Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/05461/2010

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 17-18 June and 9 October 2014	**On 7 November 2014**

Before

THE HONOURABLE MRS JUSTICE SIMLER
UPPER TRIBUNAL JUDGE GRUBB

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

"AA"

Respondent

(ANONYMITY ORDER MADE)

Representation:

For the Appellant: Mr R Hopkin, Senior Home Office Presenting Officer
For the Respondent: Mr D Seddon and Mr T Lay instructed by Lawrence Lupin Solicitors

DETERMINATION AND REASONS

1. Although this is an appeal by the Secretary of State against a decision of the First-tier Tribunal allowing AA's appeal on humanitarian protection grounds,

for convenience we refer to AA as "the Appellant" and the Secretary of State as "the Respondent" as the parties were originally.

2. This appeal is subject to an anonymity order made under rule 14(1) of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698) that no report or other publication of these proceedings or any part or parts of them shall name or directly or indirectly identify the Appellant. Reference to the Appellant may be by use of the initials "AA" but not by name. References in this Determination to certain other individuals and to certain events has also been anonymised in order to preserve AA's anonymity. Failure by any person, body or institution whether corporate or incorporate (for the avoidance of doubt to include either party to this appeal) to comply with this order may lead to a Contempt of Court. This order shall continue in force until the Upper Tribunal (IAC) or an appropriate Court lifts or varies it.

3. This is the determination of the Upper Tribunal to which both members of the Panel have contributed.

I. INTRODUCTION

4. The Appellant is a Rwandan national seeking asylum in the United Kingdom. This appeal arises out of a decision by the Respondent by letter dated 15 March 2010 refusing to grant the Appellant asylum or humanitarian protection but granting him discretionary leave. The Appellant appeals against the refusal to grant him asylum under s.83 of the Nationality, Immigration and Asylum Act 2002.

5. The appeal has had a chequered history. The Appellant arrived in the United Kingdom on 27 October 1999 and claimed asylum. This was refused in 2000 but following appeals to an Adjudicator and the IAT his case was remitted for re-hearing. Before the case was re-heard, in February 2002 the Respondent granted exceptional leave to remain for 4 years until January 2006. On 31 December 2005, the Appellant applied for indefinite leave once again. By letter dated 6 April 2009, the Respondent rejected that application and invoked exclusion from the protection of the Refugee Convention by virtue of Article 1F(a) of that Convention, in that there were serious reasons for considering that he had been involved or complicit in genocide in Rwanda. The Appellant appealed but in June 2009 (just before the appeal hearing) the Respondent withdrew the decision.

6. Subsequently, by letter dated 15 March 2010 the decision under challenge was made. The Respondent issued a certificate under s.55 of the Immigration, Asylum and Nationality Act 2006 on the basis that Article 1F(a) of the Refugee Convention applied as there were serious reasons for considering that the Appellant was part of a joint criminal enterprise to perpetrate genocide or crimes against humanity; and/or that he had aided such acts or otherwise

assisted the common plan to persecute and exterminate the Tutsi. She refused to grant the Appellant indefinite leave to remain under her policy relating to suspected war criminals and under paragraph 322(5) of the Immigration Rules HC 395 (as amended, referred to as the "IR"). She rejected the claim for asylum under paragraph 336 IR; and humanitarian protection under paragraph 339F IR. However, she granted limited leave to remain in the exercise of discretion having regard to the decision in Brown & Ors v Govt Rwanda [2009] EWHC 770 (Admin) (subsequently upheld on appeal) which held that those extradited to Rwanda would face a real risk of a flagrant denial of justice in breach of Article 6 rights.

7. The Appellant appealed against those decisions to the First-tier Tribunal (the "FTT"). In a determination sent on 7 July 2010, Judge Billingham allowed the Appellant's appeal. He rejected the Respondent's case on exclusion on the basis that there was insufficient evidence that the Appellant was in a position to influence or encourage the commission of genocide and accepted the Appellant's case based on humanitarian protection under paragraph 339C (albeit dismissing his appeal on asylum grounds). The Respondent appealed to the Upper Tribunal ("the UT") which set aside the FTT determination on the basis that the FTT had failed to determine whether (on the wider basis contemplated by JS (Sri Lanka) v Respondent [2010] UKSC 15) the Appellant contributed in a significant way to the ability of the Mouvement Revolutionnaire Nationale pour le Developpement ("MRND") to pursue its purpose of committing war crimes.

8. By a determination sent to the parties on 17 March 2012 the UT allowed the Respondent's appeal. The UT found that the Appellant was excluded from the protection of the Refugee Convention under Art 1F(a) on the basis of his involvement with the MRND long after he was aware that massacres had occurred preceding the genocide and that the extermination of Tutsis in Rwanda was planned. Having done so, applying s.55 of the 2006 Act, the UT made no decision on asylum/humanitarian protection. The Appellant sought permission to appeal to the Court of Appeal on the basis that the UT had erred in law in finding that he was excluded and in failing to make findings in relation to asylum and/or humanitarian protection.

9. Permission to appeal was granted by the Court at an oral hearing on 20 December 2012. At paragraphs [7] to [10] of his judgment giving permission, Richards LJ held:

> "7. The first main ground of challenge is that the Upper Tribunal's conclusions to the effect that the applicant contributed to the genocide were reached without regard to the conclusions reached by the International Criminal Tribunal for Rwanda ("the ICTR"), notably in its judgment in the Bagosora case. Mr Seddon submits that in that judgment, reached on the basis of a very large amount of documentary evidence and witness testimony over an extremely long trial, the ICTR

> rejected the proposition that the genocide was the result of lengthy planning and preparation prior to 7 April 1994, and did so in the context of a conspiracy charge which was found not proved against very senior people within the MRND. That, it is said, is directly inconsistent with the Secretary of State's case, effectively accepted by the Upper Tribunal that the applicant's criminal responsibility for the genocide lay in his involvement in the planning and preparation for it.
>
> 8. The fact that Mr Seddon was advancing that line of argument by reference to the Bagosora case was plainly understood by the Upper Tribunal. Reference is made to it at paragraphs 46, 61 and 65 to 66; albeit at the end of paragraph 65 the tribunal referred to the appeal judgment which came out after the hearing and said that it would deal with it below, but did not in the event, as it would seem, deal with it, at least expressly.
>
> 9. What troubles me about this issue is that, although the Upper Tribunal was plainly aware of the submission and its potential significance, it did not engage at all with the ICTR's findings when it came to its analysis and when it reached a conclusion seemingly inconsistent with the ICTR's conclusion that planning had not been proved. All the more troubling is that it was able to reach that conclusion in relation to the applicant, who was, on any reasonable view, a very much lesser player than the senior figures who were the subject of the charges in the Bagasora case. In the absence of reasoned explanation as to why a different conclusion than that of the ICTR was reached by the Upper Tribunal, one is left with an uneasy feeling that the tribunal may after all have failed to have proper regard to this aspect of the evidence when reaching its conclusion.
>
> 10. That is reinforced by a related ground of appeal concerning the position of the expert evidence adduced on the applicant's behalf. There was a report of an expert, Mr Nsengiyumva, which dealt in part with the ICTR material but also covered various other matters including issues concerning the academic environment and political involvement at Butare. The Upper Tribunal made no explicit reference to that expert evidence."

10. On 3 July 2012 the appeal was allowed by consent and remitted for a full re-hearing in the UT, retaining the facts previously agreed before the first UT hearing.

11. Thus, the matter came before us to determine both the question of exclusion under Art 1F(a) and whether the Appellant is at real risk of persecution for Refugee Convention reasons on return to Rwanda or alternatively, is entitled to humanitarian protection. The appeal being under s.83 of the 2002 Act, is limited to those two grounds (see s.84(3) of the 2002 Act and FA(Iraq) v SSHD [2010] 1 WLR 2545).

12. The Appellant was represented at the hearing by Mr Seddon and the Respondent by Mr Hopkin. We are grateful to both of them for the assistance they provided. The hearing was originally listed for two days only which proved insufficient. The Tribunal reconvened to hear submissions limited to the inclusion issue on 9 October 2014, with exchange of written arguments before that date. At the end of that hearing, having advanced arguments on the Respondent's behalf, Mr Hopkin applied to adjourn the case on the inclusion

issue. In the absence of any justifiable basis to do so, we refused that application.

II. EXCLUSION

The parties' positions in summary

13. The Respondent's case on exclusion has changed over the course of these proceedings. Originally, her central allegation against the Appellant (as set out in the letter of 15 March 2010) was that as the MRND leader of students for his year at Butare University, there were serious reasons for thinking that he participated in the planning and preparation of the genocide in Rwanda, which was meticulously organised in the months and years before April 1994. It was also alleged that he had returned to Butare University in April 1994 and actively participated in the genocide there. The Respondent relied on a series of reports produced by the UKBA War Crimes Unit setting out material that was said to demonstrate that pre-planning. Reliance was also placed by the Respondent in the 15 March 2010 letter on the fact that the Appellant spent time at a particular Refugee Camp in a leadership role there, after fleeing Rwanda in 1994. The Camp was said by the Respondent to have been a focal point of Hutu extremists fleeing Rwanda, many of them genocide perpetrators. This allegation was dealt with by the FTT at paragraph 40. The FTT accepted as credible, evidence of other witnesses called by the Appellant at that hearing (all of whom were MRND members) who had been at the Camp and said that the Appellant was not politically active at the Camp and did not associate with extremists. This is no longer relied on by the Respondent.

14. The Respondent's position before us was advanced on the basis of three principal grounds justifying the Appellant's exclusion from international protection. In particular, Mr Hopkin contended that there are serious grounds for considering that:

    (i) the Appellant was a participant in acts of genocide in Rwanda (by killing and assaulting Tutsis and moderate Hutus) between 6 and 9 April 1994 in Gisenyi, and during the first week in May 1994 at the University of Butare; and/or

    (ii) as a member of the student leadership structure of the MRND at Butare University between 1992 and 1994, by his extensive activities on behalf of the MRND during this period the Appellant knowingly and intentionally contributed in a significant way to a joint criminal enterprise of persecuting Tutsis in Rwanda before April 1994; and/or

    (iii) the Appellant aided and abetted international crimes of murder or genocide after 6 April 1994, by acting as a supporter and defender of the MRND and its policies between 1992 and 1994 and by providing acts of assistance by words or actions that lent encouragement or support,

knowing that these acts and support encouraged violence and discrimination towards Tutsis at the time and knowing they would assist in any subsequent acts of murder or genocide.

15. The Appellant denies these allegations in their entirety. On his behalf, Mr Seddon contends that a central edifice of the Respondent's case (both as originally advanced and as advanced before us) has been undermined, namely the idea or theory that the Rwandan genocide was pre-planned in the months and years prior to April 1994. The suggestion of pre-planning was comprehensively rejected by the International Criminal Tribunal of Rwanda ("the ICTR") in a number of cases, including Bagosora & Ors Case No. ICTR-98-41-T and Prosecutor v Karemera & Ors Case No. ICTR-98-44-T. Although convicted of genocide offences after 6 April 1994, all individuals prosecuted were acquitted of the conspiracy charge in the period prior to 6 April 1994.

16. Mr Seddon further contends:

(i) If there was no preparation and planning for the genocide by those who orchestrated it ultimately, it cannot be said that the Appellant was involved or participated in such preparation and planning.

(ii) It was neither the purpose nor the policy of the MRND to commit human rights abuses or international crimes.

(iii) In any event the Appellant had no knowledge that international crimes were being committed in the name of or by the MRND. The Appellant did not by his actions contribute significantly to the commission of international crimes and moreover, there is no evidence that international crimes were committed in the period 1990 to 1993.

(iv) There is not a scrap of evidence that the Appellant participated in the genocide from 7 April 1994.

The principles relating to exclusion

17. Art 1F of the Refugee Convention sets out the circumstances in which an individual will be excluded from protection of the Refugee Convention. So far as relevant to this appeal, Art 1F provides:

> "The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:
>
> (a) he has committed ... a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes; ..."

18. It is common ground in this appeal that the burden lies upon the Respondent to establish that Art 1F applies; in other words, that there are "serious reasons for considering" that the Appellant has committed a crime against humanity. Moreover, as an exclusion from the protection of fundamental rights, the clause must be narrowly interpreted and cautiously applied. In Al-Sirri v SSHD [2012] UKSC 54 at [75] the Supreme Court held:

> "We are, it is clear, attempting to discern the autonomous meaning of the words "serious reasons for considering". We do so in the light of the UNHCR view, with which we agree, that the exclusion clauses in the Refugee Convention must be restrictively interpreted and cautiously applied. This leads us to draw the following conclusions:
>
> (1) "Serious reasons" is stronger than "reasonable grounds".
>
> (2) The evidence from which those reasons are derived must be "clear and credible" or "strong".
>
> (3) "Considering" is stronger than "suspecting". In our view it is also stronger than "believing". It requires the considered judgment of the decision-maker.
>
> (4) The decision-maker need not be satisfied beyond reasonable doubt or to the standard required in criminal law.
>
> (5) It is unnecessary to import our domestic standards of proof into the question. The circumstances of refugee claims, and the nature of the evidence available, are so variable. However, if the decision-maker is satisfied that it is more likely than not that the applicant has not committed the crimes in question or has not been guilty of acts contrary to the purposes and principles of the United Nations, it is difficult to see how there could be serious reasons for considering that he had done so. The reality is that there are unlikely to be sufficiently serious reasons for considering the applicant to be guilty unless the decision-maker can be satisfied on the balance of probabilities that he is. But the task of the decision-maker is to apply the words of the Convention (and the Directive) in the particular case."

19. In determining what amounts to a "crime against humanity" the Supreme Court in JS accepted that the Rome Statute of the International Criminal Court ("the ICC") was the "starting point" (at [8]). The international crimes are defined by Articles 7 (crimes against humanity) and 8 (war crimes) of the ICC. Articles 25 (individual responsibility) and 30 (mental element) are also important.

20. Article 7 of the ICC defines a "crime against humanity" in terms of a series of criminal acts from murder at (a) to "other inhumane acts" at (k) which constitute a crime against humanity

> "when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack"
>
> Where 'attack directed against any civilian population' means

> "a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack; ..."

21. Article 8 defines war crimes by reference to a further list of wrongful acts when "committed as part of the plan or policy or as part of a large-scale commission of such crimes".

22. Article 25 addresses the circumstances in which an individual may be "criminally responsible" for a crime against humanity falling within Article 7 and imposes individual responsibility on those who commit such crimes individually or jointly (Article 25(3)(a)). Article 25(3) also imposes individual responsibility for those with less than direct involvement in the commission of the crime where a person:

> "(c) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission;
>
> (d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:
>
> i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or
>
> ii) Be made in the knowledge of the intention of the group to commit the crime …"

23. The necessary mental element required for criminal responsibility is dealt with by Art 30 which provides at (1) that the material elements must be committed with intent and knowledge, and that:

> "2. For the purposes of this article, a person has intent where
>
> (a) In relation to conduct, that person means to engage in the conduct;
> (b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.
>
> 3. For the purposes of this article, 'knowledge' means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. 'Know' and 'knowingly' shall be construed accordingly."

24. In JS, the Supreme Court dealt with the correct approach to Article 1F, recognising that criminal responsibility is engaged by persons other than the person actually committing the crime; encompassing those who order, solicit or induce; those who aid, abet, or otherwise assist; and those who in any other way intentionally contribute to its commission. Where a person is alleged to possess individual criminal responsibility not by reason of any personal commission but by complicity, there is a requirement that that person has

"contributed in a significant way" to the commission of the act in the knowledge that his act or omission would facilitate the criminal conduct. At paragraph [38] of JS Lord Brown held that the Court of Appeal had been wrong to restrict the scope of Art 25(3) only to those who would be criminally liable (whether as perpetrators or accessories) under domestic criminal law, stating

> "Put simply, I would hold an accused disqualified under article 1F if there are serious reasons for considering him voluntarily to have contributed in a significant way to the organisation's ability to pursue its purpose of committing war crimes, aware that his assistance will in fact further that purpose"

25. The Supreme Court considered the question "what more is required beyond mere membership of an organisation which commits war crimes for a person to be excluded from the protection of the refugee convention". The Court held that even in the case of an extremist organisation, joining it will not be enough to suggest complicity; the critical question must always be whether the evidence provides serious reasons for considering the individual to have committed the actus reus of an international crime with the requisite mens rea. The Supreme Court identified a number of factors that are likely to be relevant to the necessary evaluation of the individual's role in the organisation and the nature of his participation:

> "30. .... (in no particular order) (i) the nature and (potentially of some importance) the size of the organisation and particularly that part of it with which the asylum-seeker was himself most directly concerned, (ii) whether and, if so, by whom the organisation was proscribed, (iii) how the asylum-seeker came to be recruited, (iv) the length of time he remained in the organisation and what, if any, opportunities he had to leave it, (v) his position, rank, standing and influence in the organisation, (vi) his knowledge of the organisation's war crimes activities, and (vii) his own personal involvement and role in the organisation including particularly whatever contribution he made towards the commission of war crimes."

26. Other members of the Court agreed with the factors set out by Lord Brown at [30] but Lord Kerr (with whom other members of the Court agreed) cautioned against that list becoming prescriptive:

> "55. I would be reluctant to accept that this list of factors provides the invariable and infallible prescription by which what I have described as the critical question is to be answered. What must be shown is that the person concerned was a knowing participant or accomplice in the commission of war crimes etc. The evaluation of his role in the organisation has as its purpose either the identification of a sufficient level of participation on the part of the individual to fix him with the relevant liability or a determination that this is not present. While the six factors that Counsel identified will frequently be relevant to that evaluation, it seems to me that they are not necessarily exhaustive of the matters to be taken into account, nor will each of the factors be inevitably significant in every case. One needs, I believe, to concentrate on the actual role played by the particular person, taking all material aspects of that role into account so as to decide whether the required degree of participation is established."

27. Lord Kerr emphasised that the assessment required an examination of the individual's actual involvement in the organisation which committed crimes against humanity.

Agreed factual background

28. The Appellant is a Hutu from the village of Rambura, Karango, in the province of Gisenyi in Rwanda. He was an able student, scoring high marks at school and in 1992, having graduated from Rambura College, he was admitted to the University of Butare to study biology and chemistry.

29. At this time, the president of Rwanda was President Juvenal Habyarimana, whose home village was also Rambura. He was the leader of the MRND which had been in power since 1973. The MRND was largely Hutu. There had been fighting between the MRND Government and the Rwandan Patriotic Front ("the RPF") since October 1990. The RPF was largely Tutsi. The Appellant's brother, BB, had a significant role in President Habyarimana's staff.

30. At the University of Butare the Appellant joined the MRND and was elected student leader for his year group in 1992 and 1993. The organisation invited politicians to speak at the University and the Appellant spoke at student meetings.

31. On 6 April 1994 President Habyarimana was returning from Arusha in Tanzania, from discussions concerning the implementation of the Arusha peace accords relating to the armed conflict between the RPF and the MRND. The Appellant's brother BB, was aboard the President's aircraft when it was shot down, and both were killed. At the time of the shooting down of the aircraft, the Appellant was at home in Rambura during the Easter holidays. Following the shooting, he went to Kigali with another brother and sister to find BB's family. Having found them, they all returned to Rambura. At some point between then and his departure from Rwanda in August 1994, the Appellant returned to the University campus.

32. The Appellant escaped to the Democratic Republic of Congo in August 1994 but returned to Rwanda in 1997 with his family where he remained until he left for the UK in 1999. He suffers from anxiety and stress.

33. His family are pursuing claims against the Rwandan Government for compensation in relation to BB's death and are seeking criminal convictions for unlawful killings against the RPF Government headed by President Kagame. The Appellant considers that members of his own family have been victims of unlawful killing and seeks justice for them.

Further findings of fact

34. We heard oral evidence from the Appellant and considered the various accounts given by him over the 15 year period he has spent in the United Kingdom. In evidence he adopted his earliest witness statement dated December 1999 subject to amendments made to correct certain aspects of it in a later statement; the statements dated 10 May and 4 June 2010; and his most recent witness statement, all of which he confirmed as true. In addition we were referred to answers to questions he gave when interviewed on a number of occasions by the UKBA. We also had a considerable volume of documentation including a series of War Crimes Unit Case Reports, a report of "the International Commission of Investigation on Human Rights Violations in Rwanda" dated January 1993, a report entitled "Beyond the Rhetoric, Continuing Human Rights Abuses in Rwanda" dated June 1993 and a "Human Rights Watch Africa" report dated May 1994.

35. When assessing the Appellant's evidence it is, we consider, important to recognise two things. First, English is not his first language and on arrival here, he could not speak or understand it. Secondly, he has been asked to recall events that took place some time ago (now more than 20 years ago). Over the period since his arrival in the UK, he has read and become familiar with many reports and publications concerning the Rwandan genocide, accumulating a knowledge and understanding of events he may not have had when he left Rwanda. It is clear to us from what he said that these have influenced, to some extent at least, his recollection and account of what happened at the time. We consider that he has found it difficult when answering questions, to separate what he now knows occurred from what he actually remembers about the material period and what actually happened at the time. This may explain some conflict or inconsistency in the detail of some of the answers he has given in interview to the UKBA, though his account on essential matters has remained consistent.

36. Even recognising these features and making allowances for them, we have not been able to conclude that he is an entirely straightforward witness. He appeared unable or unwilling to give a straight answer to some direct questions. On occasions he was belligerent or sarcastic in his response to questions. There are also some changes in the detail of his evidence, when earlier statements are compared with later statements, that cannot be explained by his increasing level of knowledge or understanding, or not having English as a first language, and are not otherwise satisfactorily explained.

37. We approach the Appellant's evidence with caution in the circumstances and because we are not altogether persuaded of its reliability. We regard it as particularly important in light of the Respondent's position, to consider his evidence in the context of other objective material about what was happening in Rwanda at the relevant time, and about the nature of the MRND and the role played by the MRND both before and after 6 April 1994. Our approach accordingly is first to make findings about what the Appellant did at the

material times; then to consider the objective material; and then to draw inferences and conclusions in relation to the three grounds for exclusion advanced.

38. Although in later statements and in evidence, the Appellant sought to distance himself from President Habyarimana, we are quite satisfied that the Appellant and his family were strong supporters of the President. They lived in the same small village of Rambura, also the President's village, and he describes the two families as very close in his 1999 statement. The whole region of Gisenyi, but in particular the village of Rambura, were very much favoured by the President in terms of development projects and the money invested in them - the village had the benefit of infrastructure, roads and electricity not found elsewhere. The Appellant's brother, BB, was sponsored through higher level training for four years by the government. According to the Appellant's first statement, BB was only able to gain a place there because of his strong links with the President and was sponsored to finish his studies at a college abroad. Having done so he rose through promotions to his significant role in the President's staff. Further, in interview on 1 May 2009 the Appellant was asked whether his connection to the President helped him get a scholarship. His answer was

> "I would say yes. Yes my performance was good but competition was very high and we only had two universities. If it were not for my brother I am not too sure whether I would have got place or not."

39. In his school graduation photograph the Appellant was photographed wearing a badge with the face of President Habyarimana on it. Although he sought to downplay the significance of this, we are satisfied that he was expressing support for President Habyarimana by wearing the badge.

40. As a student at school in Rambura, the Appellant told us that he had no involvement with the MRND. In particular, he denies attending MRND meetings in Rambura whilst still a school-boy, and maintains that there were no such meetings in his village, and his first involvement with MRND was when he went to University. However, a letter from his then solicitors, Gill and Co, dated 22 December 1999 provided the Immigration office with a number of photographs in support of his asylum claim and one such photograph is described as showing the Appellant "standing in an MRND meeting in Rambura". The Appellant maintained that this was a simple mistake that had not been noticed. This inconsistency was much relied on by the Respondent, and Mr Hopkin suggested in effect that it was an attempt to re-write the past to obscure his much earlier involvement with the MRND.

41. We are puzzled by the Solicitors' reference but given the fact that the Appellant volunteered in the same 1999 statement his voluntary membership of the MRND as soon as he started University, and the fact that his whole family were members of the MRND and his brother held a high position in the President's staff, we cannot see why he would lie about any MRND involvement before

this time. Further, having looked carefully at the photographs (and the colour prints provided after the hearing) we are satisfied that the photograph relied on in this regard, shows the Appellant at his graduation, and not standing in an MRND meeting in Rambura. Accordingly, we are satisfied that his first active involvement with the MRND was at University.

42. The Appellant became a voluntary member of the MRND and was elected as the MRND student leader for his year at Butare University within a short time of joining the University in autumn 1992. He represented the MRND for his year in 1992 and 1993 and in his 1999 statement (at paragraph 6) he volunteered the following information about his activities on behalf of the MRND of which there would otherwise have been no evidence:

> "as leader (of the MRND) for my year, I would organise the buses to go to meetings, I would organise contributions if there was some kind of collection going on, I would give out badges, I would invite government politicians to talk of what the government would do about the war, for example; and Rwanda's problems. When the MRND had important meetings, I would always be sent along as delegate, as a representative. University meetings will take place about every month. I would speak at meetings, to defend the MRND actions and talk about the opposition. We were there to give different examples to show that the MRND were working for everyone."

There is no other evidence of anything said or done by the Appellant while at Butare University.

43. The reference to defending MRND actions was seized on by the Respondent and interpreted as defending actions such as the Bagogwe and Kibilira massacres between 1990 and 1994 in which it was said the MRND leadership, its supporters and their militia, undertook targeted and sustained violence against the Tutsis.

44. The Appellant was accordingly pressed in interview about the reference to defending MRND actions and has maintained throughout, that he had no knowledge of violence or abuse carried out by the MRND at the time he joined the organisation or at any time afterwards. He has said throughout that he believed that the MRND was a moderate party; not a party of extremist Hutus. By contrast he regarded the RPF as an extremist Tutsi party and the CDR as an extremist Hutu party. He has maintained that at the time, that is between autumn 1992 and 6 April 1994 he was not aware of militias being involved in killings. There is no direct evidence to contradict the Appellant's statements that he did not make any anti-Tutsi speeches at any time nor did he arrange meetings the purpose of which was to give a platform for anti-Tutsi sentiment to be expressed.

45. In interview in May 2009 the Appellant was asked what he said at the meetings at which he was a 'delegate' and stated:

> "it was my duty to show at these national meetings what was discussed at student meetings and represent them. And prove why we joined the MRND over other parties, appeal to the public."

46. Later he stated:

> "I could probably take against any other party and show how their policy would not be in the interest of Rwandans. Two extremist parties are PL – Tutsi party – and CDR – extremist Hutus. So it was my duty to tell that MRND was moderate. We were in between so easy to pick up on PL – if general public vote for PL then this is how our country will be. We have tomorrow for their politics. PL and CDR are racist and I would tell voters not to vote for them because they are extremists. I have the right to do so as a Rwandan".

47. The Appellant was cross-examined about becoming a student leader and defending the party, and responded:

> 'MRND, as I have explained, there were different parties, others were extremist. I was defending against the extremists. It was the party that could play a key role in having peace. The war could have ended and there been no genocide. But with extremists, they made the Rwandans suffer. There were problems within the MRND. I wanted to make sure the Habyarimana group…hand over party to ordinary people. The peace agreement was an achievement. On 6 April 1994 the peace agreement was signed, they shot down the aircraft and genocide started - extremists. If the peace agreement had been implemented, it wouldn't have happened."

48. In his May 2010 statement, the Appellant states that he saw the MRND as the most easily reformed party that could bring Rwanda into the modern world; but he was not uncritical of the party. There were specific ministers whose policies he criticised; and he stated that he even considered that President Habyarimana himself did not sufficiently promote a culture of equal opportunities.

49. There is no evidence that the Appellant had links with extremist groups or organisations. He has said that he was against the 'Inkandagirabitabo' (those who 'march over the books') element within the MRND, including people such as Bagosora. Overall the policies he says he espoused (and believed the MRND espoused) were seeking a resolution of the civil war and achieving power sharing. He denies that the MRND espoused extremist Hutu ideology and maintains that the Hutu extremist party was CDR, which he did not join.

50. The Respondent points to conflicts in the evidence the Appellant has given about Hutu/Tutsi sectarian tensions at Butare University, as a basis for concluding that he is covering up his real role and actions at the time. A careful reading of the interviews and statements suggests that this conflict is over-stated:

    (i) In his third interview, the Appellant said there was no tension at University (Q22-24) as far as he was aware because "…they were signing

peace agreements if you remember so we were all happy as far as I knew".

(ii) In his second interview (Q30-32), he was being asked about his professors and he agreed that some supported the MRND "for their own safety".

In his oral evidence, the Appellant confirmed that they may have done this for protection because of the attitudes of certain Hutu extremists in a time of war. This was not, as we understood it, an agreement that there were ethnic tensions on campus. That professors, in a significant or exposed position, may consider that they needed to align themselves clearly with the state at a time of war does not of itself mean that there were ethnic tensions on campus.

51. The Respondent also relies on conflicts in the Appellant's evidence as to the precise ethnic composition of Butare University. The reality, as it appears to us, is that the Appellant does not know the precise ethnic make-up, and has hazarded a guess at different times based on a different knowledge-base and understanding. We do not regard this as sinister. As he explained and seems rational, his first assumption was that because the University is located in the south of Rwanda where the majority are Tutsi, this would suggest greater numbers of Tutsis. Later he thought that because the Hutu were the majority in the whole country, it may mean that the majority was Hutu.

52. The Respondent also relies on conflicting evidence given by the Appellant about the role of the lecturers' branch at the University. Once again, we consider that too much is made of this so-called conflict. In the fourth UKBA interview, the Appellant stated that members of the University staff did not attend student MRND meetings at Butare (Q29), whereas in his first statement (paragraph 7) he says that the lecturers helped "organise student wing". Yet, the Appellant's own Solicitors' record of the fourth interview was that the "Professors probably had their own meetings. There were meetings as overall nationwide meetings." The answer does not in fact address whether the lecturers attended or not.

53. The Appellant has explained (and this evidence is supported by his expert) that local and national news was limited in Rwanda during the period 1990 to 1994. We accept (by reference to objective material referred to below) that this was a period of civil war in which serious violence between the government side and the RPF took place, with allegations and counter allegations of abuse made on both sides, and limited independent or objective information available. There was no internet available during this period. There were three radio stations: Radio Rwanda and RTLM, both of which were pro the Habyarimana administration; and Radio Muhabura which favoured Paul Kagame and the RPF side. The Appellant states that the pro-government media would claim that RPF soldiers or supporters had attacked and committed abuses causing the government to fight them; whilst on the other side, the RPF media would claim

that innocent civilians had been abused by the Rwandan army; and that it was not possible for him to verify the conflicting claims. Further he states that where there was acceptance by the Habyarimana administration that abuses had been carried out by its side, such abuses were put down to people acting on their own and outside the authority or instructions given by the army or the government itself. We return to these assertions having reviewed the objective material below.

54. It is common ground that, on 6 April 1994, the Appellant was at home for the Easter vacation, and that he and his family heard about the President's plane being shot down that evening. He and his family knew that the Appellant's brother, BB, was on board that plane, and we have no reason to doubt that the family were upset and concerned when they heard the news at about 8pm that evening.

55. The Respondent has relied on evidence of Tutsi killings at Rambura College on the night of 6 April deriving from a sentence in the UKBA Case Research and Analysis report (manuscript date 27 November 2011): "It is considered significant that when the genocide began the first Tutsis to die were those living within walking distance of Rambura College". The source of this statement is said (in a footnote) to be The Globe and Mail Canada, 11 April 1995. However, we have not been provided with this newspaper article, and it has not been shown to the Appellant.

56. The Appellant volunteered in evidence that he and his family left their house in Rambura that evening to use a public telephone in the village in circumstances where there was otherwise no evidence to show that he had left the family house. The public phone was at a post office some minutes' walk from his house. He maintained that he saw nothing sinister and was not aware of any killings in Rambura (or Rambura College) that evening. Nor is there any evidence that he went to Rambura College that evening.

57. It is accepted by the Respondent that the Appellant left home the following morning, 7 April, with other family members to go to Kigali to collect BB's wife and children, and did not return to Rambura until 10 April 1994. There is no evidence that he did or said anything on the journey or once in Kigali, suggesting complicity in acts of genocide that were by then undoubtedly taking place.

58. Once back in Rambura, the Appellant and his family were in mourning for BB (regarded by the Appellant as a father figure). He stated (and we accept) that friends and wider family members visited the house to mourn with them. He recalls still being in mourning on a date in early May 1994, as this would have been BB's birthday, and accordingly a memorable date.

59. The account given by the Appellant about returning to Butare University a few days after 1 May 1994 has been reasonably consistent. In his statement dated 10 May 2010, he explained that he returned about three or four weeks after the plane was shot down and that he was unable to remember the exact date but knew that it would have been after 1 May 1994. The date is significant because acts of genocide are now known to have been committed at Butare University on about 21 April 1994 and the Respondent's case was (originally) that the Appellant was present in Butare at that time. It is now accepted that he was not.

60. The Respondent challenges as irrational and inexplicable, the Appellant's decision to return to the campus given the genocide that was taking place, and the risk such a journey would hold for an innocent person not party to it. The Appellant states that he expected to be at home only for the Easter holidays and had left most of his possessions at the University. He was concerned that if he did not retrieve his study materials and exams went ahead in June he would not be prepared. There had been no official announcements concerning the University and whether or not it would resume, and if so when.

61. Moreover, it is submitted on the Appellant's behalf that his decision to go to Butare University should be viewed in the context of the fact that he did not consider himself to be at risk in returning to Butare. From Rambura there were two routes to Butare. One was through Kigali in the north and would have involved travelling through territory that was by then RPF controlled, so dangerous for him. The other was through Gitarama in the south, where the Hutu government had re-established its seat, so was government-controlled and understood to be safe for him. He took the latter route via minibus travelling entirely through government controlled territory. He understood that he was not therefore at risk from the fighting between the RPF and the government while on his way to Butare. There is no evidence to contradict this account of the Appellant's journey, and Mr Leopold Nsengiyumva's evidence supports it, stating that it was safe for the Appellant to travel to Butare through the government controlled zone.

62. Although there is no evidence that the Appellant saw anyone taken off the minibus on which he travelled to Butare and abused during the journey, his assertion that he did not see people being killed, or led away, is challenged as implausible by the Respondent. It is an acknowledged fact that genocide took place in Rwanda at this time, and the Appellant has not disputed this. Being a witness to such acts does not however implicate a person in those acts. Having volunteered the evidence that he travelled to Butare, we find it difficult to see why, if he had witnessed atrocities or abuse, he would have lied about it when it would not harm his case to say so. Moreover, from what is known about deaths at the Butare campus, students were led away and taken to woods close to the campus where they were killed; they were not slaughtered in plain sight on the campus (March 2010 refusal letter, paragraph 22).

63. There is no evidence to contradict the Appellant's account that on arrival at the University there were soldiers checking identity documents. There were also soldiers throughout the campus. He states that he went straight to his room to collect his possessions. The atmosphere had changed and was tense but he saw no sign of murder or injury. The only person he says he saw on this trip, whom he knew, was CC. He says he met her first on his way to the University and then again when he was returning to get the bus. On his account, it took him about an hour to go to his room after first seeing CC, collect his belongings and return to the bus stop.

64. A witness statement from CC, who was among the students who remained on campus during the period April 1994 to July 1994, confirms that she saw him as he was walking towards the campus from the city of Butare around 6 May 1994. He told her that he was coming to collect his belongings and they spoke for a few minutes. She states that he made his way to the campus and she made her way to the bus station. She says a few minutes later she met him in the bus station as she was still there waiting for her bus-taxi. They spoke for a few minutes and he left before her. The discrepancy in timing was relied on by Mr Hopkin as indicating that the Appellant's evidence could not be relied upon. We do not regard this discrepancy as sufficiently significant to undermine his evidence about his trip to Butare University, still less sufficient to give rise to an inference that he was participating in acts of genocide during this visit. The Appellant himself volunteered the information that he returned to the University to collect his belongings. He could quite easily have said nothing about this journey, maintaining that he was at home in Rambura throughout, without fear of contradiction. We cannot understand why he would have volunteered this information if the real reason for his visit to Butare campus was to participate in the genocide in some way.

65. More generally, CC states in her witness statement that she saw the Appellant regularly once she joined the University in 1993 and that she saw him in his capacity as an MRND member/representative assisting several students from different tribes, political parties and regions. She states that the Appellant was not at the University when the killing and trouble was taking place on the campus around 18 to 21 April 1994.

66. The Respondent's original case relied on the Appellant's stay at a named refugee camp and involvement with food distribution there as indicating that he must have been part of the leadership of the refugee camp and therefore associated with others involved in leading the genocide. More than a million refugees fled to Eastern DRC, with a high percentage from north-west Rwanda (March 2010 refusal letter, paras 45, 47) and the Appellant has always maintained that there is no basis for the Respondent's inference. At the first hearing of this appeal (before Judge Billingham) three witnesses were called to give evidence for the Appellant. They were at the camp, saw him there, and

stated that he was not involved in speaking to or dealing with any extremists throughout the years he was at the refugee camp in question, or in taking part in political activities. Their evidence was accepted, and this allegation has not been pursued since. The Appellant is entitled to rely on the fact that he was not involved or associating with Hutu extremists at the camp, despite their asserted presence there, and not taking part in political activity with them, as supportive of his case that he was not involved with them during the genocide either.

Other evidence

67. We turn to consider the reports relied on by the Respondent, the expert reports from Leopold Nsengiyumva, served on behalf of the Appellant, and other objective material. Although Mr Nsengiyumva's evidence was not agreed by the Respondent, there was no serious challenge to it, (save perhaps by reference to independent reports – if any – that might contradict it).

68. Mr Nsengiyumva makes clear that in preparing his reports he has relied heavily on the judgments of the International Criminal Tribunal for Rwanda (the "ICTR") in Bagosora and Karamera to which reference is made below.

69. A significant part of the case against the Appellant is based on his involvement with the MRND. The Respondent's War Crimes Unit reports draw heavily on the indictments (as opposed to the judgments) of the ICTR against Karamera and Ngirumpatse (and others) in support of this part of the case; in other words, relying on the case for the prosecution. For example, the first report contains the following passages, nearly all of it drawn from the ICTR indictment:

> "From 1990, Rwanda's President Habyarimana and several of his close associates devised the strategy of inciting hatred and fear of the Tutsi minority as a way of rebuilding solidarity among Hutu and keeping themselves in power[1]. They strongly opposed any form of power sharing, including the one envisaged by the Arusha Accords. The strategy adopted in the early 1990's which culminated in the widespread massacres of April 1994, comprised several components, which were carefully worked out by the various prominent figures who shared the extremist Hutu ideology. In the addition to incitement to ethnic violence the extermination of the Tutsi there was the organisation and military training of the youth wings of the political parties, notably the Interahamwe (MRND), the preparation of lists of people to be eliminated, the distribution of weapons to civilians, the assassination of certain political opponents and the massacre of many Tutsi in various parts of Rwanda between October 1990 and April 1994.
>
> Formed in 1991 the Interahamwe militia originally served as a nation force aimed to help protect the country from attacks by the Tutsi-dominated Rwandan Patriotic Front (RPF).23
>
> The Interahamwe were highly structured, along the same lines as the MRND party. At national level, they had a chairman, two vice-chairmen, a secretary general and a

[1] Indictment of the International Criminal Tribunal for Rwanda against Bizimanz, Karemera et a(ICTR-98-44-i)- 1.13

> treasurer. In June 1993, to ensure better territorial coverage and effectiveness, the MRND central committee decided to create Interahamwe branches in the various prefectures in the country[2]. By 1992/93 the Interahamwe was a fully-fledged mechanism for killing civilians that would eventually carry out most of the genocide."

70. The Karamera trial (which lasted hundreds of days with hundreds of witnesses, and thousands of pages of transcripts and documents) concerned the two highest-ranking leaders of the MRND: Karamera was the Vice President of the MRND, and Ngirumpatse was the National Party Chairman of the MRND. They continued to hold these positions until they left Rwanda in July 1994. They were charged with conspiracy to commit genocide in the period prior to 8 April 1994. They were also charged with genocide and other serious crimes against humanity in the period immediately afterwards from 8 April to mid July 1994. All charges were denied. So far as the conspiracy charges were concerned, they contended that the genocide was a spontaneous public reaction to President Habyarimana's assassination. They maintained that they did not plan genocide in advance and lacked the ability to prevent the killings once the genocide began. They argued that they did not encourage people to attack and kill Tutsis and Hutu opponents.

71. The prosecution case relating to the period before 8 April 1994 was that they conspired with others to destroy the Tutsi population of Rwanda in whole or in part by forming, training, arming and financing the Interahamwe militia, widely considered to be the main group of civilian perpetrators of the Rwandan genocide. Significantly, the prosecution alleged that they participated in MRND national meetings and rallies that fostered the Hutu Power movement and anti-Tutsi extremism as part of the conspiracy.

72. In a judgment dated 2 February 2012, the ICTR rejected the conspiracy charges. It found that during 1992 the MRND established a youth wing, later called the Interahamwe. In 1993 it received military training and the MRND Executive Bureau agreed with the military authorities to distribute arms to the Interahamwe, stockpiling additional arms for later distribution. However, the ICTR was not satisfied that the military training or distribution and stockpiling of arms were intended to facilitate the killing of Tutsis. In light of the ongoing conflicts with other political parties and the RPF, the ICTR considered it reasonable to infer that the accused, along with other MRND leaders, were merely seeking to protect themselves and their supporters from attacks from other opposition political parties or the RPF by forming, expanding training and arming the Interahamwe prior to 8 April 1994.

73. As to national MRND meetings, the ICTR was not satisfied that the accused had chaired meetings of the National Committee of the Interahamwe where they and other leaders prepared lists of people to be killed and planned a

[2] Indictment of the International Criminal Tribunal for Rwanda against Bizimana, Karemera et at (ICTR-98-44-I)-3.10,3.11).

killing campaign against Tutsis and moderate Hutus. So far as large public rallies were concerned, four large rallies were held during 1993 and 1994 and these were attended by leaders of the MRND along with Interahamwe. Three of these promoted the cause of Hutu Power and espoused opposition to the Arusha peace accords. The MRND Executive Bureau condoned the three rallies which were addressed by the accused. Nevertheless the ICTR was not satisfied that the rallies called for the killing of Tutsi civilians and considered, in light of the evidence of ongoing conflicts with other political parties and the RPF, that the rallies were held to galvanise support for the MRND and to speak out against opposition parties and the RPF.

74. As a result of these conclusions the ICTR did not consider that the participation of Karamera and Ngirumpatse in a conspiracy to commit genocide was the only reasonable inference that could be drawn from the circumstantial evidence concerning the period prior to 8 April 1994. These conclusions undermine those parts of the reports relied on by the Respondent, that were based on the case for the prosecution in these trials.

75. The other significant ICTR trial (Bagosora and Others) concerned senior military figures also charged with conspiracy to commit genocide, together with crimes of genocide and war crimes and crimes against humanity in Rwanda in 1994. On the Respondent's own case, as reflected by her March 2010 letter, Col Bagosora was the mastermind and the "perceived architect" of the genocide. In her letter of 15 March 2010, the Respondent relies on an earlier decision of the ICTR, Akeyusa, confirming that Col Bagosora established his own self-proclaimed Hutu Power interim government shortly after the President's aircraft was shot down (see paragraph 7, March 2010 letter).

76. The prosecution in the Bagosora trial relied (largely) on circumstantial evidence said to form links in a chain from late 1990 through to 7 April 1994, amounting to a conspiracy to exterminate the Tutsi population. The defence disputed that there was a conspiracy, arguing a number of alternative explanations for the events which unfolded after 6 April. One argument was based on the view that it was the RPF which shot down President Habyarimana's plane on 6 April and that this event together with other factors, triggered spontaneous rather than planned, killings.

77. The ICTR judgment in Bagosora was delivered on 18 December 2008. It found that some of the accused played a role in the creation, arming and training of civilian militia as well as the maintenance of lists of suspected accomplices of the RPF or others opposed to the ruling regime. The ICTR was not satisfied however that these actions were directed at killing Tutsi civilians with the intention to commit genocide. It held that several elements underpinning the prosecution case of conspiracy were not supported by sufficiently reliable evidence: for instance Col Bagosora's reference to preparing for the "apocalypse" and the accused's alleged role in certain clandestinely criminal

organisations. Other evidence concerning the drawing up of lists of Tutsis to be killed was not considered credible. Whilst accepting that there were indications which could be construed as evidence of a plan to commit genocide, in particular when viewed in light of the subsequent targeted and speedy killings immediately after the shooting down of the President's plane, the evidence was regarded as also consistent with preparations for a political or military power struggle and measures adopted in the context of an ongoing war with the RPF that were used for other purposes from 6 April 1994. In the circumstances, the ICTR was not satisfied that the prosecution had proven beyond a reasonable doubt that the accused conspired amongst themselves or with others to commit genocide before it. Each was acquitted on the counts of conspiracy charged in their indictment; but all were convicted of genocide.

78. The Respondent advances the case against the Appellant that it was the Hutu planners of the genocide that shot down the President's plane (paragraph 95, March 2010 letter). However, if those who were centrally responsible for the genocide brought down the aircraft, as a means of creating a trigger for the genocide, that is inconsistent with the suggestion that the genocide was instigated by those closely associated with President Habyarimana. In the Appellant's case, since his brother was on board the aircraft, it makes it less likely that he (and his family of Rambura-based MRND members and President Habyarimana supporters) would have supported this action. Rather, logic suggests that another extremist group, perhaps including those associated with Col Bagosora, was responsible.

79. So far as objective evidence concerning the MRND and its membership are concerned, there is no dispute that the MRND was created in 1975 when Rwanda was a one-party state, and every Rwandan was treated as a member, no matter what his or her ethnic background. The reports relied on by the Respondent suggest that President Haybarimana adopted a policy of systematic discrimination in favour in particular of Hutu from his native region. This weakened his power base and radicalised the opposition RPF. An RPF attack in October 1990 led to thousands of opposition members in Rwanda (considered supporters of the RPF) being arrested and to growing criticism of his management of the country. This compelled President Habyarimana to accept a multi-party system. Talks with the RPF and the Democratic Republican Movement (or MDR) started and led to a ceasefire in July 1992 which recognised RPF control over a portion of Rwandan territory in the north east. Meanwhile in March 1992 a group of Hutu extremists founded a new radical political party, the CDR, which was more extremist than the MRND and opposed President Habyarimana.

80. There is objective evidence of propaganda campaigns which consisted of fabrication by the Habyarimana government about violent events that had occurred: for example, in March 1992 killings in Bugasera began a week after a propaganda agent working for the Habyarimana government distributed a

tract claiming that the Tutsi of that region were preparing to kill many Hutu. Both MRND militia and CDR militia participated in the March 1992 killings. In Kibilira the population was goaded on to defend itself against fabricated attacks supposed to have been perpetrated by RPF infiltrators and to attack and kill their Tutsi neighbours. Radio Rwanda played a part in anti-Tutsi propaganda.

81. In his report Mr Nsengiyumva refers to the fact that a number of Tutsi members of the MRND were elected to committees at both prefecture and national level. He states that no single case of violence against Tutsis was reported to his knowledge between 1975 and 1990. Moreover, intermarriage was encouraged during this period. Even in April 1994, Mr Nsengiyumva states that the MRND had Tutsis in its ranks, and he identifies a number of those in prominent positions. Mr Nsengiyumva expresses the view that the violence witnessed before April 1994 was not ethnic in nature even though Tutsi deaths were recorded, but maintains that the violence was mainly political.

82. Mr Nsengiyumva explains the difference between the Interahamwe of the MRND and the Interahamwe killings after 6 April 1994, which he maintains are distinguishable and should be distinguished. According to Mr Nsengiyumva, before April 1994, the MRND Interahamwe was a name for a broad-based youth wing comprising both Hutu and Tutsi. It was only later that the name was extended to refer to those found killing civilians in the Rwandan genocide. His evidence is supported by the fact that so far as the ethnic composition of the MRND Interahamwe is concerned, the president of the Interahamwe, Mr Kajuga Robert, was a Tutsi who campaigned for the MRND. Further, the national interim committee of the Interahamwe elected in November 1991 comprised a Tutsi president, a vice president married to a Tutsi woman and fathered by a Tutsi mother, and a treasurer from Butare, who had a Tutsi mother

83. The Respondent relies in particular, on reports of three serious massacres at Kibilira between October 1990 and January 1993 to support her case on the activities of the MRND during this period. Kibilira is a commune halfway between Kigali and the capital of Gisenyi. The material relied upon by the Respondent states:

    i. That the first attack began on October 11, 1990 and was directed by the burgomaster and the assistant prefect. At least 348 people were killed, more than 550 houses were burned and farm animals and household goods were destroyed pillaged in the time taken by the authorities to respond. The report continues:

> "the role of the burgomaster and the assistant prefect was so apparent that both were removed from their positions and imprisoned immediately after the attacks ended. According to one

> witness the burgomaster upon being taken to jail asked residents to continue their work. The two spent only a few weeks in prison and then released. The assistant prefect died soon after in mysterious circumstances. The burgomaster was named to a position as medical assistant… and serves as the local vice president of the MRND."

ii. The second attack took place in about March 1992. This time authorities reacted more quickly and five people were killed, dozens wounded and 74 houses were destroyed. Once again those accused in the attacks were detained only briefly and once again the victims themselves were blamed. Nobody is identified as responsible for directing that attack.

iii. The third attack occurred at the end of December 1992. One person was killed and several injured. The report states without identifying with particulars or by reference to any particular document that, once again, local authorities including councillors and responsible officials organised and participated in the attacks and those detained after the attacks were released soon afterwards. The third attack is said to be significantly different from the first two in that the assailants also attacked Hutu members of opposition parties, accusing them of betraying President Habyarimana.

84. Mr Nsengiyumva addresses the fact that human rights abuses were undoubtedly committed during the period 1990 to 6 April 1994 in Rwanda. On this point there is common ground. The question for us in the context of the Appellant's case is whether the incidents referred to in the reports relied on by the Respondent (particularly those at Kibilira) were carried out (and known to be carried out) by the MRND or as part of MRND policy, such that the Appellant can be taken to have known and condoned these acts by representing and defending the MRND once he joined.

85. The reports relied on by the Respondent do not answer this point directly. They appear to indicate that these were individual incidents directed by individuals or a group. Some reports make reference to a particular official involved in directing an attack (a burgomaster, prefect, sub-prefect, or committee member), but that cannot by itself justify the conclusion that the MRND was driving or responsible for this agenda; or even that the MRND was a political party at ease with violence against Tutsis and acquiescent in such violence. To the contrary, the reports are equally consistent with isolated officials or members of the MRND who held extremist views and acted on those views but without it being MRND policy to do so. To this must be added the persistent propaganda and misinformation broadcast by the conflicting political parties and their media outlets when assessing what the Appellant knew and condoned.

86. The Respondent also relies particularly on a speech given by Leon Mugusera who was at the time Vice-President of the MRND for the prefecture of Gisenyi

and known to have close ties to President Habyarimana. His speech given on 22 November 1992, at a rally of the MRND, is widely regarded as having played an important role in inciting attacks against Tutsis and fomenting hatred against them and is relied upon by the Respondent as indicating that this represented MRND policy. The report relied on by the Respondent states that the speech became widely known throughout Rwanda and that President Habyarimana never disavowed the violent words he used. A link is made between this speech and the violent attacks committed within a month at Kibilira.

87. Mr Nsengiyumva challenges this view. He deals in detail with the speech of Leon Mugesera in November 1992. He explains how the speech came to be disseminated in Rwanda. According to testimony from Higiro Jean Marie Vianney, Director of the Rwandan Office of Information (which ran the state radio, Radio Rwanda), and who was a member of the MDR (not the MRND), Radio Rwanda did not report the inflammatory remarks made by Mugusera about Tutsis. It reported an edited version of the speech omitting the inflammatory material. That material was only subsequently published and disseminated by the opposition MDR party.

88. More significant however is the reaction of the MRND to this speech (also dealt with by Mr Nsengiyumva in his most recent report). On 28 November 1992 (within days of the speech being broadcast) the Minister of Justice issued an arrest warrant in respect of Mugusera so that he could be prosecuted for delivering an inflammatory speech inciting the Hutu population. This was done quickly. Mugusera was arrested and tried, and left Rwanda, without the help of the MRND according to Mr Nsengiyumva. Mr Nsengiyumva also refers to the fact that on 7 December 1992, the political bureau of MRND met and there is a handwritten note to President Habyarimana reflecting condemnation of the speech of Mugusera; and to the fact that later MRND meetings condemned the speech and its content.

89. Mr Nsengiyumva has analysed all the available MRND speeches from this period, including that of Mugusera and concludes that it would be easy to be a member and activist of the MRND without in any way espousing any of the inflammatory views expressed by Mugusera. In his view, most MRND members and activists did not support this extremist view and apart from the Mugusera speech, he has identified no other recorded, available speech of the MRND of a similar nature.

90. So far as the atmosphere and environment at Butare University in the period before April 1994 is concerned, the Respondent suggests that it was a hot-bed of extremism. In support of that, allegations are made about actions of Pauline Nyiramasuhuko, wife of the Rector of Butare University and Minister for Family and Women Affairs, as demonstrating ethnic tension between Tutsis and Hutus at the University; and the Respondent contends that the Appellant

must have been well aware of this. An account relied on by the Respondent suggests that Pauline Nyiramasuhuko entered the town of Butare (though not the campus) periodically before April 1994 in the company of MRND supporters, barricading the streets, and intimidating the civilian population with a demonstration of MRND and Hutu power. It is suggested that by this (and similar) actions the MRND sought to desensitise Hutu civilians to kill Tutsis on command. The Respondent asserts that the Appellant's own actions in support of the MRND made an important contribution to this agenda.

91. We are concerned that the evidence about Pauline Nyiramasuhuko was not even put to the Appellant in cross-examination despite the fact that he has consistently stated that he does not know her personally, and although he knew who she was as wife of Butare University's Rector, he had no knowledge of the events described or where or when they occurred. Furthermore, Pauline Nyiramasuhuko was herself tried and acquitted of all conspiracy charges relating to the period before 6 April 1994. Once again it appears that the Respondent's material has been overtaken by later events that cast doubt on the Respondent's characterisation of the MRND.

92. Further pointers in the objective evidence, against extremism at Butare University are the facts that the composition of the University was not sectarian, and students, including Tutsis, fled towards the campus on 7 April 1994, believing it to be a place of safety. Further, according to the Akayesu Judgment, ICTR-96-4-T, at paragraph 110, it was not until the leadership of the new interim Government travelled to Butare that the killings started there. It does not appear that killings on the Butare campus started spontaneously in response to the aircraft being shot down, but required at least a degree of central involvement by the national leadership.

93. In addition, Mr Nsengiyumva has stated that the two main professors relied on by the Respondent to indicate extremism there (Nahimana Ferdinand and Leon Mugesera) were not lecturers at Butare University at the time the Appellant started in 1992. He suggests that when they became lecturers, they were based at Nyakinama campus in Ruhengeri (in the North of Rwanda) some 200 km from Butare.

The grounds for exclusion

94. Against those findings of fact set in the context of the objective material, we turn to consider the grounds relied upon by the Respondent for considering that the Appellant should be excluded from protection.

First Ground: the Appellant was a participant in acts of genocide in Rwanda (by killing and assaulting Tutsis and moderate Hutus) between 6 and 9 April 1994 in Gisenyi, and during the first week in May 1994 at the University of Butare

95. There is no direct evidence to support any part of these allegations.

96. So far as the period 6 to 9 April when genocide activity in Gisenyi is relied upon, there is no dispute that the Appellant went to Kigali on 7 April following the shooting down of the aircraft on 6 April 1994, to find and bring back his sister-in-law and children. He and they returned to Rambura on 10 April 1994. Accordingly, the ground relied on here is now limited to the allegation that, on the evening of 6 April 1994, after hearing of the shooting down of the aircraft, the Appellant participated in acts of genocide near Rambura College in Gisenyi.

97. It is common ground that the Appellant was at home in Rambura on the night of 6 April when the aircraft was shot down. He volunteered in evidence that he and his family left the house that evening, having heard of the shooting down, to use a public telephone in the village in circumstances where there was otherwise no evidence to show that he had left the house. The public phone was at a post office some minutes' walk from his house. He maintained that he saw nothing sinister and was not aware of any killings in Rambura that night.

98. The Respondent relies on statements that the prefecture of Gisenyi was the "heartland of Hutu extremism" and that systematic and well organised killing started here within hours of the plane crash. Col Bagosora was held by the ICTR to have been responsible for organised killings perpetrated by soldiers and militia men at a number of sites throughout Gisenyi between 6 and 9 April. Given the Respondent's acknowledgment that Col Bagosora was responsible (March 2010 refusal letter, paragraph 28) and that he was also likely responsible for bringing down the aircraft in order to trigger the killings (paragraph 95 of the letter), we regard it as unlikely that the Appellant, whose brother was killed on the aircraft, would have been part of that same group of extremists responsible for massacres in Gisenyi between 6 and 9 April 1994.

99. The Respondent also relies on the newspaper article foot-noted as contained in the Globe and Mail Canada of 11 April 1995 (about Tutsi killings at Rambura College on evening of 6 April, but which we have not actually seen). Even if correct, there is no evidence linking these killings to the Appellant. We do not know what time or where exactly the killing occurred; whether the killings were carried out by soldiers, militia or others; how many were killed; whether others have been identified and implicated. We bear in mind that what is required is the considered judgment of the decision-maker that there are serious reasons derived from clear and credible evidence. In our judgment, there is insufficient evidence of precisely what happened, still less to hold the Appellant responsible. Further, the Appellant's evidence about how he spent the evening of 6 April after hearing that the aircraft had been shot down, was plausible and there is no proper evidential basis for rejecting it.

100. The Respondent contends, in addition, that there are serious reasons for considering that the Appellant participated in acts of genocide at Butare "during the first week in May 1994". The objective evidence suggests that the horrific events at Butare started around 21 April 1994. The War Crimes Unit report refers to soldiers killing a student at the campus barrier on 21 April and then to Tutsi students being rounded up "that evening", checked off against a list and then taken to be killed; and the March 2010 refusal letter (paragraphs 22-25) makes a similar reference, but without making clear when the killings came to an end. Mr Nsengiyumva's first report states that "it is generally accepted that killings started on 21 April 1994 and took approximately 1 week". This evidence was not directly challenged by the Respondent. CC's statement supports it: she refers to high tension on campus on 21 April, when RPF soldiers came on site and then for two to three days afterwards, but to relative calm after that.

101. The Appellant's consistent evidence has been that he returned to Butare in early May 1994, remembering that it was a "number of days after" his deceased brother's birthday. CC saw him at Butare on about 6 May 1994. It is at least surprising that, if he is (or was) an extremist committed to genocide, he would have waited until well after 21 April 1994 before returning to his campus, as MRND representative, where critical events were taking place. In any event, given the evidence adduced by Mr Nsengiyumva and CC, that the killings were over by the time he arrived there, and the absence of clear evidence from the Respondent that there were killings in Butare in early May 1994, we do not consider that the Respondent has established a basis for this ground.

102. There is no direct evidence of the Appellant's involvement in acts of genocide in these two periods. We have accepted the Appellant's account of the circumstances of his visit to Butare University consistently with the evidence of CC (see paras 63 to 65 above), The evidential basis for exclusion must be strong and capable of sustaining grounds that are stronger than merely suspecting. The Respondent's case does not meet this standard for the reasons we have given.

Second Ground: as a member of the student leadership structure of MRND at Butare University between 1992 and 1994, by his extensive activities on behalf of the MRND during this period, the Appellant knowingly and intentionally contributed in a significant way to a joint criminal enterprise of persecuting Tutsis in Rwanda before April 1994.

103. There is a significant overlap between this ground and the third ground for exclusion relied on by the Respondent.

104. In considering this ground, we bear in mind that the MRND was a national political party in a one party state until the early 1990s. It was made up mainly of Hutus, but there were both Tutsi members and Tutsi officials, even in the

early 1990s. The Appellant was directly involved with the MRND at Butare University only, there being no persuasive evidence of his involvement before that. However, there is no evidence or suggestion that MRND students generally were connected to the military or any extremist elements within the MRND or that they were connected to the Interahamwe (which itself was separate and only became active in the genocide after it commenced, when the term began to be used generally and broadly to refer to gangs of civilian killers).

105. The MRND was a state actor and not proscribed. The Appellant joined as a volunteer from a long line of supporters of President Habyarimana but there is no evidence that he joined it as a consequence of any extremist views espoused by it or believing it to be a party preparing for, comfortable with or planning for genocide. The Appellant was an active member from November or December 1992 until early April 1994. There is no direct evidence of any MRND involvement or activity thereafter.

106. We turn to consider the Appellant's knowledge of the MRND's international crimes and his own personal involvement and role in the organisation, including particularly what (if any) contribution he made towards the commission of war crimes.

107. As a student representative, we accept that the Appellant was in a position to influence policy and opinion. He attended meetings as a delegate; organised the attendance of students and was involved in organising the attendance of speakers at public meetings; and he "defended the views of the MRND". There was a faint assertion in Mr Hopkin's oral submissions that the Appellant also encouraged recruitment to the MRND, although he was not directly challenged about this having stated at interview that he did not recruit to the MRND (Q34). None of these actions advance the Respondent's case unless there are serious grounds for considering that the Appellant did what he did, knowingly and intentionally for the purpose of the commission or support of the commission, of international crimes by members or recruits.

108. We are not persuaded that the evidence establishes that the MRND was an organisation committed to human rights abuses between 1990 and 1992, or from then to 6 April 1994. The historical position suggests that the MRND was a broad-based, mass organisation and that both Hutus and Tutsis were part of it until the early 1990s. The ICTR – albeit applying a criminal standard – was not satisfied that the MRND had a "criminal" plan or policy prior to April 1994, as we have indicated above by reference to the judgment in the Karamera and other cases. The evidence before us, even applying the lower standard in Art 1F, provides no basis for us to reach a different view.

109. The Mugusera speech was not promoted or apparently promulgated by the MRND. Accordingly, we are not satisfied that there is clear, credible or strong

evidence of a central ideology promoted by the MRND encouraging the genocide or abuse of Tutsis. We are also not satisfied that there is persuasive evidence from which to consider that the Appellant would have known that the MRND's central policy was driving human rights abuses at Kibilira or elsewhere at the time he joined the MRND or afterwards in the period before 6 April 1994. In our view, the prompt condemnation of the Mugusera speech, together with his arrest, would have suggested the contrary. Accordingly we cannot conclude on the evidence available to us that the Appellant joined an organisation he knew to be committed to anti-Tutsi ideology.

110. In the circumstances, even if there were 'international crimes' committed during the period 1990 to 1993, the evidence does not afford serious reasons for considering that there was any 'purpose', 'plan' or 'enterprise' on the part of 'the MRND', as an organisation, to commit such crimes in that period. For that reason also, the Appellant's activity as part of the MRND organisation cannot, therefore, have contributed towards the commission of international crimes in that period.

111. If we had been satisfied on the evidence available to us that there was an 'MRND' purpose, plan or enterprise to commit international crimes during the period 1990-1993, it would still have been necessary for the Respondent to demonstrate (even in the case of an organisation that is criminal or terrorist in nature) that some personal activity, or conduct, on the part of the Appellant significantly contributed to the MRND's ability to commit international crimes between 1990 and 1993.

112. There is no evidence (whether given by the Appellant himself or in the independent evidence adduced by the Respondent) that the Appellant did anything that materially contributed towards the commission of international crimes during the relevant period. It has not been suggested that he engaged in the acts that formed the basis of the conspiracy charges in Karamera and Bagosora to fix responsibility on senior people for contributing towards an organisational ability to commit international crimes: for example, the preparation of lists of Tutsis for killing; the arming and training the militia for the purpose of mass killings; the ethnic definition of the 'enemy' as 'Tutsis' and mass de-sensitisation to killings through mass propaganda. There is no evidence that speakers invited to MRND meetings were extremists or promoted genocide. Accordingly, we are not persuaded that the Respondent has demonstrated serious grounds for considering that actions of the Appellant contributed "in a significant way" to the organisation's ability to commit international crimes (if any were committed) or that he acted in a way such that his assistance did in fact further that purpose. There is not even evidence for example, of him turning a blind eye to people being abused or tortured and then enabling such torture to continue by sending arrested individuals into the hands of abusers (as occurred in AAR (Iran) v SSHD [2013] EWCA Civ 835).

113. What the Respondent relies on ultimately is an assertion that, in speaking at meetings and in defending the MRND, the Appellant was, promoting and contributing to mass killings. The Respondent relies on an apparent inconsistency in the Appellant's evidence as to whether he represented the views of the MRND students in his year in internal meetings at the University campus but simply attended national meetings as an ordinary member, rather than as a delegate (as he said in evidence to us); or represented his fellow MRND students' views at national meetings (as he stated in his fourth interview, Q.31). There is a lack of clarity in the questions and answers on this point, and the extent of the asserted discrepancy is not clear; but, in any event neither account gives rise to any inference that the Appellant did anything to promote or support the killings of Tutsis, or anyone else at any of these meetings. There is no evidence, other than the Appellant's own, as to the political approach and attitude that he took and what he said when he spoke. He does not accept that he provided any support for mass killings in what he said; and we have found no evidence to support the contrary.

114. Accordingly, we are not satisfied that there is evidence that he was actively defending the massacre or killing of Tutsis in what he said or did. We do not consider that there is evidence, still less persuasive evidence, that the Appellant knew or would have known that Tutsi massacres were taking place in the name of the MRND or supported by this organisation between 1990 and 1994. The political conflict was such that violent conflict and abuses occurred between the different factions, and these were misreported as part of persistent propaganda campaigns.

115. Finally, we are also not satisfied that the Respondent has established the crimes committed between 1990 and 1993 were 'international crimes' in the sense that they were criminal acts committed as part of a "widespread or systematic attack directed against any civilian population" pursuant to or in furtherance of a state or organisational policy to commit such attacks (see Art 7, ICC Statute). The March 1993 "Africa Watch Report" relied on by the Respondent describes killings and atrocities committed in the period 1990 to 1993. It refers to testimony that established that Rwandans were killed for the sole reason that they belonged to the Tutsi group. However, it continues:

> "The question remains whether the designation of some members of the Tutsi ethnic group as a target for destruction demonstrates an intention, in the sense of the Convention, to destroy this group or a part of it because of its members' ethnicity.
> While the casualty figures established by the Commission are significant, they may be below the threshold required to establish genocide. .."

116. The evidence relied on by the Respondent does not persuade us that attacks, though horrific and brutal, were widespread or systematic pursuant to, or in furtherance of, state or MRND policy as we have described it above, by reference to the ICTR judgments and other material. Also important is the ICTR

conclusion in the case of senior political figures of the MRND and the military, charged with conspiracy in this period, that the accused were seeking to protect themselves and their supporters from attack by opposition parties, and their actions were consistent with preparations for a political or military power struggle and measures adopted in the context of an ongoing political war.

Third Ground: he aided and abetted international crimes of murder or genocide after 6 April 1994, by acting as a supporter and defender of MRND and its policies between 1992 and 1994 and by providing acts of assistance by words or actions that lent encouragement or support, knowing that these acts and support encouraged violence and discrimination towards Tutsis at the time and knowing they would assist in any subsequent acts of murder or genocide.

117. In light of our conclusions on the second ground, this ground must fail also given the significant overlap.

118. The most senior members of the MRND and of the military (Bagosora and Karamera) were charged and tried for conspiracy. The international tribunal exhaustively considered the available material. All conspiracy charges were rejected. In those circumstances we consider that there are grave difficulties in the way of the Respondent in seeking to assert that there are serious reasons for considering that the Appellant was aiding and abetting in the period prior to April 1994, the genocide offences that occurred thereafter.

119. We have dealt above with the nature of the MRND as an organisation; the fact that until the early 1990s there is no evidence of violence against Tutsis; the fact that from 1990 onwards the RPF launched a civil war to overthrow President Habyarimana and there was retaliation and counter attack. During the period 1990 to 1994, the MRND had Tutsis in the senior ranks and there were Tutsi members. The Mugusera speech was not apparently adopted by the MRND or published by them.

120. Given the lack of faithful reporting of what was being done and the propaganda campaign involving persistent fabrication of events by the government, we are not satisfied that the Appellant would have known that crimes were being committed by the MRND as part of any policy, purpose or plan if that is what was happening – and we do not consider that has been established. The evidence simply does not indicate that the MRND endorsed or was planning for genocide and/or abuse of the Tutsis.

121. In any event, the atrocities committed after 6 April appear to have been committed by a different regime than the President Habyarimana regime. If Col Bagosora was responsible for shooting down the aircraft to trigger the violence and genocide that occurred after 6 April, it is unlikely that the Appellant would have been involved with the regime endorsed by Col Bagosora. The Appellant (and his family) were strong Habyarimana supporters, as we have found.

122. For all these reasons, the Respondent has not satisfied us that she had serious reasons derived from strong evidence, for considering that the Appellant aided and abetted acts of genocide by knowingly supporting or defending MRND in the period prior to April 1994, in a way that would support or encourage violence and discrimination against Tutsis and thereby assist in subsequent genocide.

III. INCLUSION

123. We now turn to consider the issue of the Appellant's inclusion under the Refugee Convention or, if the Appellant is not a refugee, whether he is entitled to subsidiary protection under Art 15 of the EU Qualification Directive (Directive 2004/83/EC) (given effect to domestically in the humanitarian protection provisions in para 339C of the Immigration Rules).

124. We were referred by both representatives in their written and oral submissions to a considerable number of background documents and cases contained in the three lever arch appeal files, in particular in paras 90-92 of the Appellant's skeleton argument and para 38 of the Respondent's written submissions. The fact that we do not refer to each and every background document to which we were referred, in order not unnecessarily to lengthen this already long determination, does not mean that we have not considered it in reaching our findings. We have taken into account all the material relied upon by the parties.

The parties' positions in summary

The Appellant

125. The Appellant's position on inclusion is set out in Mr Seddon's skeleton argument dated 10 June 2014 at para 67-104, in his written submission dated 1 July 2014 at paras 16-99 and in his oral submissions.

126. The Appellant's position before us was advanced by Mr Seddon on three principal bases which, it is contended, bring the Appellant within the Refugee Convention or entitle him to subsidiary protection under the Qualification Directive.

(i) t*here is a real risk that the Appellant will be prosecuted for genocide on return to Rwanda*

127. In relation to the risk of prosecution for genocide, Mr Seddon submitted that the Appellant was known to the Rwandan authorities and would be of interest

to them on return. He relied upon an internet news agency report in November 2012 (at bundle 1/667 which we do not identify further in order to maintain the anonymity of the Appellant) in which the Chief Prosecutor for Rwanda (Mr Ngoga) referred to the Appellant's case and that he is suspected of genocide by the UK authorities. He also relied upon the Appellant's most recent witness statement where he stated that he has been contacted by a number of Rwandans as a result of that news report which had been widely publicised in Rwanda and, in November 2012, four people dressed as civilians had visited his family in Rwanda asking, amongst other things, of his whereabouts.

(ii) *there is a real risk that the Appellant will be prosecuted for '''genocide ideology''' or ''divisionism'' on return to Rwanda*

128. In relation to the risk of prosecution for '''genocide ideology''' or ''divisionism'', Mr Seddon relied upon the agreed facts that the Appellant's family (in particular his sister-in-law) was pursuing a claim against the Rwandan government for compensation in relation to his brother's death in the presidential plane crash in April 1994 and, secondly that he supported international efforts by a group of French, Spanish and Australia judges who were investigating the RPF government headed by the current president, Kagame for atrocities committed by the RPF. Mr Seddon submitted that these actions fell within the rubric of '''genocide ideology''' or ''divisionism'' as they challenge the accepted political stance in Rwanda on the genocide in 1994.

129. Mr Seddon submitted that any trial would be so unfair as to amount to a flagrant breach of Article 6 of the ECHR as (a) the Rwandan judiciary are not impartial or independent and (b) the trial process would not allow the Appellant effectively to defend himself. There would be inequality of arms as the Appellant would be unable effectively to call witnesses, especially from abroad who would be fearful of giving evidence on his behalf because of potential repercussions from the Rwandan authorities. Mr Seddon relied upon the Divisional Court's decision in Brown (aka Bajinja) and Others v The Government of Rwanda and SSHD [2009] EWHC 770 (Admin) where the Divisional Court (Laws and Sullivan LJJ) concluded that the extradition of a number of individuals to Rwanda in order to face prosecution for genocide was unlawful on the basis that there was a real risk of a flagrant breach of Article 6 and their right to a fair trial.

130. Mr Seddon invited us to distinguish the European Court of Human Right's (ECtHR) decision in Ahorugeze v Sweden (Application No 37075/09) (27 October 2011) (2012) 55 EHRR 2 where the ECtHR concluded that a Rwandan national could lawfully be extradited to Rwanda in order to stand trial on charges of genocide. Mr Seddon submitted that the ECtHR's decision turned upon an application of the Rwandan law relating to transfers from the International Criminal Tribunal for Rwandan (ICTR) or where the Rwandan

state extradited an individual for prosecution (Organic Law No 11/2007 of 16 March 2007 amended by Organic Law No 03/2009 of 26 May 2009) (the "transfer law"). That law provided for the evidence of witnesses to be taken from abroad. Further, Organic Law No 31/2007 of 25 July 2007 (as amended by Organic Law No 66/2008 of 21 November 2008) abolished the death penalty in Rwanda and in transfer cases removed the possibility of a sentence of life imprisonment in isolation without the possibility of release for at least 20 years. Neither of those laws applied to the Appellant who would not be subject to transfer by the ICTR nor was he being extradited from the UK.

131. In addition, Mr Seddon submitted that any imprisonment of the Appellant would be imposed on a discriminatory basis (based upon political motivation) and prison conditions in Rwanda were such that there would amount to persecution and serious ill-treatment contrary to Article 3. In particular, Mr Seddon relied on the fact that the punishment for genocide was life imprisonment in isolation with no possibility of release for twenty years.

(iii) *There is a real risk that the Appellant will be subject to persecution or serious ill-treatment because he has previously been arrested, detained and ill-treated in 1997 and 1999 because of his and his family's association with the former president of Rwanda*

132. In relation to the Appellant's past ill-treatment in Rwanda, Mr Seddon relied upon the Appellant's evidence of his past ill-treatment in Rwanda in the circumstances set out in his first statement dated 21 December 1999 (bundle 1/155-159) at paras 10-25 in that in 1997 he was placed in a military camp and forced to do manual work; his father was arrested and detained and died in prison; his brother had also been killed; the Appellant was, having initially been released, again arrested on suspicion of supporting Hutu extremists and was detained, beaten and forced to work in the fields; and finally was arrested in July/August 1999 and was questioned about his sister-in-law's claim against the government. In addition, Mr Seddon relied upon the Appellant's recent statement concerning the authorities' claimed visit to his home village where his family were questioned about his and his brother's whereabouts.

<u>The Respondent</u>

133. The Respondent's position is set out in her decision letter of 15 March 2010, in Mr Hopkin's written submissions dated 20 June 2014 and in his oral submissions before us.

The Appellant's claim under headings (i) and (ii)

134. The Respondent's principal case is that the Appellant has failed to establish that there is a real risk that he will be prosecuted in Rwanda either for genocide or for '''genocide ideology''' or ''divisionism''.

135. Mr Hopkin submitted that there was no evidence that the Appellant was subject to any ongoing criminal investigation in Rwanda. Further, he submitted that the internet news report of November 2012 should not be construed as linking knowledge of the Appellant with the Rwandan prosecutor or that he is of interest to the Rwandan authorities.

136. Further, the Appellant's profile did not fall within that of someone at risk of prosecution for '''genocide ideology''' or ''divisionism''. Only perceived opponents of the regime were targeted for prosecution. Mr Hopkin submitted that the Appellant would not be perceived as someone who affected the "political settlement" in Rwanda. He was not a political opponent nor was he a journalist challenging the government in the press.

137. Mr Hopkin submitted that if, contrary to the Respondent's principal case, there was a real risk of the Appellant being prosecuted in Rwanda he did not accept that any such prosecution would be politically motivated or that the Appellant would not receive a fair trial or that the circumstances of his imprisonment would amount to persecution or serious ill-treatment. Mr Hopkin placed reliance upon the ECtHR's decision in Ahorugeze and invited us to not follow Brown which, he submitted, had been superseded by the ECtHR's decision. Although initially he submitted that Ahorugeze did not turn on the application of the "transfer law", in the course of his submissions he recognised that that claimant's extradition in Ahorugeze was governed by the transfer law. Nevertheless, he submitted that the improving conditions in Rwanda both in relation to trial procedures, the judiciary and prison conditions meant that the Appellant had failed to establish a breach of Article 3 of the ECHR or that he would be subject to persecution or serious ill-treatment entitling him to refugee status or subsidiary protection.

138. Mr Hopkin submitted that any risk of the Appellant being subject to imprisonment in isolation was "remote" or "negligible".

The Appellant's claim under heading (iii)

139. Finally, Mr Hopkin submitted that the Appellant's past ill-treatment occurred some 15-20 years ago and was not an indicator, therefore, of any risk to the Appellant in the future. He submitted that the Appellant's recent evidence concerning interest in his family in Rwanda should be rejected on the basis that it was inconsistent with the Appellant's own case that the authorities already knew all about him and, in particular, his whereabouts.

The issues

140. The issues we have to decide are, in summary, as follows:

(a) Is there a real risk that he Appellant will be subject to persecution for a Convention reason or, if not, serious harm entitling him to subsidiary protection under the Qualification Directive on the basis of prosecution for genocide or '''genocide ideology''' or 'divisionism'' on return to Rwanda?

In deciding that issue:

(i) Is there a real risk that the Appellant will be prosecuted for (a) genocide or (b) '''genocide ideology''' or ''divisionism'' in Rwanda? And
(ii) If prosecuted, is there a real risk that any trial will be 'flagrantly unfair' in breach of Art 6 of the ECHR? And
(iii) If convicted, will any punishment amount to a breach of Art 3 of the ECHR? And
(iv) If so, will (ii) and/or (iii) amount to persecution for a Convention reason (namely political opinion) or serious harm for the purposes of subsidiary protection.

(b) Is there a real risk that the Appellant will be subject to persecution for a Convention reason or, if not, serious harm entitling him to subsidiary protection under the Qualification Directive on the basis of his past history and his family's association with the previous president of Rwanda?

The legal framework

141. The Appellant's appeal is brought under s.83 of the Nationality, Immigration and Asylum Act 2002. That is because the Appellant has previously been granted leave to remain of at least 12 months duration. Most recently, the Appellant was granted leave to remain on a discretionary basis "having regard to" the decision of the Divisional Court in Brown (see para 149 of the Respondent's decision letter of 15 March 2010).

142. An appeal under s.83 of the 2002 Act may only be brought on the grounds that the individual's removal from the UK would breach the Refugee Convention (see s.84(4)). Mr Hopkin, on behalf of the Secretary of State, accepted that the Appellant could also rely upon the subsidiary protection provisions in the Qualification Directive (and para 339C dealing with humanitarian protection) on the basis of the Court of Appeal's decision in FA (Iraq) v SSHD [2010] EWCA Civ 696 which is binding upon the Upper Tribunal. However, he reserved the Secretary of State's position on the correctness of FA (Iraq) for a higher court.

143. What is clear is that the Appellant cannot directly rely upon the European Convention on Human Rights to resist his removal to Rwanda. He may only rely upon a breach of the ECHR to the extent that, as a result, he qualifies as a refugee or is entitled to subsidiary protection.

144. In Article 1A(2) of the Refugee Convention a 'refugee' is defined as someone who:

> "owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country…is unable or, owing to such fear, is unwilling to return to it. "

145. The prohibition on refoulement in Article 33 prevents the return of a refugee to a place where he has a well-founded fear of persecution for a Convention reason.

146. It is for the Appellant to establish that there is a "reasonable likelihood" or "real risk" that his return will breach the Refugee Convention. In Brown, Divisional Court stated what is meant by "real risk" at para [34]:

> "[i]t means a risk which is substantial and not merely fanciful; and it may be established by something less than proof of a 51% probability."

147. As regards subsidiary protection the Qualification Directive defines a "person eligible for subsidiary protection" in Art 2(e) as:

> "a third country national…who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of original,…would face a real risk of suffering serious harm as defined in Article 15, …and is unable, or owing to such risk, unwilling to avail himself or herself of the protection of that country;…"

148. As the definition of a person entitled to subsidiary protection in Art 2(e) makes plain, a person can only be entitled to subsidiary protection if that individual is not a refugee within the meaning of the Refugee Convention.

149. Article 15 of the Qualification Directive, so far as relevant to this appeal, defines "serious harm" as consisting of:

> "…
>
> (b) Torture or inhuman or degrading treatment or punishment of an applicant in the country of origin;…"

150. That provision mirrors Article 3 of the ECHR which states that no-one shall be subjected to:

> "torture or to inhuman or degrading treatment or punishment".

151. Ill-treatment must attain a minimum level of severity to fall within Article 3 (see, e.g. Ireland v UK (1980) 2 EHRR 25 at [162]). The assessment of this minimum is relative and takes into account the individual's circumstances including the duration of the treatment, its physical or mental effects, and the age, gender, vulnerability of the state of health of the individual (Ireland at [162]).

152. Torture, unlike inhuman or degrading treatment, requires deliberate ill-treatment causing very serious and cruel suffering (Ireland at [167]).

153. Treatment is 'degrading' if it arouses in the victim to a sufficiently high level feelings of fear, anguish and inferiority capable of humiliating and debasing him (Ireland at [167]).

154. A punishment will be inhumane or degrading if it entails a degree of humiliation which attains the minimum level and which is other than the usual level of humiliation inevitably involved in a legitimate punishment (see, e.g. Kudla v Poland (2002) 35 EHRR 11 at [94]). Discriminatory measures based on race may constitute degrading treatment (see, East African Asians Cases (1973) 3 EHRR 76).

155. Likewise the conditions and circumstances of any detention or imprisonment may breach Art 3 if the effect of those conditions on the individual attains the minimum level of severity going beyond the inevitable suffering or humiliation arising from a particular legitimate punishment (see, e.g. Mathew v Netherlands (2006) 43 EHRR 444).

156. Article 6 of the ECHR sets out the right to a fair trial. It provides as follows:

> "1. In a determination of …any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. …
>
> ….
>
> 3. Everyone charged with a criminal offence has the following minimum rights: …
>
> (d) to examine or have examined witnesses against him and to obtain the attendance examination of witnesses on his behalf under the same conditions as witnesses against him;…"

157. Article 6.1 sets out two aspects of a right to a fair trial: first, the right to a fair hearing within a reasonable time; and secondly that there be an independent and impartial tribunal. As Article 6.3(d) spells out, a minimum content to the right of a fair trial is that an individual charged with a criminal offence should have the ability to examine and obtain the attendance of witnesses on his behalf to the same extent as the prosecution.

158. There are a number of points on the application of these provisions which we did not understand to be a matter of dispute between the parties.

159. First, in a "foreign case" such as the present where the breach of Article 6 is said to arise abroad, it is necessary to establish the "flagrant denial of justice" that is recognised in the settled jurisprudence of the Strasbourg case law, for example in Ahorugeze, the Court stated that a violation of Article 6 would only arise where there was a "flagrant denial of justice" which meant (at [115]):

> "A flagrant denial of justice goes beyond mere irregularities or lack of safeguards in the trial procedures such as might result in a breach of Article 6 if occurring within the Contracting State itself. What is required is a breach of the principles of fair trial guaranteed by Article 6 which is so fundamental as to amount to a nullification, or destruction of the very essence, of the right guaranteed by that Article."

160. That approach has been adopted by our domestic courts, for example by the House of Lords in EM (Lebanon) v SSHD [2008] UKHL 64.

161. Secondly, we did not understand Mr Hopkin to dispute that if, indeed, there were a flagrant breach of Article 6 that would amount to persecution for the purposes of the Refugee Convention or serious harm for the purposes of subsidiary protection at least where any prosecution or punishment was disproportionate or discriminatory in nature, for example because of political motivation or interference. In our view, that is undoubtedly correct and follows from the definition of an "act of persecution" in regulation 6 of the Refugee or Person in Need of International Protection (Qualification) Regulations 2006 (SI 2006/2525) which provides, so far as relevant, as follows:

> "5(1) In deciding whether a person is a refugee an act of persecution must be:
>
> (a) Sufficiently serious by its nature or repetition as to constitute a severe violation of a basic human right, in particular a right from which derogation cannot be made under Article 15 of the Convention for the Protection of Human Rights and Fundamental Freedoms; or
>
> (b) (i) An accumulation of various measures, including the violation of human rights which is sufficiently severe as to affect an individual in a similar manner as specified in (a).
>
> (ii) An act of persecution may, for example, take the form of: …
>
> (b) a legal, administrative, police, or judicial measure which in itself is discriminatory or which is implemented in a discriminatory manner;
>
> (c) prosecution of punishment, which is proportionate of discriminatory;
>
> (d) denial of judicial redress resulting is disproportionate or discriminatory punishment; …"

162. In our judgement, a combination of reg 5(1)(b) read with (a) together with, in particular, reg 5(2)(c) and (d) captures the Appellant's case in this appeal if factually made out as contended for in Mr Seddon's submissions concerning the circumstances of a prosecution, any resulting trial and punishment if the Appellant were convicted.

Risk of prosecution for genocide

163. Mr Seddon placed reliance upon a news report from November 2012 (at bundle 1/677). We do not identify that report in order to retain the Appellant's anonymity and, subject to redaction in order to maintain that anonymity, the report states as follows:

> "A Rwandan suspected of taking part in the l994 genocide […] cannot be deported to Rwanda because of human rights laws, according to a British newspaper.
>
> [The Appellant] is alleged by the UK Border Agency's War Crimes Unit to have helped Hutu soldiers kill members of the Tutsi ethnic group during the genocide in 1994, "the website of the [ ] reported on Saturday.
>
> Reacting to the article, Rwandan Prosecutor General Martin Ngoga said "there is not just one case. There are four cases of people who were arrested and released. There are more fugitives who have not been mentioned yet to the opinion."
>
> But, according to Ngoga, the Crown Prosecution was well aware of these cases. "Not withstanding what the Crown Prosecution has been trying to do, we are deeply disappointed by the way this question of fugitives has been attended to in the UK," he explained.
>
> Ngoga added, "The attention attached to this matter does not match the gravity of the charges against them. There is some level of indifference. This is unacceptable.""

164. The report goes on to give further personal details in relation to the Appellant and then continues:

> "The suspect sought asylum, but his application was turned down. An immigration tribunal has since ruled he does not qualify for refugee or humanitarian protection in Britain because he is suspected of crimes against humanity in Rwanda.
>
> But he has been allowed to remain because of a precedent set in the High Court which let four suspected Rwandan war criminals stay in Britain on the basis that they may not get a fair trial in their home country, breaching their human rights."

165. The report then goes on to refer to the fact that the Appellant is a Hutu from a village in north Rwanda where the former Rwandan president came from and that his brother, who was identified by name together with his connection with the previous president, was in the president's plane when it was shot down on 6 April 1994.

166. Mr Seddon submitted that it was clear that the Rwandan Prosecutor General, Mr Ngoga had been shown the article in the British newspaper identifying the Appellant and had specifically referred to him when he had stated "there is not just one case". Mr Seddon submitted that the reference to the other four people, presumably in Brown, showed that Mr Ngoga was prepared to "lump" the Appellant with those whose extradition was sought for genocide. He submitted that the reasonable inference was that Mr Ngoga was well aware of the Appellant and we should conclude that Mr Ngoga would be interested in prosecuting the Appellant on his return.

167. Secondly, Mr Seddon relied upon the fact that the Secretary of State had granted the Appellant leave to remain in March 2010 on the basis that the Secretary of State took the view, in the light of the decision in Brown that the Appellant was at risk of prosecution and a flagrant breach of his Article 6 rights in any trial on his return to Rwanda.

168. Finally, Mr Seddon relied upon the Appellant's most recent witness statement at paras 91-104 in which the Appellant stated that as a result of the publicity in the news report he had received calls from other Rwandans as had his family in Europe some of which were abusive. Further, in November 2012 four individuals in civilian dress had visited the Appellant's family in his home village and had asked questions including as to the Appellant's whereabouts.

Discussion

169. It is clear from the background material that since 1996 when Rwanda adopted a new law governing the prosecution of genocide related crimes there have been a substantial number of prosecutions (see "Human Rights Watch, Rwanda: Justice after Genocide – 20 years On", 28 March 2014 at pages 3-6). There have also been a number of prosecutions of high profile individuals before the International Criminal Tribunal for Rwanda (ICTR) based in Tanzania (ibid at pages 6-7). Since 2011, the ICTR has transferred several genocide cases to Rwanda; the first being that of Jean Bosco Uwinkindi in April 2012 (ibid at pages 8-9). Prior to that, transfers from the ICTR were not sanctioned because of perceived problems of fairness in the trials. Further, Rwanda has sought the extradition from a number of countries of Rwandans to face prosecution for genocide or genocide related offences (ibid pages 10-11). Until the first ICTR transfer, it seems that most countries denied extradition requests but, following the ICTR's decision to transfer its first genocide case in 2011, courts in several countries including Sweden and Norway have agreed to extraditions. The ECtHR upheld the extradition of a Rwandan genocide suspect in October 2011 in the Ahorugeze case. Extradition proceedings and appeals are, according to the "Human Rights Watch Report", on-going in several countries (ibid pages 9-10).

170. In the light of that, it is a matter of some significance, in our judgment, that no case has been opened against the Appellant before the ICTR and no extradition

request has been made by the Rwandan government for his return to Rwanda. That is, despite the claim put forward by the Appellant, that the Prosecutor General of Rwanda is well aware of the Appellant's case and his involvement in genocide and, on Mr Seddon's submissions, has "lumped" him together with the individuals who have been subject to extradition requests in the Brown case.

171. Mr Seddon sought, in his submissions, to explain the absence of any extradition request by submitting that the Prosecutor General was, in effect, 'playing the system' and awaiting the Appellant's removal and not expending time and money on seeking the Appellant's extradition as a result of the lack of success in extraditing the individuals in Brown.

172. We do not accept that submission. First, it is entirely speculative in seeking to explain the absence of extradition proceedings against the Appellant if, as on the Appellant's case, he is well known to the Rwandan authorities. Secondly, the background material demonstrates that the Rwandan authorities do seek the extradition of those, in European countries, in whom they have an interest as potential perpetrators of genocide. Indeed, the "Human Rights Watch Report" which is dated 28 March 2014 (and is therefore relatively recent) notes at page 11 that as regards the individuals in Brown:

> "Fresh extradition hearings are proceeding in this case at time of writing".

173. We were not provided with any information by either party to suggest that this was other than the situation and, again, in our judgment, demonstrates the Rwandan authorities' persistence in extraditing those in whom they have an interest in prosecuting for genocide offences.

174. Mr Seddon referred us to paragraphs 127, 143 and 149 of the Respondent's refusal letter of 15 March 2010. Both paragraphs 127 and 143 are premised upon an assumption that the Appellant may be investigated for the crime of genocide on return and subject to a prosecution for it. The thrust of the paragraphs is, however, to deal with the issues of whether, if prosecuted, the Appellant would be subject to treatment contrary to Article 3 of the ECHR on the basis of the prison conditions that he would face or whether he was at risk of the death penalty. In our judgment there was no explicit recognition that a real risk of prosecution for genocide, or indeed any offence, is accepted by the Respondent.

175. We do not accept that the Respondent's decision to grant the Appellant discretionary leave following Brown in March 2010 can materially assist the Appellant.

176. The reasons for the grant of leave are set out at paragraph 149 of the decision letter and followed the Respondent's conclusion that the Appellant would *not* be at risk of treatment contrary to Article 3 if he were imprisoned in Rwanda. Nevertheless, the Respondent stated that she would exercise her discretion to

grant discretionary leave in the light of the Brown decision. Again, the Respondent premises her grant of leave on the basis that if the claimants in Brown "were returned to Rwanda to be tried for genocide in the High Court of Rwanda" they would be subject to a flagrant denial of justice in breach of Article. We read nothing further into this than, as Mr Hopkin submitted, that the Respondent was out of an "abundance of caution" responding to the Divisional Court's decision in Brown and it does not amount to an explicit recognition that the risk of prosecution was established. Brown is, in our judgment, distinguishable in that the individuals concerned were seeking to resist extradition for the sole purpose of prosecuting them in Rwanda for genocide and related offences. There could, therefore, be no doubt in their cases that there was a real risk of prosecution.

177. In any event, even if it was recognised as a risk in 2010, we would still need to consider whether any risk existed, not as at March 2010 but at the date of the hearing before us. That finding can only be made on the basis of all the evidence including, to the extent that it is relevant, the Respondent 's position in March 2010.

178. In relation to the Appellant's evidence set out in his most recent statement (which he adopted before us), we approach that evidence with some caution. Whilst it is the case that Mr Hopkin did not specifically cross-examine the Appellant on this part of his statement at the hearing, Mr Hopkin on behalf of the Respondent directly put in issue the credibility of the Appellant. As we have already noted, we did not find the Appellant's evidence to be entirely reliable (see paras 36 and 37 above).

179. At paras 91-97 of his statement the Appellant refers to interest in him and his family in Europe as a result of the news report in November 2012 as follows:

> "91. Suddenly, in November 2012, not long before my Court of Appeal case (which was anonymised), publicity was given to my case by the [ ] newspaper in early November 2012. There had never been any interest shown by the media in my case before this time. I had had no contact from the media and no journalists or members of the public attended my Tribunal proceedings. Also, I understand that my Tribunal decisions were not 'reported'. It is not clear how or why suddenly publicity was given to my case.
>
> 92. The publicity identified me as a person living in the UK who was involved in the genocide in Rwanda. The publication of this article has had a profound affect on my life and also the life of others.
>
> 93. The article was widely reported in other websites and also in Rwanda. It was on Rwandan television and the Rwandan Chief Prosecutor expressed an interest in me.
>
> 94. Since that time I felt like a rejected person and everyone sees me as a killer. I live in fear and in hiding. I do not meet other Rwandan people except for my closest friends who understand what has happened to me.

> 95. After the publication of the article, work colleagues began to make comments about me, saying that I am war criminal. I had to sop work as I was so stressed by the situation. I used to go to church where many other Rwandans attended but I had to stop going to that.
>
> 96. I also received many calls. Some were from Rwandans who were friends and who understood about the Rwandan government and felt sorry for me. They are people who know that I would never be involved in killings or abuses. However, I also received many calls from other Rwandans who I knew through social gatherings, or other meetings and who were on the side of the Rwandan government. They asked me why did I kill people. They were mainly Tutsis but also Hutus and many of them had had family killed in the genocide. Many also still have contacts back in Rwanda and travel back to Rwanda. The calls were abusive and I ended up having to change my phone number.
>
> 97. In addition, my family in Belgium also received calls from Rwandans in Belgium and Holland. As was the case with me, some of these calls were understanding but most were abusive."

180. As regards this evidence, Mr Seddon did not draw our attention to any supporting evidence showing that the article had been "widely reported" on other websites or in Rwanda or otherwise disseminated to the public.

181. At paras 98-104, the Appellant refers to "significant problems" being caused to his family members still living in Rwanda as a result of the article. At para 99 he states that:

> "In November 2012, four people in civilian dress came to [my village] and started interrogating my cousins about my late brother and myself and asking questions about the land that my family own. They arrived in a white pick-up vehicle."

182. At para 100 he states that:

> "They asked questions of many other people in the town"

They spoke to his relatives one of whom was asked:

> "Who was looking after all of my family's fields."

183. At paragraph 101, the Appellant says that the four people spoke to "an old Hutu military man" in the town whom his relative identified to them.

184. At paragraph 102, the Appellant says that his four cousins, who look after the land, have now left Rwanda "as a result of concerns for their own safety".

185. At paragraph 103, the Appellant says that his relative had told his cousin that their properties had been taken but she did not know by whom. His relative also has said that "other family members who have stayed in the town are living in fear."

186. As regards this evidence even taken at its highest it merely shows that "four people in civilian dress" enquired about the family's land in their village and the whereabouts of the Appellant's late brother and the Appellant. There is no suggestion in the evidence that anybody was threatened even if, again taking the evidence at face value, the Appellant's relatives decided to leave the village. The evidence does not establish that the Appellant was being sought by the Rwandan authorities because of his perceived involvement in genocide or genocide related offences. Indeed, on Mr Seddon's submission, the Rwandan Chief Prosecutor would not need to enquire about the whereabouts of the Appellant as, on his submissions, he was well aware that the Appellant is in the UK as a result of the news report. As Mr Hopkin submitted, to infer from this evidence that the Rwandan authorities are interested in the Appellant in order to prosecute him for genocide related offences is inconsistent with that part of the Appellant's claim that he is already well known to the prosecutor and in the UK.

187. In addition, if the Appellant returned to Rwanda we have found that the evidence does not establish that there are serious grounds to believe that he was involved in genocide in 1994. That would, no doubt, be a relevant factor for the Rwandan authorities if he were to come to their attention on return to Rwanda. Our finding would run counter to the statement in the November 2012 news article that a Tribunal had refused the Appellant's claim for refugee status or humanitarian protection on the basis that he was "suspected of crimes against humanity in Rwanda."

188. We have taken all these matters into account and we are not satisfied that there is a real risk that the Appellant would be of interest to the Rwandan authorities and at risk of prosecution for genocide upon return.

Risk of prosecution for '"genocide ideology"' or ''divisionism''

189. The Appellant also claims that he will be at risk of prosecution under the Rwandan laws dealing with '"genocide ideology"' or ''divisionism''.

190. The Appellant principally puts his case under this head on the basis of the two claims being pursued against the Rwandan Government by his family set out in para 9 of the 'Schedule of Agreed Facts' (at bundle 1/65-66):

> "The Respondent's family are pursuing two claims against the Rwandan Government. One is a claim for compensation, namely for the money owed to the Respondent's sister-in-law for his brother's [ ] death. The second claim is that the Respondent's family, along with others, are supporting international lawyers who are pursuing criminal, convictions against the Kagame regime for their part in unlawful killings. The Respondent claims that members of his own family have been victims of the unlawful killings and he is seeking justice for them. These lawyers include French anti-terrorist Judge, Jean Louis Bruguiere, Spanish Judge Ferdinando Merrelles and the Australian Judge and former ICTR investigator, Michael Hourigan."

191. We were referred to a considerable body of material dealing with the offences of "'genocide ideology'' and ''divisionism'' in Rwanda. A useful summary is found in the Amnesty International Report "Safer to Stay Silent: The Chilling Effect of Rwanda's Law on ''genocide ideology'' and Sectarianism" (2010) (bundle 3/1-50). At pages 7-9 of the bundle in the introductory section headed "Summary" sets out the background as follows:

> "Rwanda's laws on "'genocide ideology'" and "sectarianism", more commonly known as "'divisionism'", were introduced in the decade following the 1994 Rwandan genocide. Up to 800,000 Rwandans were killed during the 1994 genocide, most of them Tutsi, but also some Hutu who opposed this organized killing and the forces that directed it. Aware of the role that hate speech and the infamous hate radio Radio Télévision Libre des Milles Collines (RTLM) played in inciting genocidal participation, the post-genocide government led by the Rwandan Patriotic Front (RPF) enacted laws to encourage unity and restrict speech that could promote hatred.
>
> Following six years of extensive reforms to the conventional justice system, the Rwandan government announced a review of the "'genocide ideology'" law in April 2010. Amnesty International welcomes this government initiative. This report identifies Amnesty International's concerns about the current legislation and its application in light of the Rwandan government's review process.
>
> Prohibiting hate speech is a legitimate aim, but the Rwandan government's approach violates international human rights law. Rwanda's vague and sweeping laws against "'genocide ideology'" and 'divisionism'" under "sectarianism" laws criminalize speech protected by international conventions and contravene Rwanda's regional and international human rights obligations and commitments to freedom of expression. The vague wording of the laws is deliberately exploited to violate human rights.
>
> Prosecutions for "'genocide ideology'" and so-called "'genocide ideology''-related" offences were brought even before the law defining this offence was promulgated. People continue to be prosecuted for "'divisionism'", under "sectarianism" laws, even though "'divisionism'" is not defined in law. Rwandans, including judges, lawyers and human rights defenders, expressed confusion about what behaviour these laws criminalize .
>
> These broad and ill-defined laws have created a vague legal framework which is misused to criminalize criticism of the government and legitimate dissent. This has included suppressing calls for the prosecution of war crimes committed by Rwandsn Patriotic Front ((RPF). In the run-up to the 2010 elections, legitimate political dissent was conflated with "'genocide ideology'", compromising the freedom of expression and association of opposition politicians, human rights defenders and journalists critical of the government.
>
> Individuals have exploited gaps in the law for personal gain, including the discrediting of teachers, for local political capital, and in the context of land disputes or personal conflicts. Several "'genocide ideology'" and "'divisionism'" charges based on flimsy evidence resulted in acquittals, but often after the accused spent several month in pre-trial detention. Many such accusations should have been more thoroughly investigated, but broad laws offer little guidance to the police and prosecution.

The cumulative result of these laws is to deter people from exercising their right to freedom of expression. This chilling effect means that people who have yet to have any action taken against them nonetheless fear being targeted and refrain from expressing opinions which may be legal. In some cases, this has discouraged people from testifying for the defence in criminal trials.

The laws have had a corrosive effect on mutual trust in a society already fragile after the 1994 genocide and run counter to the government's stated commitment to national unity.

At times, the Rwandan government went to great lengths in seeking "'genocide ideology'" prosecutions. One such case involved the prosecution of a failed asylum-seeker for statements made abroad. Such cases, in the context of public statements by government officials insinuating guilt of individuals before trial, contribute to the broader chilling effect and do little to instil trust and confidence in the justice system.

The Rwandan authorities have taken a number of strides towards improving their conventional justice system, most notably the abolition of the death penalty, to improve the delivery of justice and to try to secure transfers to genocide suspects from the International Criminal Tribunal (ICTR) and other national jurisdictions. However, many improvements appear stronger on paper than in practice, others are untested, and concerns around fair trials remain.

Rwanda's efforts to reform many of its laws in line with its international obligations make the problematic nature of "'genocide ideology'" and "sectarianism" laws increasingly apparent. These laws have undermined confidence in the judiciary, impeding government attempts to have genocide suspects living abroad extradited to be brought to trial in Rwanda. They have also damaged efforts to create conditions that will encourage Rwandese refugees to return home. The laws have attracted extensive international criticism in the lead-up to the August 2010 presidential elections.

The Rwandan government announced a review of the "'genocide ideology'" law in April 2010. Amnesty International hopes it will result in amended legislation and practice to prohibit only expression amounting to advocacy of hatred that constitutes incitement to hostility, discrimination or violence, while allowing freedom of expression in line with Rwanda's international human rights obligations.

Freedom of expression is essential to and interrelated with the realization and exercise of all human rights.

There was a sudden surge of international attention to these laws following the arrest of defence attorney, Peter Erlinder, a US citizen, in May 2010 on charges of genocide denial under a 2003 law and his subsequent bail. This report does not specifically deal with this case, or the 2003 law, but addresses the application of similar and related laws.

"'genocide ideology'" is a sensitive issue in Rwanda. Rights groups and journalists are regularly rebuked in media outlets close to government for drawing attention to deficiencies in the law. Amnesty international hopes that this report will be received by the Rwandan government and other key stakeholders as a useful contribution to the review process announced by the Rwandan government."

192. The Human Rights Watch Report "Rwandan: Justice After Genocide: 20 years On" summarises the position at page 12 as follows:

> "For the vast majority of families of victims of RPF killings, there is therefore little hope of seeing the perpetrators prosecuted. A few have attempted to demand justice for these crimes, but it has been a difficult struggle. There are tight restrictions on free speech in Rwanda, and few people dare broach publicly the sensitive subject of RPF crimes. Talking about those, crimes, and effectively departing from the official version of Rwanda's recent history, can carry serious consequences, such as charges of genocide denial, ''genocide ideology'' or 'divisionism' (inciting ethnic divisions). Rwanda has passed a number of laws which may originally have been intended to prevent and punish hate speech of the kind which led to the 1994 genocide, but in practice, have restricted free speech and imposed strict limits on how people can talk about the genocide and other events of 1994. "

193. A footnote to that passage in the report notes the revision of the ''genocide ideology'' law in 2013 as follows:

> "Some of these laws such as the 2008 law on ''genocide ideology'', have been used to stifle dissent and prosecute government critics. A revised and improved version of the ''genocide ideology'' law was adopted in 2013. Although the new law defines the offense more precisely and requires evidence of the intent behind the crime, thereby reducing the scope for abusive prosecutions, it retains language that could be used to criminalize free speech, and offenses are punishable by up to nine years' imprisonment."

194. The change in the law is also referred to in the "US State Department Country Report on Human Rights Practices for 2013, Rwanda" (at bundle 2/132 at 146) as follows:

> "In August the government signed into law a revised ''genocide ideology'' law that introduced international definitions for genocide and narrowed the scope of what constitutes "''genocide ideology''" and related offences to a more specific range of actions and statements. Specifically, the new law states that "genocidal ideology" must be clearly linked to specific acts or statements, rather than the broader "aggregate of thoughts" standard defined in the 2008 law. International and local human rights organisations, including HRW and the Rwandan League for the Promotion and Defense of Human Rights (LIPRODHOR), welcomed the revised law while expressing concern that, despite clearer protections and narrower definitions, the law still could be used by government to restrict freedom of speech and the press."

195. That report notes (at bundle 1/147) that:

> "The government investigated and prosecuted individuals accused of threatening or harming genocide survivors and witnesses or of espousing ''genocide ideology'', which the law defines as dehumanizing an individual or a group with the same characteristics by threatening , intimidating, defaming, inciting hatred, negating the genocide, taking revenge, altering testimony or evidence, killing, planning to kill, or attempting to kill someone.
>
> The NPPA reported that, from July 2012 to July 2013, authorities prosecuted 772 individuals for 'divisionism' and "''genocide ideology''-related crimes",

> representing a 33 percent increase in such prosecutions, compared with the July 2011 to 2012 period."

196. Mr Seddon submitted that the Appellant had already been ill-treated by the Rwandan authorities because of his perceived anti-government or genocide denial views when he was detained and ill-treated in August 1999. Mr Seddon referred to the Appellant's evidence in his first witness statement dated 21 December 1999 at paras 20 *et seq* (bundle 1/20 *et seq*). He submitted that that evidence was neither challenged in the refusal letter nor was the Appellant cross-examined about it. Mr Seddon pointed out that the Respondent had already, in her refusal decision of March 2010, branded the Appellant as a "revisionist" (at para 104, bundle 1/55). In support of his submission that the Appellant was at risk of prosecution for these offences, Mr Seddon also relied upon the evidence in Brown that the reluctance of witnesses to give evidence was out of fear of prosecution (see especially [49], [51], [52] and [62]). Mr Seddon also relied upon the prosecution of Victoire Ingabire for ''genocide ideology'' after she raised in a speech the RPF's involvement in war crimes (see, for example Amnesty International Report at page 21). Mr Seddon submitted that drawing these strands together, the Appellant had established that there was a real risk that he would be subject to prosecution for ''genocide ideology'' or 'divisionism'.

197. In addition, Mr Seddon relied upon the case of HJ (Iran) and HT (Cameroon) v SSHD [2010] UKSC 32 and submitted that the Appellant would be at risk because he would be required to suppress his political opinions in order to avoid prosecution.

Discussion

198. We have set out above the background material concerning the Rwandan authorities' use of laws to suppress political dissent through prosecutions for ''genocide ideology'' or ''divisionism''. Those laws, at least as originally drafted, have been the subject of international criticism because of their open textured nature and potential for suppressing legitimate political opinion or disagreement with the government's view in particular, so far as relevant to this appeal, exploring the role of the RPF (and therefore the current President Kigame) in genocide. We note, as the "US Department of State Report for 2013" most recently points out, there were 772 prosecutions for such offences between July 2012 and July 2013. That represented a 33 per cent increase in prosecutions over the previous 12 months. We also note that in 2008, as a result of issuing international arrest warrants for a number of RPF officers, it is reported that the Rwandan authorities were exploring the possibility of prosecuting that Judge for ''genocide ideology'' (see "Human Rights Watch Report", July 2008 at pages 92-93 cited in Brown at [75]).

199. Against that, it is clear that the Rwandan authorities acknowledge the international criticism of the Rwandan laws and undertook to carry out a review (see "Human Rights Council, 17th Session, Report of the Working Group

on the Universal Period Review – Rwanda" (14 March 2011) (bundle 2/1-20 at paras 79.3 and 79.4). That undertaking included an assurance that the law would not be manipulated or interpreted in a manner that restricted the responsible exercise of freedom of opinion and that it would not be abused for political or partisan purposes.

200. As we have already noted, the law was amended in 2013 to define the offences "more precisely" and to require evidence of "the intent behind the crime" so that it thereby reduced "the scope for abusive prosecutions" (see "Human Rights Watch Report: Rwanda, Justice After Genocide – 20 years On" at page 12 above). The figure of 772 prosecutions between July 2012 and July 2013 relates to a period, of course, before the law was amended.

201. We accept that there have been a number of "high profile" prosecutions essentially of opposition politicians such as Victoire Ingabire (see "Amnesty International Report" at pages 21-22). Likewise, there have been prosecutions of those who represent their views to the public such as editors of newspapers (see "US Department of State Report 2013" at bundle 2/17-18). We do not say that all previous prosecutions are of such high profile perceived opponents of the Rwandan Government but, in our judgment, the background material does show that they are likely to be the targets for prosecution when criticism is made in public or in the press. In our judgment, the Appellant does not fall into this category of targeted individual.

202. Mr Seddon accepted that the Appellant is not named in any of the claims either brought by his sister-in-law for compensation for the death of his brother or in his family's support for the action of the foreign judges in seeking to bring to account potential genocide perpetrators in the RPF.

203. Mr Seddon submitted that the Appellant's evidence in his witness statement that he had been asked about the claim by his sister-in-law for his brother's death when he was detained in 1999 had not been challenged in cross-examination. Again, we remind ourselves that in the evidence that the Appellant did give in this complex factual case we did not find his evidence to be wholly satisfactory or reliable. In any event, that occurred sometime ago and there is no evidence of any further State interest in the Appellant or his family as a result of that claim.

204. Our attention was drawn to pages 22 and 23 of the "Amnesty International Report" which identifies that prosecutions for ''genocide ideology'' have occurred in Rwanda for statements made abroad. One instance involved a representative of the RPF in Switzerland during the war and the other a failed asylum seeker deported from Germany. As regards the former, the Amnesty International Report states that it is unable to ascertain what was the basis of the charges. As regards the German deportee, the Rwandan Court appears to have dismissed the ''genocide ideology'' charge based upon his statement that former RPF soldiers had killed his parents and, instead, convicted him of using

forged documents in his asylum claim in Germany. It would appear that the individual had initially claimed that his family members were killed but subsequently retracted that statement and said that they were alive.

205. We were also shown news reports concerning a perceived death threat to Rwandan exiles living in the UK (see, e.g. BBC News Report dated 2 August 2011 at bundle 3/475-477). The Rwandan High Commission has denied involvement in any plot to kill the two exiles. Both were involved in political groups opposing the ruling party of President Kigame. Even accepting the threat, which we do not, it is clear to us that the political profile of the exiles distinguishes them from the Appellant. The Appellant has not been involved in political activity since leaving Rwanda. The report also refers to a third exile who believes that he is in danger because he gave evidence to a French judicial enquiry detrimental to President Kigame. As we have already indicated, even if one equated that with the Appellant's support through his family of the actions of the foreign judges to indict RPF members, the Appellant is not named or identified and there is no reason, in our judgment, to believe that the Rwandan authorities are even aware of his involvement.

206. In our judgment, the Appellant has not established that there is a real risk that the Rwandan authorities have any interest in him which will lead to a prosecution for ''genocide ideology'' or denial based upon his sister-in-law's claim for compensation or his family's support of the foreign judges' actions.

207. As regards Mr Seddon's reliance on HJ Iran, we accept that an individual who is prevented from expressing political opinion for fear of persecution falls potentially within the Refugee Convention (see RZ (Zimbabwe) and others v SSHD [2012] UKSC 38). We are not, however, satisfied that the Appellant has established that he will either express 'political' views consistent with the two bases of his claim under this head or will not do so for fear of persecution for expressing that opinion. The Appellant has had no political profile since he left Butare University in 1994. He has shown no inclination to express political opinions including the view associated with the actions of the foreign judges, namely that the RPF was, itself, guilty of genocide.

208. For these reasons, we are not satisfied that there is a real risk that the Appellant will be subject to prosecution for '''genocide ideology''' or ''divisionism'' in Rwanda.

Risk based on past history

209. Although Mr Seddon continued to rely on this basis, it was not entirely clear to us to what extent it formed a separate and discreet factual basis for a risk to the Appellant.

210. In terms, this basis of the claim relies upon the Appellant's previous detention and ill-treatment in 1999; his family's association with the previous president including his brother's close association with the previous president and the

Appellant's evidence in his most recent statement concerning the visit by "four people in civilian clothes" to his village. In large measure, we have already dealt with this evidence.

211. As regards the latter evidence, as we explained above, it does not establish any interest in the Appellant based upon his involvement in genocide or, we would add, in relation to any views he may hold or be perceived to have expressed that could be seen as falling within the rubric of 'genocide ideology' by the Rwandan authorities.

212. The evidence concerning his previous detention in Rwanda now relates to a period over 15 years ago.

213. As regards the Appellant's association with the former president, it is clear to us that in his evidence the Appellant downplayed his family's connection (apart from his brother) effectively stating that they lived in the same village as the president came from and, in that context, the Appellant and his family knew the president and his family. We do not see that as any basis upon which the Appellant can establish that he will be of any interest and at risk of ill-treatment by the Rwandan authorities on return.

214. As regards the association of the Appellant's brother with the president, as we have indicated there was a close association. He was killed in the same plane crash as the former president accompanying him on that plane. There is no suggestion that the family of the Appellant's brother, in particular his sister-in-law has ever experienced any difficulties in Rwanda as a result of her husband's association with the former president or, indeed, because of her claim for compensation.

215. Whilst we acknowledge that past ill-treatment is a "serious indicator" of future risk (see para 339K of the Rules), taking all these matters together, we are not satisfied on the evidence that the Appellant has established under this head of claim a real risk of persecution or serious ill-treatment contrary to Article 3 of the ECHR or falling within Article 15(b) of the Qualification Directive.

Conclusion on risk of persecution or serious ill-treatment

216. As the Appellant cannot establish a real risk of prosecution in Rwanda and has otherwise not established he is at risk of persecution or serious ill-treatment, the Appellant's claim must fail and his appeal is dismissed.

217. In the light of that, it is not strictly necessary for us to decide whether <u>if</u> (contrary to our earlier findings) there is a real risk that the Appellant would be prosecuted for genocide or 'genocide ideology' or 'divisionism' there is a real risk of a flagrantly unfair trial contrary to Article 6 of the ECHR or to a punishment, if convicted, that would breach Article 3 of the ECHR and whether, on the Appellant's case, the prosecution, judicial process and

punishment would be inflicted on a discriminatory basis because of his political view and so amount to persecution for a Convention reason.

218. Both representatives made detailed written and oral submissions on these issues and, in the light of that, we consider it appropriate to express our views and findings on the hypothetical basis that the Appellant has established that there is a real risk that he will be prosecuted in Rwanda.

Unfair trial and punishment

Unfair Trial

219. The centre piece of the Appellant's case in relation to his claim that any trial for genocide or 'genocide ideology' would be flagrantly unfair and a breach of Article 6 of the ECHR is the Divisional Court's decision in Brown.

The Divisional Court's decision in Brown

220. In that case, the claimants resisted their extradition to Rwanda to face prosecution for genocide on the basis that they would not receive a fair trial before the High Court of Rwanda. The claimants relied upon Article 6 of the ECHR. The Divisional Court recognised that in order to establish a breach of Article 6 the claimants had to show a "real risk of a flagrant denial of justice" citing R v Special Adjudicator ex parte Ullah [2004] 2 AC 323 and EM (Lebanon) v SSHD [2008] UKHL 64. The claimants argued that there would be a flagrant denial of a fair trial on two bases. First, they argued that they would not have the same opportunity as the prosecution to call witnesses; in particular defence witnesses would be frightened of reprisals if they testified as there was a risk of a witness being accused of "genocide ideology". As regards witnesses overseas, there were inadequate video-link facilities to permit witnesses to give evidence from abroad. Secondly, it was argued that the Rwandan judiciary was not independent and impartial but was subject to political pressure and influence.

221. The Divisional Court considered the claimants' arguments in the light of the Rwandan "transfer law" enacted on 16 March 2007. As will become clear below, that law was subsequently amended on 26 May 2009 and it was that amended law which was subsequently considered by the ECtHR in the Ahorugeze case.

222. The Divisional Court accepted the substance of the claimants' case that there was a real risk of a flagrant denial of a fair trial. The Court's judgment contains a detailed and comprehensive assessment of the background evidence and expert reports presented to it. At paras [37]-[48], the Court set out the approach in the existing ICTR jurisprudence concerning the transfer of defendants for trial to the Rwandan High Court by the ICTR. Summarising those cases, the effect of which was that the ICTR had consistently refused to transfer cases

because of difficulties with the availability and presentation of defence evidence, the Court said this at para [47]:

> "We can see, then, that in repeated recent decisions, the ICTR has not been satisfied that defendants charged with genocide and related offences will be fairly tried in Rwanda, having regard to the apprehension of serious difficulties as regards the availability and presentation of defence testimony. On this ground it has consistently declined to order referral to Rwanda for trial in such cases under Rule 11 *bis*. Courts in Europe have followed the ICTR. Thus on 23 October 2008 the Toulouse Court of Appeal, in declining to order extradition to Rwanda in *Bivugarabago*, explicitly followed the ICTR in *Munyakazi* and *Kanyarukiga* in relation to the safeguard and protection of defence witnesses. A like decision was arrived at on 3 November 2008 by the Appellate Court of Frankfurt am Main in *Mbarushimana*. There followed *Senyamuhara* in the Mamoudzou Court of Appeal on 14 November 2008 and *Kamali* in the Court of Appeal of Paris on 10 December 2008. Even more recently, in *Kamana*, the Lyon Court of Appeal on 9 Janaury 2009 refused to extradite the defendant on like grounds. All these judgments relied heavily on extant decisions of the ICTR."

223. Those decisions emphasised the unsatisfactory nature of video-link facilities for overseas witnesses and the effect upon witnesses' willingness to give evidence in the light of potential accusations and prosecutions for "genocidal ideology". The Court went on at para 49 to cite at length from a Human Rights Watch Report, "Law and Reality – Progress in Judicial Reform in Rwanda" (July 2008) which again highlighted difficulties faced by defendants in being able to call witnesses, in particular in the light of intimidation and threats of prosecution, including the risk of prosecution for "genocidal ideology".

224. The Court set out at paragraphs [50]-[56] evidence given before it on behalf of the defendants. At para [57], the Court observed that the evidence marched in step with that of the Human Rights Watch Report of July 2008 and the conclusions of the ICTR.

225. At paras [59]-[66], the Court dealt with the Rwandan government's response to this evidence which, the Court summarised at paragraph [79]:

> "…taken together points in our view to the existence (to say the least) of a substantial risk that if [the claimants] are put on trial before the High Court of Rwanda [they] will be unable effectively to martial and present the evidence on which they desire to rely from the mouths of defence witnesses."

226. The Rwandan Government specifically drew attention to a witness protection scheme administered by the Office of the Prosecutor General of Rwanda and that threats of harassment were reported to the police. The Court did not accept that this or any other argument presented by the Rwandan Government deflected from the Court's view on the evidence that there was a real risk that potential defence witnesses would be deterred from giving evidence. At para [62] the Court said this:

> "In our judgement neither the judges' reasoning nor [Counsel for the Rwandan Government's] submissions in its support, possess anything like the force that

> would be needed to contradict the pressing effect of all the evidence now before us which demonstrates a real risk that many potential defence witnesses – whether presently inside or outside Rwanda – would be so frightened of reprisals that they would not willingly testify. The judge's dismissal of the admitted fact that witnesses have been attacked and killed with the throwaway observation "this applies to both prosecution and defence" defies restrained comment. And the possibility of accusations of "genocide minimization" is especially troubling. It pre-empts what is acceptable and what is unacceptable speech. But that must be inimical to the giving and receiving of honest and objective evidence."

227. At paras [63]-[66], the Court considered the evidence concerning the availability of video-link facilities in order that overseas witnesses could give evidence but rejected the view that such was readily available and concluded at para [65] that:

> "There must at least be a substantial risk that such facilities would not be available. In that event the appellants would effectively be deprived of the opportunity of calling witnesses in their defence. It might be suggested that the Court would permit the witnesses' statements to be read. That appears to be a very doubtful prospect – see Article 7 of the organic law (again, we have no evidence of how the provisions work in practice). But even if it were done, there is a plain likelihood that little weight would be attached to them."

228. At para [66], therefore, the Court concluded that:

> "If [the claimants] were extradited to face trial in the High Court of Rwanda, the appellants would suffer a real risk of a flagrant denial of justice by reason of their likely inability to adduce the evidence of supporting witnesses."

229. Having reached that view in relation to the availability of witnesses, the Court went on to consider whether the Rwandan High Court was an independent and impartial tribunal.

230. At para [68] the Court set out the importance of considering this issue in the context of the "qualities of the political frame in which it is located" as follows:

> "Moreover the question whether a court is independent and impartial cannot be answered without considering the qualities of the political frame in which it is located. If the political regime is autocratic, betrays an intolerance of dissent, and entertains scant regard for the rule of law, the judicial arm of the State may be infected by the same vices; and even if it is not, it may be subject to political pressures at the hands of those who are, so that at the least the courts may find it difficult to deliver objective justice and even-handed procedures for every litigant whatever the nature of his background or the colour of his opinions. We must take care, of course, to avoid crude assumptions as to the quality of a State's judiciary based on the quality of the State's politics. There are, thankfully, many instances of independent judges delivering robust and balanced justice in a harsh and inimical environment; but it takes courage and steadfastness of a high order."

231. The Court then went on to consider the background material to which it was referred, ICTR judgments concerning transfer to the Rwandan Court and expert evidence presented to the Court. In particular, at paras [100]-[107] the

Court considered the *Bizimungu* case upon which Mr Seddon placed reliance on behalf of the Appellant. That concerned the prosecution of the president of Rwanda between 1994 and 2000. In 2004, he was put on trial for various forms of sedition, criminal association and fraud and embezzlement. He was convicted and his conviction was upheld by the Supreme Court of Rwanda. The evidence accepted by the Divisional Court was that the Judge who had presided at Bizimungu's trial in the first instance had fled Rwanda and had told journalists that there had been no substantial proof of Bizimungu's guilt and he had been convicted as a result of political pressure (see [106] of Brown). At para [107], the Divisional Court accepted what the trial judge in the *Bizimungu* case had said and concluded that it amounted to significant evidence of judicial interference in the judicial process. The Court said this:

> "In our judgment there is a substantial likelihood that the trial judge said what he is alleged to have said, whether there is one source or more. There is no reason to suppose otherwise. And if it was said, there is nothing to suggest it was fake. We must assess its significance. It is of course right that the relevant events took place some time ago: the trail was in 2004. It is also right that the case must have possessed an especially high profile. Balancing the whole matter (and we should not forget that the appellants, too, would have a considerable, profile as defendants in a genocide trial: three were *bourgmestres*, the fourth said to have been a close associate of President Habyarimana), we regard the Bizimungu case as being significant evidence of executive interference in the judicial process in the High Court, and thus of a want of impartiality and independence."

232. The Court set out its conclusions on the fair trial issue at paras [119]-[121] as follows:

> 119. As will be apparent from this judgment, we accord great respect to the ICTR's decisions. However, the Appeals Chamber's finding that no reasonable Trial Chamber would have concluded that there was sufficient risk of government interference with the Rwandan judiciary to warrant denying the prosecution's transfer request was based only on the record before it, and in particular on the failure to mention any specific incidents of judicial interference (paragraph 78 above). We have had the advantage of being able to consider not only the HRW Report of July 2008, including its treatment of the Bizimungu case (paragraph 104 above), but also the evidence of Professor Reyntjens, Professor Sands and Professor Schabas, and in particular the acceptance by Professor Schabas in cross-examination on 21 August 2008 that there probably was executive interference in the Bizimungu case (see paragraph 101 above). Thus we have the evidence of a specific incident of judicial interference that the Appeals Chamber lacked.
>
> 120. More generally, we have not forgotten the scale of the dreadful tribulations suffered in Rwanda in 1994. Nor have we ignored the real and substantial measures taken to establish a judicial system capable of delivering criminal justice to acceptable standards. But our duty is to apply an objective test – real risk of flagrant denial of justice. We certainly cannot sanction extradition as a means of encouraging the Rwandan authorities to redouble their efforts to achieve a justice system that guarantees due process. That might serve a political aspiration, but would amount to denial of legal principle.

> 121. We stated earlier (paragraph 68) that the question whether a court is independent and impartial cannot be answered without considering the qualities of the political frame in which it is located. We have had no day-by-day details from the GoR of the conduct of the Rwandan High Court's business. No details of trials; of defences run, successfully or unsuccessfully; no details of any of the myriad events that show a court is working justly. We have reached a firm conclusion as to the gravity of the problems that would face these appellants as regards witnesses if they were returned for trial in Rwanda. Those very problems do not promise well for the judiciary's impartiality and independence. The general evidence as to the nature of the Rwandan polity offers no better promise. When one adds all the particular evidence we have described touching the justice system, we are driven to conclude that if these appellants were returned there would be a real risk that they would suffer a flagrant denial of justice…"

233. As we have said, Mr Seddon placed reliance upon the Brown decision and its conclusion that any trial for genocide (and he would add 'genocide ideology' or 'divisionism') would be flagrantly unfair both because of the lack of impartiality and independence of the Rwandan judiciary and because of the lack of equality of arms in the Appellant's ability to defend any prosecution by calling witnesses even if, and it appears to be only the case in transfer cases, video link facilities would be in theory available because the evidence did not show that in practice that was the case.

234. Mr Hopkin did not seek to undermine the Court's decision in Brown. Instead, he relied upon the ECtHR's decision in Ahorugeze which reached the opposite conclusion to the Court in Brown. He also relied upon the background material in particular the "US State Department Report on Human Rights Practices for Rwanda" for 2011, 2012 and 2013 which he submitted demonstrated that the Rwandan judiciary was now impartial and independent except perhaps in high profile cases which would not be the proper characterisation of any prosecution of the Appellant (see, in particular, the 2013 report at pages 144 and 145). He submitted that the prosecution of Victoire Ingabire was an example of such a high profile case where political interference could not be excluded.

The ECtHR's decision in Ahorugeze

235. In Ahorugeze, the ECtHR concluded that the extradition of a Rwandan national to face prosecution for genocide in Rwanda did not breach Articles 6 or 3 of the ECHR.

236. In reaching its decision, the ECtHR relied upon the amendments made to the Rwandan "transfer law" from 26 May 2009. The provisions of the law are set out at para [34] of the ECtHR's judgment which we gratefully adopt. Principally those amendments provided for two significant changes to the Rwandan law.

237. First, in Article 13 the law now provides for the protection of witnesses from criminal liability for anything said or done in a trial. It provides as follows:

> "Without prejudice to the relevant laws on contempt of court and perjury, no person shall be criminally liable for anything said or done in the course of a trial."

238. At least in principle, therefore, the law protects witnesses from the risk of a prosecution for anything said at a trial which might otherwise constitute "genocide ideology" or "divisionism" which was one of the dangers which influenced the Court in Brown to conclude that a defendant in a genocide trial might be unfairly prejudiced by the reluctance of witnesses to give evidence.

239. Secondly, Article 14 *bis* allows for the giving of testimony by a witness residing abroad, including by video-link which has the obvious advantage that a witness does not return to Rwanda.

240. The ECtHR also referred to the Rwandan law of 2007 abolishing the death penalty and its amendment from 1 December 2008 in relation to genocide cases. Article 2 of the original law abolished the death penalty. Article 3 provided that the penalty substituted would be either "life imprisonment" or "life imprisonment with special provisions". Article 4 defines "life imprisonment with special provisions" as imprisonment in isolation with no prospect of release for at least 20 years. However, by the amendment to that law on 1 December 2008, Article 3 was amended such that "life imprisonment with special provisions" could not be pronounced in respect of any case transferred to Rwanda from the ICTR or from other states in accordance with the provisions of the transfer law.

241. It is clear from Article 24 of the transfer law that the transfer law (and the exclusion of the punishment of "life imprisonment with special provisions") apply both to cases transferred to Rwanda by the ICTR or where:

> "extradition of suspects is sought by the Republic of Rwanda from other states".

242. It follows, in our judgment, that the transfer law has no application to this appeal as the Appellant is not subject to an extradition request.

243. By contrast, there is no doubt that the ECtHR in Ahorugeze was concerned with a case in which the "transfer law" did apply.

244. The ECtHR was influenced by the transfer decision of the ICTR in Uwinkindi where the Court, for the first time, permitted the transfer of a case to Rwanda (see [51]-[56]). At [58], the ECtHR also noted the ICTR's view in Uwinkindi in relation to the independence and impartiality of the Rwandan judiciary as follows:

> "On the issue of the independence and impartiality of the Rwandan judiciary, the Chamber was of the view that Rwandan judges, as professional judges, benefited

> from a presumption in their favour that could not be lightly rebutted (paragraph 166). The judges of the High Court and the Supreme Court were considered qualified and experienced and in possession of the necessary skills to handle a transferred case (paragraph 178). Furthermore, the Rwandan legal framework guaranteed the independence and impartiality of the judiciary (paragraph 186). The submissions made in the case by the defence and by *amici curiae* in support of their contention that the judiciary lacked those qualities in practice, in the Chamber's opinion, mainly concerned cases of a political nature and did not reflect the conditions of the trial or the charges faced by the accused (paragraph 196). In addition, the information available to the Chamber did not give reason to conclude that the judiciary was unduly corrupt (paragraph 185).

245. Further, at para [56], the ECtHR noted the witness protection programme in Rwanda. At para [51] it also noted the availability of defence counsel. At para [59] the ECtHR also noted that there were "additional safeguards in the monitoring and revocation mechanisms" available under rule 11 *bis* of the ICTR's Rules and Procedure and Evidence.

246. Mr Hopkin placed reliance upon the case of Uwinkindi and its adoption in Ahorugeze. He also relied upon a decision of the Oslo District Court on 11 July 2011, referred to by the ECtHR in Ahorugeze at [72]-[75]) in which the Court permitted the extradition from Norway to Rwanda of a genocide suspect. At para [73], the ECtHR recorded that the Oslo court:

> "found that the legislative and other changes, as well as the possibility for observers to follow the trial, meant that there was no real risk that the trial would be unfair."

247. It is also clear from para [74] of the ECtHR's decision that the Oslo District Court was itself influenced by the ICTR Referral Chamber's decision in Uwinkindi. We were informed at the hearing that an appeal had been dismissed in the Uwinkindi case by the ICTR's Appeal Chamber.

248. The ECtHR's conclusion in relation to the fairness of a trial subject to the "transfer law" is set out at paras [117]-[123] as follows:

> "117. The Court reiterates that, in 2008 and early 2009, the ICTR as well as courts and authorities of several national jurisdictions refused to transfer or extradite genocide suspects to Rwanda due to concerns that the suspects would not receive a fair trial in the country. The decisions mainly focussed on the difficulties for the defence to adduce witness testimony, on account of the fears of witnesses to appear for fear of reprisals and the risk that remote defence testimony would not be given the same weight by the courts as evidence for the prosecution given in person. While the ICTR found no reason to criticise the impartiality and independence of the Rwandan judiciary or the composition of the courts, the UK High Court concluded that there was evidence of judicial interference by the Rwandan executive. Several decisions also found that the possibility of life imprisonment in isolation constituted an impediment to transferring the suspects to Rwanda.
>
> 118. Since these decisions were taken, several amendments have been made to the Rwandan legislation. The respondent Government and the third-party

intervener have submitted that there have been additional improvements in legal practice. Consequently, it needs to be determined whether these changes are sufficient to conclude that, if the applicant is now extradited to Rwanda, he would not be subjected to a real risk of a flagrant denial of justice.

119. As noted above in regard to the applicant's complaint under Article 3, he cannot be sentenced to life imprisonment in isolation (see §93). Thus, this particular issue need not be examined further.

120. The Court considers that the central issue in this present case is the applicant's ability to adduce witnesses on his behalf and obtain an examination of testimony by the courts that reasonably respect the equality of arms vis-à-vis the prosecution.

121. As regards the fears of reprisals that the applicant's witnesses may have, it is, noted by the ICTR in *Uwinkindi,* not determinative whether those fears are reasonable or well-founded but rather whether there are objective reasons to believe that witnesses would refuse to come forward. In this respect, the Court first notes that, through a May 2009 amendment to Article 13 of the Transfer Law, witnesses - as well as other participants in the proceedings – are afforded immunity from prosecution for statements made or actions taken during a trial. Furthermore, in addition to the witness protection programme previously in existence under the auspices of the Office of the Prosecutor-General ("VWSU"), Rwanda has recently made arrangements for an additional witness protection unit under the direction of the judiciary ("WPU"). The Court also takes into account the submissions made by the Netherlands Government, according to which, during Dutch investigations of genocide cased in Rwanda, the Rwandan officials had never inquired about the witnesses or their statements. Similar assessments, recorded in the Oslo District Court's judgment of 11 July 2011, had been made by the Norwegian police after having interviewed 149 witnesses in Rwanda since September 2009.

122. Furthermore, the introduction of Article 14 bis of the Transfer Law provides for the possibility of witnesses residing outside Rwanda to give testimony through the use of several alternative means, without having to appear in person at a trial. Besides the possibility of making depositions before a judge in Rwanda or abroad, the most important development is perhaps that the law now provides for the hearing of witnesses during the trial via video-link. Already in its first referral case, *Munyakazi*, the ICTR Appeals Chamber was satisfied that video-link facilities were available and would likely be authorised in cases where witnesses residing abroad genuinely feared to testify in person. In the present case, the respondent Government have submitted that there are no technical obstacles to the use of video-link in Rwanda. In this connection, the Court reiterates that it has previously held that the use of video-link testimony is as such in conformity with Article 6 (see for instance, *Kabwe and Chungu v. the United Kingdom* (dec.), nos. 29647/08 and 33269/08, 2 February 2010). Furthermore, in view of the legislative changes providing for alternative ways of giving testimony, the Court cannot find any basis for concluding that statements thus made would be treated by the courts in a manner inconsistent with the respect for the equality of arms.

123. In conclusion, the Court finds no reason to conclude that the applicant's ability to adduce witness testimony and have such evidence examined by

> the courts in Rwanda would be circumscribed in a manner inconsistent with the demands of Article 6."

249. At para [124] the ECtHR noted that the claim that no qualified lawyer would be able to defend the applicant was simply unsubstantiated. As regards the independence and impartiality of the Rwandan judiciary, the ECtHR (at [125]) rejected the argument that the Rwanda judiciary lacked the requisite independence and impartiality in the following terms:

> "Turning to the independence and impartiality of the Rwandan judiciary, the Court takes note of the concerns expressed by some international organisations as well as the UK High Court. However, in its referral cases, the ICTR has concluded that the Rwandan judiciary meets these requirements. The *Uwinkindi*, the Referral Chamber considered that the judges of the High Court and the Supreme Court were qualified and experienced and in possession of the necessary skills to handle a transferred case. Furthermore, both the ICTR and the respondent Government have pointed to the legal and constitutional guarantees of the judiciary's independence and impartiality. The experience of the Dutch investigative teams and the Norwegian police – that Rwandan authorities had not in any way interfered with their work or with the witnesses they heard – points in the same direction. The Court therefore concludes that there is no sufficient indication that the Rwandan judiciary lacks the requisite independence and impartiality."

250. At para [127] the Court noted the ICTR Referral Chamber's decision in Uwinkindi and, in particular its reference to monitoring mechanisms but considered those not to have had any material effect on the Chamber's decision based upon changes to the transfer law:

> "The Court has in the foregoing referred to the ICTR Referral Chamber's decision in *Uwinkindi*. While noting that the decision is not final, the Court nevertheless considers that its conclusions have to be given considerable weight. It is the first transfer decision taken by the ICTR since the legislative changes in Rwanda. The Chamber found that the issues that had led to the decisions in 2008 to refuse transfers had been addressed to such a degree in the intervening period that the Chamber was confident that the accused would be prosecuted in a manner consistent with internationally recognised fair trial standards enshrined in the ICTR Statute and other human rights instruments. While the Chamber also relied on the monitoring it ordered and its ability to revoke the transferred case if necessary, this does not, as noted above in regard to the complaint under Article 3, change the conclusions drawn. In this connection, the Court notes that Sweden has declared itself prepared to monitor the proceedings in Rwanda and the applicant's detention."

251. At para [128], in a passage relied upon by Mr Hopkin, the ECtHR noted that the standard in transfer cases "clearly set a higher threshold" than the test for extraditions under Article 6 of the Convention as the transfer court must be satisfied "that the person in question will receive a fair trial".

252. At para [129] the ECtHR concluded that if extradited to stand trial in Rwanda the applicant: "would not face a real risk of flagrant denial of justice".

Discussion

253. In our judgment, the ECtHR's decision in Ahorugeze cannot assist the Respondent in this appeal.

254. First, the ECtHR's decision, in relation to the fairness of any trial based upon difficulties of witnesses attending or giving evidence from abroad, is squarely based upon the new "transfer law" which has no application in this appeal for the reasons we have already given. As a result, this Appellant is in no better position than were the individuals in the Brown case as regards his ability fairly to defend himself in any prosecution in Rwanda.

255. Secondly, as the ECtHR made clear at para [127] it was the amendment to the "transfer law" which was the material consideration in the change in the ICTR Referral Chamber's position adopted in the Uwinkindi case.

256. Thirdly, there is no evidence before us that any trial of the Appellant would be subject to independent monitoring to the extent that that could, though we do not accept it to be the case, affect the fairness of any trial.

257. Fourthly, as regards the independence and impartiality of the judiciary, the Divisional Court in Brown based its decision on a detailed consideration of the background evidence and expert reports. It set the trial process and the Rwandan judiciary in the political context in which it operates. By contrast the ECtHR in Ahorugeze relied (at [125]) on the views of the ICTR Referral Chamber in Uwinkindi (set out at [58] of the ECtHR's judgment) based, it would seem, on structural matters alone: the judges are professional and benefited from a presumption in favour of independence and impartiality (the source of which is not vouchsafe) and the legal framework guaranteeing the independence and impartiality of the judiciary. The points made by the Divisional Court in Brown, based upon more comprehensive evidence including that of experts, are simply not met by those structural considerations. The evidence in Brown went further and demonstrated that executive influence occurred in trials with a political element, for example the *Bizimungu* prosecution. In our judgment, if (and we emphasise this is not our finding) the Appellant were subject to prosecution for genocide or 'genocide ideology' or 'divisionism' there is a real risk that the political context would potentially entail executive influence over the judiciary.

258. We see nothing in the material relied upon by Mr Hopkin, in particular in the "US Department of State Reports" that leads us to any different conclusion. The most recent 2013 report states that (at bundle 2/143):

> "The constitution and law provides for an independent judiciary, and the judiciary operated in most cases without government interference; however, there were constraints on judicial independence, and government official sometimes attempt to influence individual cases. In February the Ministry of Justice announced that 10 judges and clerks were dismissed during the previous 24 months due to corruption. Authorities generally respected court orders."

259. Under the rubric "Judicial Civil Procedures and Remedies" the 2013 states at page 14 (bundle 2/145) that:

> "The judiciary was generally independent and impartial in civil matters."

260. The latter, in our judgment, tells us nothing about the impartiality and independence of the judiciary from executive interference in trials for genocide and related offences. Likewise, the former extract recognised that government officials do attempt to influence some individual cases despite the constitution providing for an independent judiciary. As the Divisional Court in Brown acknowledged, the issue is not one of independence in theory but rather what happens in practice. The material to which we have been referred does not persuade us that there is any proper basis for reaching any different conclusion to that of the Divisional Court in Brown. The material referred to in Brown and to which we were referred by the parties leads us to conclude that the political milieu in Rwanda is such that, if the Appellant were subject to prosecution for genocide, there is a real risk of executive interference (see in particular that referred to in Appellant's skeleton argument paras 90 and 91).

261. Consequently, we make the following findings. First, on return to Rwanda, if prosecuted for genocide or genocide related offences, there is a real risk that the Appellant's trial would be flagrantly unfair and a breach of Article 6 of the ECHR. Secondly, the circumstances of prosecution (which are themselves likely to involve political considerations) and of the trial given the prospect of executive interference, would entail "judicial measures" or "prosecution" on a discriminatory basis resulting in a sufficiently serious violation of the Appellant's human rights (Article 6 of the ECHR) so as to constitute "persecution" under reg 5 of the Refugee or Person in Need of International Protection (Qualification) Regulations 2006. Thirdly, that persecution would be for a Convention reason, namely imputed or actual political opinion.

262. If we are wrong about that, and the Appellant is not entitled to refugee status, we are satisfied that the circumstances of the trial would amount to "inhuman or degrading treatment" falling within Article 3 of the ECHR and Article 15(b) of the Qualification Directive entitling the Appellant to subsidiary protection.

Punishment

263. Mr Seddon also relied upon the risk of the Appellant being convicted, following a prosecution for genocide or genocide related offences, and subject to a sentence of life imprisonment in isolation without the prospect of parole for 20 years. He submitted that this, in itself, amounted to discriminatory punishment and therefore "persecution" within reg 5 of the 2006 Persons in Need of International Protection Regulations or, alternatively, "inhuman or degrading punishment" contrary to Article 3 of the ECHR and Article 15(b) of the Qualification Directive. In addition, he relied upon the circumstances in which the Appellant would be detained pre-trial and the more general circumstances of his imprisonment post-conviction.

264. We deal first with the risk of the Appellant being imprisoned for life in isolation with no possibility of parole for 20 years.

265. In Ahorugeze the ECtHR was not required to determine whether that, in itself, breached Article 3 of the ECHR (see [119]). That was, of course, because the individual in that case was subject to the new "transfer law" and by virtue of the Organic Law No 31/2007 (as amended) by Organic Law No 66/2008 that punishment could not be imposed in a transfer case. This is not a transfer case and so, in principle, that punishment is available.

266. Mr Hopkin submitted that the risk of the Appellant being subject to this punishment was "so remote as to be negligible" or speculative. This risk, of course, only arises in relation to a conviction for genocide. The punishment for "genocide ideology" has, since 2008 been a maximum term of 9 years imprisonment.

267. Mr Seddon did not draw our attention to any material which suggested that the punishment for genocide was necessarily life imprisonment in isolation. That would seem, on the limited material before us, to be the maximum rather than the only available punishment. Whilst there must be a risk that any conviction of the Appellant might attract the maximum punishment for his offences, there is nothing in the material before us to suggest that his involvement in genocide (accepting for these purposes the Respondent's claim in that regard at its highest) would put his offences in the highest possible category justifying the maximum sentence. We do not accept that there is a 'real' risk of this punishment being imposed and we do not consider that simply facing the risk (albeit not real) of such a punishment is, in itself, inhuman and degrading treatment contrary to Article 3 of the ECHR.

268. That said, Mr Hopkin accepted that he was in some difficulties if the Appellant was subject to pre-trial detention. However, he did not accept that prison conditions in themselves, if the Appellant were convicted, breached Article 3 of the ECHR. He submitted that the background evidence demonstrated that although prison conditions were "harsh" they met international standards (see "US Department of State Report" 2011 at bundle 2/43-46; 2012 at bundle 2/87-88 and 2013 at bundle 2/136-137).

269. We were told about Mpanga Prison in Rwanda where those transferred by the ICTR were held if convicted and the similarly upgraded security wing at Kigali Central Prison and facilities where those individuals were held during the trial. It was not a matter of dispute between the parties that those facilities met "international standards" (see, e.g. "US Department of State Report 2012" at bundle 2/88). It is not entirely clear to us from Mr Hopkin's submissions whether the Respondent disputed that the Appellant would be held in Mpanga Prison if convicted and during any trial in similar facilities. It seems to us that there is at least a real risk that the Appellant would not, if convicted, be held in

Mpanga Prison. For example, the "US Department of State Report 2012" refers (at bundle 2/8):

> "Individuals convicted of genocide – related offences comprised a majority of the adult prison population."

270. The next paragraph deals with eight prisoners held at the purpose-built detention centre (which we understand to be Mpanga Prison) following transfer from the ICTR. That, in our judgment, at least creates a very real possibility that the Appellant maybe held in an "ordinary" Rwandan prison. We have carefully considered the evidence relied upon, particularly by Mr Hopkin, in relation to prison and detention conditions. As he submitted, the conditions are described a "harsh" in the US Department of State Reports. Likewise, those reports record that the government made "numerous improvement" during the relevant year. Nevertheless, the background material paints a bleak picture of prison and detention conditions including physical abuse of inmates, overcrowding, deaths from conditions such as anaemia, HIV/aids albeit at similar rates to those found in the general public.

271. In relation to police and military detention centres, the "US State Department Report 2013" (bundle 2/137) states that:

> "Overcrowding was common in police detention centres, and poor ventilation often led to high temperatures. The provision of food and medical care was inconsistent, and some detainees claim to have gone for several days without food. There were complaints regarding inadequate sanitation in some detention centres, and not all detention centres had toilets."

272. Any pre-trial detention would be likely to be lengthy. There is clear evidence of delays in bringing proceedings to court ("US State Department Report 2013" at bundle 2/11-12). Despite the claim of the government making "improvements during the year" in 2011, 2012 and 2013 (including improvement in the provision of food), we are satisfied that there is a real risk that the conditions in pre-trial detention and, if convicted, in prison will be of such harshness and severity as to pass the threshold of the minimum level of severity to amount to "inhuman or degrading treatment".

273. Consequently, we are satisfied (on this hypothetical basis) that there is a real risk that the Appellant's pre-trial detention and post-conviction imprisonment would breach Art 3 of the ECHR. That imprisonment would arise from a discriminatory/politically motivated application of the law and the trial process and so the ill-treatment would amount to persecution for a Convention reason or, alternatively, a breach of Art 15(b) of the Qualification Directive.

Conclusion

274. Despite our conclusions in relation to the fairness of any trial or punishment the Appellant would face if prosecuted for (and convicted of) genocide or 'genocide ideology', this appeal fails. For the reasons we gave above, we are

not satisfied that there is a real risk that the Appellant will be prosecuted for genocide or 'genocide ideology' or 'divisionism' or that there is a real risk that the Appellant would be subject to persecution for a Convention reason or serious ill-treatment as a result of his past history and family associations with the former president of Rwanda.

IV. **DECISION**

275. The Appellant is not excluded from the Refugee Convention under Art 1F or from subsidiary/humanitarian protection under the Qualification Directive/para 339D.

276. The Appellant has failed to establish that his return to Rwanda would breach the Refugee Convention or that he is entitled to subsidiary/humanitarian protection in the UK.

277. Accordingly, the appeal is dismissed.

Signed Date: **6 November 2014**

Mrs Justice Simler