have Rwandan connections or are of Rwandan origin);
- b) having or being perceived to have a military or political profile or background.

94. As explained earlier, we consider that M 00071 reached sound conclusions and we adopt its conclusions in this respect as well as others. We note that both the latest UNHCR evidence and the latest report of Dr Kennes lend further support to the identification of these two categories. They also lend support to inclusion of a third category, being without travel documents, but this does not arise in the UK context for reasons already given.

95. We would also observe that both UNHCR and Dr Kennes have made reference in the past to other possible categories, including

being from rebel held areas;
being of a family of mixed ethnicity;
being of Tutsi origin or being perceived to be Tutsis.

However, since in our view the latest evidence is not clear-cut in respect of these additional categories and the Tribunal has not found that they are effective risk categories currently, we leave the matter to be more definitively decided as and when necessary in future reported cases.

The claimant's particular circumstances

96. We see no proper basis for the adjudicator's conclusion that merely by virtue of being a woman returning with a very young child the claimant would be at real risk of serious harm. Even the Active Women report, whose conclusions we have not accepted, only

identifies being a woman or returning with children as giving rise to differential treatment as a result of the authorities have already taken an adverse view in a returnee. The sections dealing with women in the CIPU Assessments for April and October 2003 note a number of problems specific to women, including the fact that many suffer from domestic violence and rape, that women are relegated to a secondary role in society and that the law discriminates against women in many areas of life. However, there is nothing to indicate that the authorities at the point of return target women (or women with very young children) for ill treatment, nor indeed to indicate that there is a real risk of serious harm to women returnees (with or without very young children) once they have passed through the airport procedures.

97. That leaves the matter of the claimant's status as a member of UDPS. This was not raised by the Adjudicator, but still requires examination. The question we have to answer is, does the claimant's accepted background as a low-level UDPS member place her in the second risk category identified above – having or being perceived to have a military or political profile or background?
98. In considering the UDPS dimension we bear in mind that the Tribunal has considered this matter recently in L [2003] UKIAT 00058 and decided that it was not UDPS membership as such which will bring a person to the adverse attention of the authorities, but UDPS membership allied with the belief on the part of the authorities that he or she is conspiring with the rebels in the Eastern part of the country. It found that those UDPS members at risk were either prominent high level party officials and activists or members of any level who take part in political demonstrations which are generally illegal and broken up by the authorities. In so doing it did not follow the view reached by the Tribunal in Nibanga [2002] UKIAT 02369 heard in April 2002.
99. Since this case was decided we have the September 2003 report of Dr Kennes. Although he only deals in passing with UDPS members, it is clear from his analysis that the persons involved in opposition parties or groupings who do face a real risk on return are those who have been identified as of adverse interest prior to their departure. (His analysis does not address the separate question of whether persons involved in UDPS activities *sur plus* may also fall within the "political or military profile or background" category, but since there was no evidence in this case that the claimant was involved in any *sur plus* UDPS activities, that is not a relevant question in this case.) We also have the CIPU October 2003 Assessment. It highlights the difficulties the UDPS met in April 2002 when its members were targeted for detention. It also mentions that in 2002 it formed an alliance with the ASD (Alliance to

Save the Dialogue with Rwanda) and the RCD-G (Congolese Rally for Democracy based in Goma) and briefly considered taking up armed struggle. However, in September 2003 their leader returned from self-imposed exile in South Africa in order to prepare the party for parliamentary and presidential elections due to be held in 2005. This Assessment does not demonstrate, therefore, that the UDPS has continued to experience the same level of difficulties as they met in 2002.

100. We remind ourselves that the UNHCR description of the “military or political profile or background” category does not draw a distinction between high level and low level individuals. At the same time UNHCR does not suggest that merely being a member of an opposition party such as the UDPS suffices to place one in a risk category. Further, it does not state that persons falling into this category are necessarily at risk, only that they were “likely to be at risk and therefore deserved to receive particular and careful consideration”. In our view, whilst this category admits of a broad definition, it can only apply (leaving aside possible sur place cases) to persons whose activities on behalf of UDPS have brought themselves to the adverse notice of the authorities beforehand: i.e. they must have acquired a certain profile in the eyes of the authorities before they left.
101. How does this analysis affect the position of the claimant? The Adjudicator’s finding was that although the claimant was a low level member of UDPS, there was no credible evidence of serious harm being caused to her prior to her departure by virtue of her UDPS membership. We remind ourselves at this point that on her own account she had been a member of UDPS in Kinshasa since 1996 and had left the DRC in late 2002. Thus on the Adjudicator’s findings her UDPS membership had not caused her any difficulties for a period of several years.
102. Even accepting therefore that the UNHCR risk category of actual or perceived “military or political profile or background” should be given a broad reading, we consider that the claimant in this case had not shown that her low level UDPS activities over a five or six year period prior to leaving the DRC led her into difficulties with the authorities. We find further that upon return, they would not view her past UDPS membership, even if it became known, as a basis for treating her adversely.
103. For the above reasons the appeal is allowed.

DR H.H. STOREY

VICE PRESIDENT