

THE HIGH COURT

JUDICIAL REVIEW

[2009 No. 414 J.R.]

**IN THE MATTER OF THE REFUGEE ACT 1996, IMMIGRATION ACT 1999, SECTION 5 OF THE ILLEGAL IMMIGRANTS
(TRAFFICKING) ACT 2000, AND STATUTORY INSTRUMENT 518 OF 2006**

BETWEEN

R. T. (DRC)

APPLICANT

AND

THE REFUGEE APPEALS TRIBUNAL (TRIBUNAL MEMBER MICHELLE O’GORMAN)

AND

MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

RESPONDENTS

JUDGMENT of Mr. Justice McDermott delivered on 28th day of March, 2014

1. This is an application by way of telescoped hearing which challenges the decision of the Refugee Appeals Tribunal.

Background

2. The applicant is a national of the Democratic Republic of Congo (DRC) and arrived in Ireland on 12th December, 2007. She made an application for refugee status and completed an ASY1 form. She completed and submitted a questionnaire on 18th December. A s. 11 interview was conducted with her on 17th April, 2008. On 6th May, the applicant was notified by the office of the Refugee Applications Commissioner of a decision to recommend that she not be granted refugee status and received a copy of the s. 13(1) report. The applicant appealed to the Refugee Appeals Tribunal on 27th May. On 8th September the applicant’s solicitors made detailed submissions to the Tribunal in support of the appeal and enclosed a number of country of origin reports and previous decisions of the Tribunal. An oral hearing was conducted on 29th September.

3. By letter dated 24th March, 2009, the applicant was notified of a decision by the Tribunal to refuse her appeal enclosing a copy of the tribunal member’s recommendation made 15th March.

4. The applicant’s fear of persecution rested on three matters, namely:-

- (i) the applicant’s race or ethnicity, based on the fact that she was a Tutsi;
- (ii) the applicant’s membership of a social group comprising of Tutsi women; and
- (iii) a fear if refoiled as a Tutsi failed asylum seeker.

5. The applicant’s sister, N.T., and her husband J.M., have already been granted refugee status in the state because of fear of persecution on grounds of ethnicity or race as Tutsis. The Refugee Appeals Tribunal recommended that they be granted that status in December, 2003.

6. The applicant explained at question 21 of the questionnaire why she left the DRC. In 1998 she was visiting her uncle’s home in Kinshasa when a Tutsi massacre occurred in the City. She was twelve years old. They fled to the Eastern Congo, 40 kilometres from Goma, where they lived for several years despite the fact that the Eastern part of the country was not secure. At the time of the upheaval in Kinshasa in 1998, the applicant lost contact with her parents and siblings and spent some nine years living in the village of Mushake with her uncle. Some years later hostilities erupted in that area and living conditions deteriorated. Her aunt was raped and she and two cousins were killed in an ambush. A large movement of population took place. In the course of the unrest her uncle was shot and died from his wounds. She stated that her uncle, before he died, told her to save herself and gave her his money. She was taken by a man to the neighbouring village of Kitshanga, where they remained until the following day. They then travelled to Goma where they remained until her escape from the country was organised.

7. In her s. 11 interview she indicated that the attack on her aunt and cousins took place in September, 2007 following which rebels took over the village of Mushake and she and the remaining members of her uncle’s family were obliged to flee. She eventually travelled to Kigali, Rwanda on 11th December, 2007. She then travelled to Brussels before travelling to Ireland where she arrived on 12th December. She said that she feared that if returned to DRC she would be alone as she did not have any family there or a place to live and that as a Tutsi, she will be subject to discrimination and violence.

8. The s. 13(1) report set out a series of “credibility” issues that arose in the applicant’s claim. It noted that the rebel leader in charge of the contingent that raided the village where she lived was a Tutsi who claimed that his presence in Eastern Congo was because of the Tutsi need for his protection. It was also considered that the applicant’s knowledge of the rebel leader and the general situation in North Kivu, where the village was situated was very limited. It was considered that the applicant did not have a fear of persecution of the rebel leader because she was of the same race. It was concluded, therefore, that the applicant’s decision to leave arose from the general violence in the Eastern region of the Congo which did not give rise to a Convention ground.

The Tribunal Decision

9. On appeal, the Tribunal focused upon two matters which it claimed cumulatively undermined her credibility in respect of her statements that she had resided in North Kivu, for a significant period of time. These were:-

(a) The applicant claimed that she resided in Mushake for a period of approximately nine years but she was not able to name more than two villages in the area despite the fact that people called to her home to buy cows and wood, and that she often accompanied her aunt to the town of Kitshanga. She not able to name more than two villages in the area. In addition, she was unable to name the district in North Kivu in which Mushake was located, and could only name one of the major lakes in the area. The Tribunal concluded that her knowledge of Mushake was limited and inconsistent with her claim to have lived in the area for nine years. It expected her to have more knowledge of the surrounding area because of travelling to Kitshanga and interaction with her aunt and uncle, her cousins and the community.

(b) The applicant claimed that she did not know to which ethnic group the rebel leader who raided her village belonged or why he was fighting in North Kivu. The Tribunal concluded that it would be reasonable to expect that she would have some limited understanding about the reasons for the local war because she had been living in Mushake for some time and the civil war continued for a long period throughout the Kivu area.

The Tribunal also concluded that the applicant's failure to apply for asylum in Belgium and the fact that she risked travelling onward to another country on false documentation was not indicative of a person fleeing persecution. It is clear from the determination that aspects of the applicant's story were not believed.

10. The applicant's sister and brother in law have been granted asylum in Ireland and the Tribunal stated that it had regard to the decision of the Refugee Appeals Tribunal dated 5th December, 2003, in their case. It was acknowledged by the Tribunal that evidence from family members other than the applicant could be relevant in the event that a particular family was the subject of persecution and similarly, that evidence of ethnic persecution could be persuasive, though not personal, to the applicant. However, the Tribunal stated that the decision of a body in a particular case is neither evidence in another case nor does it create a binding authority for future cases. The Tribunal concluded that the applicant's sister's decision was dated 2003, and related to events in the DRC from 1998 to 2002. It concluded that the decision in that appeal was not of sufficient relevance to the applicant's case to warrant a conclusion that the current recommendation be overturned, particularly in the light of more recent country of origin information in respect of the situation in DRC and the credibility issues concerning the applicant.

11. It is clear expressly and implicitly from the decision that the credibility issues concerning the applicant concern only her account of living in the North Kivu area and the reasons why she fled.

12. As already stated, the applicant's sister and brother in law have already been granted refugee status in this country. The applicant's sister gave a history in her own case which was consistent with the life events in Kinshasa described by the applicant. She and her husband also gave evidence in support of the applicant's case to the Tribunal. In their decision, the Tribunal summarised the background to the case as follows:-

"N.T. was born in Lubumbashai and left there in 1992 for Kinshasa with all her family. They had ethnic problems in Lubumbashai and this is why they moved. Life in Kinshasa was not great as there were long standing problems there for Tutsis. Tutsis were under constant harassment as they were not perceived as being Congolese. In 1996 many Tutsis from the East were killed in Rwanda.

The applicant met her husband to be in Kinshasa in 1997. Her father in law (was murdered in Kinshasa by Congolese on 20th July, 1998. There were many others killed on that day and the killing continued thereafter. They went to the Tutsi Minister to seek information about the killing and he advised them to leave straightaway, which they did. He said it would be a bad idea to stay and he believed that all Tutsis would be murdered. The applicants moved to and were married in Kisangani shortly thereafter."

Though Kisangani was also subject to a great deal of ethnic tension, they were able to remain there in relative safety until 14th May, 2002, when there was a call to the general population to murder Tutsis. They described how they escaped with their two daughters and flew to Uganda. They lost contact with their families in the DRC and had not heard from them since leaving Kinshasa in 1998. These details are in accordance with the story given by the applicant in the course of her account. The Tribunal in their case concluded that their accounts were entirely truthful. There is no suggestion in the Tribunal's decision in this case that any aspect of their account lacked credibility.

13. The tribunal member in the applicant's case did not make a finding that the circumstances in which she came to leave Kinshasa were not credible. The determination in respect of lack of credibility is confined to the evidence which she gave in respect of her life over the subsequent years with her uncle in the Kivu area and the reasons given for her flight. Therefore, there was ample evidence of past persecution of the applicant and her family in the DRC at the time when she and other members of her family fled Kinshasa in 1998. That persecution was related to their race or ethnicity as Tutsis who were subjected to widespread vilification, discrimination and a government inspired campaign of murder. There was also considerable evidence of murderous violence erupting against Tutsis during periods of civil strife, especially in 2002 and 2004. An undercurrent of discrimination and hatred against Tutsis has continued.

14. This Court is not a court of appeal. The Tribunal heard the evidence and considered the materials relating to this matter. Though the entire account of her previous life was accepted as correct, and the named rebel commander was active in the Kivu area at the time which she claims to have fled, it was open to the Tribunal notwithstanding the existence of country of origin information that supported some features of the applicant's claim to reject the applicant's story in that regard.

15. However, it is clear that the Tribunal accepted that the applicant was a Tutsi, that she and her family had suffered prior persecution leading to their flight from Kinshasa in 1998, and her separation from her parents and siblings. The Tribunal did not appear to have accepted that she lived in Mushake or its environs, or that her aunt, uncle and cousins suffered the fate described. The Tribunal did not accept that she was fleeing anything other than the living conditions that existed in the DRC and had not left for a Convention reason.

16. Though her story was not believed, it was also necessary for the Tribunal to determine whether there was a future risk of harm. It had determined that she was a Tutsi. Tutsis had been subjected for reasons of race and assumed political allegiance to persecution in the past. That was clear from country of origin information and from the acceptance of the applicant's story in respect of her earlier life. It was also clear from the accounts furnished by her sister and brother in law in the course of their evidence and their application for refugee status granted in 2003.

Tutsis as an At Risk Category

17. The Tribunal considered country of origin information concerning the treatment of Tutsis in the DRC at length and found that:-

"...Country or origin information would suggest that while the Tutsis have difficulties in the DRC, the situation has improved for Tutsis and Tutsis can go about their daily lives in Kinshasa. A document on file entitled "Events of 2007" gives an outline of the difficulties which exist in the DRC and it primarily refers to Eastern Congo and makes no specific reference to the persecution of Tutsis. Further, the MONUC Monthly Human Rights Assessment: April, 2008 again refers primarily to matters in the eastern regions and no specific mention is made of Tutsis being persecuted and further, no mention of Tutsis being targeted is made in the Amnesty Report dated 2008. A document on file entitled "Fighting in Congo fuels war of anti-Tutsi sentiment", details how the clashes in North Kivu has caused a wave of anti-Tutsi sentiment but there is nothing in the article to suggest that Tutsis are being persecuted by the government or by society at large. Tutsis appear to be vulnerable in the east of the country, but country of origin information would suggest that Tutsis are living without difficulty in Kinshasa. The country of origin information report dated 21st May, 2008, suggests that a letter from the British Embassy dated 7th June, 2007 stated:-

'In Kinshasa, the Tutsi community is small, probably no more than 60 people. There is also a small detachment of mostly Tutsi soldiers who work as former vice president Ruberwa's bodyguards and some Tutsi officers in the FARDC high command. Many of the Tutsis living in Kinshasa have a high political profile'...'For the most part Tutsis in Kinshasa go about their daily business unmolested, although they are subjected to more racist comments in the street than other Congolese ethnicities (but less than white people are). Over recent years many of the Tutsis resident in Kinshasa were men who had left their families in the Kivus or overseas. Many have begun to or plan to bring their families to Kinshasa, reflecting their increased confidence in their local security'...

'Recent fighting in Eastern Democratic Republic of Congo has seen Nkunda (the rebel leader) blamed and Tutsis demonised by certain sections of the Kinshasa media and political scene. However, we have no reliable evidence to suggest that this has translated into increased harassment or other abuse of Tutsis in the city'...

18. The decision then refers to the rather low level of government participation by Tutsis and notes the following:-

"Societal discrimination on the basis of ethnicity is practised by members of virtually all of the DRC's approximately 400 ethnic groups and in 2006 the FARDC and other security forces sometimes harassed, arbitrarily arrested and threatened Tutsis. Still, there have been no recent reports that Tutsis have been subjected to any serious abuses by either government authorities or citizens. A National Institute for Social Security (INSS) Centre for Tutsis who were at risk was established in Kinshasa in 1988 with support from the Ministry of the Interior, ICRC, and international donors. However, in the light of the greatly diminished risk of abuse and the increased tolerance of the local population the centre was closed in June, 2003. Unlike in 2004 when numerous anti-Tutsi articles and government sponsored hate speeches and broadcasts were reported, anti-Tutsi sentiments including appeals to force Tutsis into exile and practice discrimination towards Tutsis in relation to citizenship rights – were not expressed in private media or government affiliated media in 2005. Also there were no known reports that government members encouraged hate speeches or any other intimidatory actions against Tutsis in 2005 or 2006."

This is a direct quotation from the United Kingdom Operational Guidelines note quoting a further extract from a letter from the British Embassy in Kinshasa dated the 7th June, 2007. Furthermore, the Tribunal noted that a United States State Department Report of 2007 released on 11th March, 2008, under the headings "Societal Abuses and Discrimination" and "National/Racial/Ethnic Minorities" concluded that there was no indication that Tutsis are currently being systematically targeted in the DRC.

19. The Tribunal also considered decisions of the United Kingdom Asylum Immigrations Tribunal and, in particular, *AB & DM v. The Secretary of State for the Home Department* [2005] UKAIT 00118, which relied upon the same materials referred to and quoted above. These cases considered whether and to what extent those of Tutsi ethnicity were at a real risk of persecution and more generally what the current risks were for failed asylum seekers, who were Tutsis.

20. The following conclusion was reached:-

"39. In the current situation in the DRC the Tribunal accepts that, with the exception of high level officials of RCD/Goma, returnees of Tutsi ethnicity or believed to be of this ethnicity could be at real risk on return. The resentment against anything or anybody Rwandan or perceived by Rwandan is very high and such that there is a real risk of generalised hostility from local communities against which the authorities are currently unlikely to protect. The situation improved in 2003 but we are satisfied in the light of the evidence before us that there has been a sharp deterioration in 2004. We accept Mr. Kennes' (expert) evidence of the current dangers for Tutsis in Kinshasa, the great majority of whom are unable generally to obtain the protection of either MONUC or the authorities."

The UKIAT concluded as follows:-

"51. Building on previous country guidance cases...the Tribunal would reformulate and summarise the current risk categories as follows:-

(i) We confirm as continuing to be a risk category those with a nationality or perceived nationality of a state regarded as hostile to the DRC and in particular those who have or presumed to have Rwandan connections or are of Rwandan origins.

(ii) We consider that in light of recent developments there is now a risk category consisting of those who are Tutsi (or Banyamulenge) or are perceived to be Tutsi (or Banyamulenge). The only possible exception to it arises in relation to high level officials of RCD/Goma. We accept that in practice there is considerable overlap with (i) since as a result of the events of 2004 "Rwandan" and "Tutsi" are more often regarded as the same by the DRC authorities and civilian population and as a result Tutsis and those perceived as such face higher risks than before. However, they are distinct categories, one nationality based, the other ethnicity based....

53. The Tribunal would reiterate some earlier observations on the task of assessing whether a person falls within the new second risk category as now extended. There are two main aspects to this. Firstly, on the evidence before us most but not all Tutsis would be at risk. As noted in paras. 39-40 some Tutsis may be able to obtain the protection of MONUC

albeit in practice they may be limited to those with wealth who are high level officials within RCD/Goma and appear able to look to the authorities for protection.

54. Secondly, as with the military or political category, much depends on the perception of the authorities as to whether they view someone adversely. It is not sufficient for an appellant simply to state that he is Rwandan or Tutsi or would be perceived as such. Evidence as to ethnicity will need to be scrutinised carefully. Given that Tutsis are described as being physically distinct from other tribes (CIPU report October, 2004 at para. 6.71) a person is more likely to be viewed as a Tutsi by the authorities if he or she has those distinctive characteristics. Similarly those whose dialect, tribal links and geographical origins link them closely to Tutsis, such as the Banyamulenge would also appear to fall within the at risk category. However, the mere fact of coming from the East or being of mixed ethnicity is unlikely without more to give rise to a perception of being Tutsi. The assessment must be made on the basis of a careful analysis of the appellant's ethnicity, background and profile."

Additional Factor Required

21. The Refugee Appeals Tribunal concluded that while *A.B & D.M.* added Tutsis to the "at risk" category in the United Kingdom, the judgments did not imply that all individual claimants accepted as Tutsis will automatically be at risk of persecution, or that ethnicity in the absence of other factors such as political activity is likely to bring such individuals to the adverse attention of the authorities. It also stated:-

"It is notable that the *AB & DM* and *MK* Country Guidance case law refers primarily to the situation pertaining in the DRC in 2004 and 2005 and the UKIAT particularly noted the situation had deteriorated sharply in 2004 (para. 39). More recent country of origin information would suggest that the situation for Tutsis (has) improved since this guidance case issued."

This appears to be a reference to the United Kingdom Home Office Operational Guidance Notes of 20th August, 2007. The relevant extract from the notes is as follows:-

"3.8.1 Some individuals will make an asylum or human rights claim based on their mistreatment by either the DRC authorities or non state agents particularly in Western DRC on the grounds of their actual or perceived Tutsi origin.

3.8.2 **Treatment.** At times of tension and anti-Rwandan feeling, numbers of people living in Kinshasa or other areas of Western DRC have been assaulted or arrested by the authorities on grounds of their Tutsi ethnic origin, namely because of their supposed Tutsi features. The most severe forms of anti-Tutsi feeling were demonstrated in August, 1998 and in the succeeding months, after the Kabila government broke with its erstwhile Rwandan supporters and incited hatred against Tutsis. At that time many people of Tutsi origin living in Western DRC left the area, sought asylum abroad or were resettled in other countries.

3.8.3 Members of former rebel groups dominated by Tutsis were appointed in the TNG (Transitional National Government) and during the 2006 elections a Tutsi from North Kivu province was elected to the national assembly. There are Tutsi members of both Houses of Parliament...Societal discrimination on the basis of ethnicity is practised by members of virtually all of DRC's approximately 400 ethnic groups and in 2006 the FARDC and other security forces sometimes harassed arbitrarily, arrested and threatened Tutsis. Still there have been no recent reports that Tutsis have been subjected to any serious abuses by either government authorities or citizens. A National Institute for Social Security (INSS) Centre for Tutsis who were at risk was established in Kinshasa in 1998 with support from the Ministry of the Interior, ICRC and international donors. However, in the light of the greatly diminished risk of abuse and the increased tolerance of the local population the centre was closed in June, 2003.

3.8.4 Unlike in 2004 when numerous anti-Tutsi articles and government sponsored hate speeches and broadcasts were reported, anti-Tutsi sentiments – including appeals to force Tutsis into exile and practice discrimination towards Tutsis in regard to citizenship rights – were not expressed in private media or government affiliated media in 2005. Also, there were no known reports that government members encouraged hate speeches or any other intimidatory actions against Tutsis in 2005 or 2006.

3.8.5 **Sufficiency of Protection.** If this category of claimants' fear is of ill treatment/persecution by the state authorities, they cannot apply to those authorities for protection. In October, 2004 the government deployed 5,000 troops to protect displaced Tutsis threatened by other ethnic groups in Eastern DRC. The authorities have, therefore, demonstrated their capacity to protect Tutsis from rival ethnic groups. If the ill treatment persecution is at the hands of non-state agents there is no evidence that such individuals would not be able to seek adequate protection from the authorities.

3.8.6 **Internal Relocation.** The law provides for freedom of movement within DRC, however, the TNG occasionally restricted these rights in areas under its control in 2006 by establishing barriers and checkpoints on roads, at ports, airports and markets for security reasons...

3.8.7 If a claimant's fear is of ill treatment/persecution by the state authorities, relocation to a different area of the country to escape this threat is not feasible. Although there are practical difficulties in moving between areas under government control and areas which are not under government control relocation by river or air is possible and it is not unduly harsh. Those who are in fear of non state agents in areas dominated by rebel forces are able to safely relocate to a different area to escape this threat."

22. The Operation Guidance Note relies upon the case law which includes the *AB* and *DM* decision and its interpretation in *R (Mukendi) v. SSHD* [2006] EWHC 4565 (Admin) in which the High Court of England and Wales (Mumby J.) held that the mere assertion by an asylum seeker that she was a Tutsi and as such at risk of persecution if removed to the DRC, was of itself insufficient to found a claim for asylum.

23. The Guidance Note contains the following conclusion:-

"3.8.9 **Conclusion.** While the situation for Tutsis deteriorated somewhat during 2004 with increased instances of sporadic anti-Tutsi media campaigns, no such incidents were reported in 2005 or 2006 to date and there is no current evidence of deliberate attacks or systematic ethnic discrimination which might suggest that someone of Tutsi origin would be at risk of discrimination or ill treatment amounting to persecution at the hands of state authorities in Kinshasa or other government

controlled areas on the basis of their ethnic origin alone. Moreover, there is no evidence that those fearing persecution by non state agents would not be able to seek and receive adequate protection from the state authorities or internally relocate to escape this threat. The grant of asylum in such cases is therefore not likely to be appropriate.

3.8.10 The AB and DM and MK Country Guidance case law...adds Tutsis to the "at risk" categories and the judgments indicate that most Tutsis and those perceived as Tutsis are likely to be at risk of mistreatment. The judgments do not however imply that all individual claimants accepted as Tutsis will automatically be at risk of persecution simply on the basis of their ethnicity, rather that ethnicity in addition to other factors such as political activity are likely to bring such individual to the adverse attention of the authorities resulting in mistreatment which may amount to persecution. Case owners should assess each claim on the basis of a careful analysis of an individual's ethnicity, background and profile, with well connected, more affluent Tutsis being unlikely to encounter/in a better position to avoid any risk of mistreatment."

24. The approach adopted by the Immigration Tribunal is further considered in *NA v. The Secretary of State for the Home Department* [2008] UKAIT 00071 which confirmed the Tutsis as being an at risk category and adopted the conclusions of the operational guidelines of 20th August, 2007. The Tribunal added the Hema Tribe who were connected to the Tutsis as an at risk category and added that:-

"41. Although the Hema come within a risk category, clan or tribal membership by itself is not determinative. Whether an appellant is at risk or is able to relocate depends not only on his ethnicity but also on his own background and circumstances looked at in the light of the country evidence as a whole."

25. The court has also been referred to *FB (Democratic Republic of Congo) v. Secretary of State for the Home Department* [2008] EWCA Civ. 457 a decision of the Court of Appeal of England and Wales in which the guidance in AB and DM was also considered. Hill L.J. stated:-

"22. I cannot accept that this is a case where one can by rote read paragraph 51(i) of AB and DM and the category thereby specified to state that the inevitable conclusion – had they known of the Rwandan and Tutsi connection – that the tribunal must have granted asylum. The Tribunal must take a broader view: the words "connections" and the word "origins" themselves require analysis and it is for the Tribunal, of course having full regard for the guidance present, to consider the case of the particular applicant for asylum."

26. The interpretation applied in the Operation Guidance Notes of 2006 replaced by those quoted in respect of 2007 were considered by Cooke J. in *YZW v. Refugee Appeals Tribunal* [2009] IEHC 170. The 2006 guidance note is largely replicated in the 2007 note. Cooke J. interpreted the note as follows:-

"8. In the final paragraph, the note records that "the three cases mentioned above (AD, DM and MK) have the effect of adding Tutsis to the "at risk" categories and the judgments indicate that most Tutsis and those perceived as Tutsis are likely to be at risk of mistreatment". In other words, that there is, for Tutsis still in the Congo, some risk of general mistreatment. But the crucial and nuanced conclusion that is drawn from all of this material by the note, is that the judgments themselves do not imply that all individual claims accepted as Tutsis will automatically be at risk of persecution, simply on the basis of their ethnicity. Rather it is ethnicity in addition to other factors, such as political activity, that brings such individuals to the adverse attention of the authorities resulting in mistreatment, which may amount to persecution.

9. Thus, the essential conclusion being drawn by the note from the available information as of November 2006, is that the former dire situation of the Tutsi community as of 1998 had been considerably ameliorated by the advent of the transitional national government in which Tutsi representatives have participated, with increased resulting tolerance from the local population and at greatly diminished risk. Accordingly, in the final resort, while there may be some risk to which the Tutsis are exposed, it is not a risk amounting to risk of persecution unless, at least, in individual cases, it is established that there is some additional factors such as prior political activity which attracts the adverse attention of the authorities.

10. That seems to me to be entirely consistent with the approach that is taken by the tribunal member in the decision in this case. He finds that on grounds of ethnicity alone, as a Tutsi, the applicant is not at risk as of May, 2007. However, he then also examines the other factor in the sense of the note by looking at the claimed association of the applicant with (a criminal)...with a view to seeing whether it would constitute another such factor which would distinguish the applicant as exposed to exceptional risk, in addition to the general risk as a Tutsi member of the Congolese population."

27. Cooke J. determined that the appraisal made by the tribunal member was entirely consistent with the overall effect of the country of origin information, particularly that set out at para. 3.8 of the 2006 note which is repeated in the 2007 note. He stated that the note urges that individual claims be carefully assessed where they involve members of the Tutsi population. He concluded that para. 3.8 was a coherent and intelligible balanced judgment of the degree of risk facing members of the Tutsi community in the DRC in particular circumstances. He held that it was correct and reasonable for the Tribunal in that case to have regard to the changed and improved situation of Tutsis which had endured, according to the guidance note since 2003, despite a temporary setback during 2004, and that satisfied to a sufficient degree the requirement that there was now no risk to the applicant upon returning to the DRC.

28. Clarke J. in *Imoh v. Refugee Appeals Tribunal* [2005] IEHC 220, stated that there is no logic in regarding a credibility decision which was based on a clear error of fact in respect of an applicant's account as being invalid and not regarding a similar credibility finding which was based upon an error in relation to country of origin information as being invalid. However, having reviewed the country of origin information, the various decisions of the United Kingdom Courts and the Immigration Asylum Tribunal, the Kingdom Home Office Guideline Notes quoted and the decision of this court in *Y.Z.W.*, I am not satisfied that the Tribunal erred in its general assessment and interpretation of the country of origin information submitted by the applicant. In this case the Tribunal concluded on the basis of the up to date information that it was unlikely that the applicant would be automatically at risk simply on the basis of ethnicity. It was Tutsi ethnicity together with other factors such as past experience or political activity that were likely to bring her to the attention of the authorities. However, though the applicant is acknowledged to be Tutsi, there is no evidence of any such political activity in her personal history that would bring her to the adverse attention of the authorities in the DRC. A question arises as to whether there was an additional factor in this case which was not or was inadequately considered by the Tribunal such as to vitiate the decision.

Risk to Tutsis as Failed Asylum Seekers

29. The applicant also claims to have a fear of persecution if returned as a failed asylum seeker who is a Tutsi. The Tribunal considered this claim

"In *A.B. & D.M.* on file it is stated:-

'In a letter of November 2002, the British Ambassador said that he had not seen any evidence that failed asylum seekers were persecuted on arrival, a view shared by the French, Belgian and Dutch Governments. The report refers to the UNHCR position paper of July, 2004, that it is not opposed to the return of the failed asylum seekers provided they have been found in fair procedures not to have international protection needs subject to the caveat that some areas remained unsafe and that states needed to ascertain carefully the nationality of rejected asylum seekers as well as their areas of origin, profile political and military affiliation. . . . The evidence emphasised that the primary risk to its returnee is where they have a political or military or ethnic (Tutsi) background which makes him of an adverse interest to the authorities'."

The *A.B. & D.M.* case goes on to state:

"That if someone is not of interest to the authorities, but is identified as a failed asylum seeker, then it is clear from the evidence that the only real risk they run is of being required to pay a fine, and while this behaviour as harassment, the UKAIT were not satisfied that there was a real risk of imprisonment or detention. . . . the applicant had no political profile and was not known to the authorities. A further document on file entitled "The grim fate that awaits those deported to Congo" suggests that all failed asylum seekers are persecuted on return to the DRC. This is not supported by conclusions in the case of *A.B. & D.M.* Further this article was written in 2004 and the situation in the DRC had deteriorated and therefore the currency of this article is somewhat diminished . . . considering all the country of origin information on file and the improved situation of the Tutsis since 2004, it is unlikely that the applicant would be automatically at risk of detention by the authorities on return to the DRC simply on the basis of her ethnicity, rather ethnicity in addition to other factors such as political activity would be likely to bring returnees to the attention (of) the authorities. While the applicant is a Tutsi, she was not politically active and there is nothing to suggest from her past history that she is known to the authorities or that she would be of any interest to the authorities and that she would come to the adverse attention of the authorities were she to return to the DRC."

30. This finding is partly based on the UKIAT decision in *A.B. & D.M.* concerning failed asylum seekers where it was stated that:-

"47. The evidence presently before us does not satisfy us that there is any adequate evidential basis for taking a different view from current Tribunal jurisprudence that returned failed asylum seekers are not at real risk of persecution for that reason alone. We accept that while there might be attempts to extract money from returnees the authorities are only interested in those who have or are perceived to have an ethnic, military or political profile identifying them as opponents to those in power. Mr. Kennes confirms in his evidence that a person returning with valid, ordinary travel documents will not be at risk unless of interest to the authorities for these reasons.

48. If someone is identified as a failed asylum seeker but there are no known political charges against him, there is a risk that they may be required to pay a 'fine'. Those who do not have charges against them or are otherwise not of interest to the authorities will be released upon payment of the fine. . . . Research into an individual case may more easily lead to the discovery of the political, military or ethnic background of a returnee but may also identify someone as a mere returned failed asylum-seeker.

49. This evidence emphasises that the primary risk to a returnee is where they have a political or military or ethnic (Tutsi) background which makes him of an adverse interest to the authorities. However, the risk arises because of his background and not because he is a returnee. The relevance of the fact that returnees are closely scrutinised goes to the likelihood of that background coming to light. If someone is not of interest to the authorities but is identified as a failed asylum seeker then it is clear from the evidence that the only real risk they run is of being required to pay a fine. . . . The aim is to obtain money and must be viewed in the context of a society where corruption is endemic and there is a background of generalised chaos. . . .

50. The issue for the Tribunal is whether the position is such that there is a real risk of a breach of Article 3 (of the European Convention of Human Rights) for all returned asylum seekers identified as such. We are not satisfied that the high threshold is met. . . . We are confirmed in this view by the fact that the UNHCR in its letter of 2nd February, 2005, maintained its opinion which it has set out in previous letters that generally speaking it was possible for unsuccessful asylum seekers to return to the DRC provided that they had been found in fair procedures not to have international protection needs."

31. It is clear that other country of origin information indicates that the issue concerning Tutsi ethnicity has been subject to the qualification earlier referred to which is equally applicable to the question of the returns of Tutsis who are failed asylum seekers. This refers to the improved position of Tutsis in the DRC and interpretation of the *A.B & D.M.* ruling in the Home Office Operation notes and United Kingdom case law.

32. I am not satisfied therefore that the Tribunal's consideration of the applicant and her fear of persecution as a failed asylum seeker as a Tutsi was in error or is to be viewed as unreasonable or irrational. It was reached on the basis of the evidence of materials submitted and set out in considerable detail in the Tribunal decision.

33. The applicant also submits that the risk to Tutsis simpliciter was reemphasised in *N.A. v. Secretary of State for the Home Department* [2008] UKAIT 00071, in which the Hema who are closely related to the Tutsis ethnically were added to the list of those at risk of persecution. However, in that case the Tribunal stated:-

"Whether any particular members of the Hema will in fact be at real risk, must take into account, not only his ethnicity, but also his background and profile. The appellant's account accepted by the original Tribunal was that he was able to escape when his home was attacked by the RCD rebels, an attack in which his father was killed and his mother raped. Taking into account the provisions of para. 33(k) of H.C. 395 that the fact that a person has already been subjected to persecution or serious harm will be regarded as a serious indication of a person's well founded fear of persecution or a real risk of serious harm, unless there are good reasons to consider that the persecution or serious harm will not be repeated, although there has been some improvement in Ituri, in the light of what has happened to this appellant in the past, we find that there is at least a real risk that the appellant will be at real risk of further serious harm as a member of the Hema. We are also satisfied that when this attack is looked at in the context of the violence in Ituri, the appellant was

not simply a victim of the civil war, but the attack was motivated by the ethnic conflicts in that region. . . . We adopt and repeat the guidance in para. 53 of the *A.B. & D.M.* that although the Hema come within a risk category, clan or tribal membership by itself is not determinative. Whether an appellant is at risk or is able to relocate depends not only on his ethnicity, but also on his own background and circumstances looked at in the light of country evidence as a whole.

Though this decision was not available to the Tribunal at the time and confirms the at risk category of the Tutsis in *A.B. & D.M.*, it also confirms that it is not the sole determinative factor as stated in the Refugee Appeals Tribunal decision. Therefore, I am not satisfied that the Tribunal erred in applying the *A.B. and D.M.* decision to the applicant as a failed asylum seeker.

Evidence of Past Persecution as an Additional Factor

34. The applicant claims that in considering the possibility of internal relocation the Tribunal erred and acted unreasonably and irrationally having regard to her personal circumstances, her family background and history, limited education and other factors including the status of her sister and brother in law as declared refugees. It is claimed that the Tribunal wrongly relied upon a perceived improvement in the situation and in particular in regard to the position in Kinshasa. It stated:

"The applicant lived in Kinshasa for a short period of time. She speaks French and Lingala. While there continues to be difficulties in the eastern part of the DRC, considering the applicant's age and the country of origin information on file, internal relocation to Kinshasa would be a viable alternative for the applicant in all the circumstances."

This finding is made in the context of an acknowledgment that Tutsis appeared to be vulnerable in the eastern part of the country by reason of the unrest and conflict periodically erupting in that area.

35. It is submitted that the Tribunal did not properly, fully and in a balanced manner consider all relevant factors concerning the applicant's personal circumstances in determining that she could return to Kinshasa. In particular, the applicant and her family had already fled Kinshasa and been separated in 1998. The applicant's sister and brother-in-law also fled Kinshasa at that time. She and her sister became separated from her immediate family. At the time of the Tribunal hearing, the applicant was 21 years of age with limited education. In addition, the country of origin information cited by the Tribunal stated that the Tutsi community in Kinshasa was small and probably no more than 60 people. It also consisted of a small detachment of Tutsi soldiers who worked as bodyguards and some Tutsi officers in the army high command. It noted that many of these Tutsis had a high political profile. It then concluded:

"For the most part Tutsis in Kinshasa go about their daily business unmolested and though they are subjected to more racist comments on the streets than other Congolese (but less than white people are). Over recent years, many of the Tutsis resident in Kinshasa were men who had left their families in the Kivus or overseas, many had begun to or plan to bring their families to Kinshasa reflecting their increased confidence in their local security".

36. The British Embassy letter (already quoted) relied upon also noted that recent fighting in the eastern part of the country had seen Tutsis demonised by certain sections of the Kinshasa media and political scene, although there was no reliable evidence to suggest that this had translated into increased harassment or other abuse of Tutsis in the city. The Tribunal concluded that the circumstances that led to the initial eruption of violence against the Tutsis in 1998 and subsequently in 2004, had changed. The threat of immediate violence had abated and there has been a significant change in the situation prevailing in the country such that Tutsis are no longer simply by reason of their ethnicity at risk of immediate persecution.

37. In my view, the evidence adduced before the Tribunal indicates an inconsistency and tension between the determination that the Tutsi continue to be at risk as clearly set out in *A.B. and D.M.* and the subsequent interpretation of that category by the United Kingdom Courts, the Immigration and Asylum Tribunal and the United Kingdom Home Office Guidance Notes. This risk has been repeatedly said to exist. It is now interpreted as a risk which of itself does not give rise inexorably to an entitlement to the grant of refugee status, but requires something additional evident from the surrounding circumstances of the individual applicant to justify the granting of refugee status. The materials quoted are not binding on a decision maker in this jurisdiction, nor should they be viewed as a form of legal precedent. They constitute country of origin information only and simple guidance as to how that information may be used. There is a danger that the subsequent interpretation of the *A.B. and D.M.* guidance may result in the determination that the Tutsis are at risk losing its meaning. A Tutsi applicant by reason of this categorisation must be regarded as different to a non-Tutsi citizen of the DRC. The evidence available to the United Kingdom authorities has resulted in the continuing categorisation of the Tutsis as a group considered to be at risk. DRC citizens generally are not considered to be at risk. I am satisfied that if this country of origin information is to be relied upon, it would be unreasonable not to afford that categorisation some evidential effect in an application by a Tutsi for asylum.

38. As noted earlier, the Tribunal accepted that the applicant's family was forced to leave Kinshasa during the murderous events of 1998. As a twelve year old she had experienced persecution resulting in the destruction of her family life and separation from her immediate family and siblings and her local community and life in Kinshasa.

39. The UNHCR Guidelines acknowledge that the mere fact of belonging to a certain racial group would normally not be enough to substantiate a claim to refugee status. However, they also state that:-

"70. ...There may, however, be situations where, due to the particular circumstances affecting the group, such membership will in itself be sufficient to ground to fear persecution."

In this case Tutsis are an at risk category because of the murderous attacks carried out on them because of their ethnicity. The events of 1998 and the renewed attacks and murders of Tutsis in 2004 have been followed by periods in which this violence has abated. However, there is a lingering undercurrent of discrimination, vilification and disparagement in the DRC against Tutsis. The applicant continued to live in this environment for a period of years until she left in circumstances which were not accepted by the Tribunal as credible. However, at the time there had been an upsurge of violence said to have been led by a Tutsi rebel commander in Kivu. Country of origin information indicates that on such occasions the national mood against Tutsis deteriorates considerably, though no outbreak of violence commensurate with that of 1998 or 2004 was reported.

40. The court is satisfied that the evidence of past persecution suffered by the applicant as a twelve year old and the continuing undercurrent of prejudice and discrimination against Tutsis in the DRC are factors additional to the fact of the applicant's Tutsi ethnicity that should have been considered by the Tribunal, particularly in respect of future persecution. This is so, notwithstanding the finding that her reasons for leaving the country were not deemed to be credible. In *MAMA v. The Minister for Justice* [2011] 2 I.R. 721, Cooke J. held that the fact that particular facts or events relied upon as evidence of past persecution were disbelieved did not relieve the decision maker of an obligation to consider whether there was a risk of future persecution of the type alleged in the event of repatriation. To tell a story that is not true concerning events involving previous persecution "will not necessarily foreclose or

obviate the need to consider the risk of future persecution provided there are some elements which furnish a basis for making that assessment" (para. 18). In my view, not only is there evidence of past persecution that ought to have been considered, but it was appropriate to do so bearing in mind the vulnerability of Tutsis as an at risk group. This evidence was highly significant particularly because the evidence that the applicant was a Tutsi, which was accepted by the Tribunal, assumes much greater relevance and importance when considered in this context because the Tutsi have been defined as an at risk group.

41. Furthermore, the generalised conclusion about the relative safety of Tutsis in Kinshasa based on the British Embassy letter appears to me to be unreasonable having regard to the acknowledged tiny population of Tutsis that remained in the capital. These are people who are prominent by virtue of which they are able to secure protection for themselves, as acknowledged in *A.B* and *D.M.* The applicant does not fall into that category. On her return she would be alone and would not have the benefit of any protection afforded by status or prominence.

42. I am satisfied that the applicant's ethnicity in addition to the other factors which include evidence of previous persecution and periodic general persecution of Tutsis in the DRC, together with the underlying prejudice and discrimination which continues to place them at risk and the accepted experience of past persecution evidenced by her sister and brother-in-law in the decision submitted, are additional factors which should have been considered in relation to future risk given her membership of an at risk category, but were not. I am satisfied that a disproportionate weight was assigned to the applicant's lack of credibility in this case without an adequate consideration of the risk of future persecution.

43. Therefore, I am satisfied in the circumstances of this particular case to grant an order of *certiorari* of the Tribunal decision and direct that the matter be remitted to the Tribunal for hearing by a different member on the basis that, for the foregoing reasons, the decision was fundamentally flawed.