Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: RP/00108/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 1 July 2016	**On 12 July 2016**

Before:

UPPER TRIBUNAL JUDGE GILL
DEPUTY UPPER TRIBUNAL JUDGE K E D CHAMBERLAIN

Between

M V Appellant
(ANONYMITY ORDER MADE)

And

The Secretary of State for the Home Department Respondent

Anonymity

The anonymity order issued by the First-tier Tribunal is replaced by the following:

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269) we make an anonymity order. Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the original Appellant. This direction applies to all, whether or not parties to this case.

Any failure to comply with this direction could give rise to contempt of court proceedings.

Representation:

For the Appellant: Mr D Neale, of Counsel, instructed by Paragon Law.
For the Respondent: Mr. S Kotas, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction and background facts:

1. The appellant is a national of the Republic of Congo (not to be confused with the Democratic Republic of Congo or DRC), born on [ ] 1994 and 21 years old. He appeals, with permission, against a decision of Judge of the First-tier Tribunal A D Troup (hereafter referred to as the "Judge") who, following a hearing on 12 April 2016, dismissed his appeal against a deportation order dated 13 November 2015 made against him as a foreign criminal. The respondent was required to order his deportation under s.32(5) of the UK Borders Act 2007 (the "2007 Act") unless one of the exceptions in s.33 applies. The relevant exception in this particular case is Exception 1 which applies where the removal of a foreign criminal in pursuance of the deportation order would breach: (a) a person's rights under the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR"), or (b) the United Kingdom's obligations under the 1951 United Nations' Convention Relating to the Status of Refugees (the "Refugee Convention").

2. The appellant arrived in the UK on 6 January 2002 with his mother and his younger brother ("MJ"). The appellant was 7½ years old, his brother 5½ years old. He has two half-sisters who were aged 14 years and 8 years at the date of the hearing before the Judge and who were born in the United Kingdom. He also has an older sister who was aged 25 years at the date of the hearing before the Judge.

3. The appellant had lived in the Republic of Congo from birth until 14 October 1997, when he was nearly 3½ years old, and in Gabon for about 4 years before his arrival in the UK.

4. The appellant's mother claimed asylum on 14 January 2002, shortly after her arrival in the United Kingdom. Her appeal was allowed by Adjudicator I.E. Vellins (hereafter referred to as the "Adjudicator" to distinguish him from the Judge), following a hearing on 8 August 2002, on asylum grounds and in relation to Articles 2 and 3 of the ECHR. She was granted indefinite leave to remain as a refugee by letter dated 12 February 2003 (the "Status letter")

5. The appellant's criminal convictions are set out below. The convictions of 4 October 2013 led to the respondent notifying the appellant that she intended to cease his refugee status in a letter dated 9 February 2015 (the "Notification letter"). She subsequently did cease (or purport to cease) his refugee status in the decision dated 13 November 2015 (the "Decision letter"), which relied, inter alia, on the reasons given in the Notification Letter. We summarise below the reasons for the respondent's deportation order, her decision to cease (or purport to cease) the appellant's refugee status and her decision to refuse humanitarian protection and his human rights claims.

6. The Status letter referred to the appellant and two of his younger siblings (the youngest had not been born then) as dependents. However, in her communications with the appellant and the UNHCR (see para 98 below), the respondent treated the

appellant as someone who has been granted refugee status in his own right, for example, by giving notice of her intention to cease refugee status. We accept Mr Neale's submission that the appellant was in fact granted refugee status by the respondent notwithstanding that the Status letter may suggest otherwise and notwithstanding that the Notification letter and the Decision letter may, in part, also do so. That is the basis upon which the Judge decided this appeal. We decide this appeal on that basis.

7. In the course of his submissions on ground 4, Mr Neale requested that the hearing before us be adjourned part-heard in order to enable the appellant to produce evidence to support the explanations advanced in the grounds and the skeleton argument dated 23 June 2016 for the failure of the appellant's mother and sister to attend the hearing before the Judge. We refused the adjournment request. Since the reasons for the adjournment request are inextricably bound up with ground 4, we give our reasons for our decision to refuse Mr Neale's request for an adjournment in the course of our assessment of ground 4.

8. It is relevant to summarise the reasons why the appellant was granted refugee status. This requires us to summarise the basis of the asylum claim of the appellant's mother and the determination of the Adjudicator (see paras 16-18 below).

9. It should be noted that the Judge had the report of an expert, Ms Ticky Monekosso, that was prepared not in relation to the appellant's case but that of his younger brother, MJ, who was also subject to deportation proceedings and who had an appeal before Judge of the First-tier Tribunal L Murray (hereafter Judge Murray to distinguish her from the Judge and the Adjudicator) at the same hearing centre on 21 April 2016. It is not known why the First-tier Tribunal was not requested to list the appeals for hearing before the same judge. As will be seen below, the Judge did not place much weight on the evidence of Ms Monekosso, whereas Judge Murray accepted the opinion of Ms Monekosso without question and therefore allowed MJ's appeal, finding that there were substantial grounds for believing that MJ would be at risk of treatment contrary to Article 3 on return.

10. The decision of Judge Murray was produced at the hearing when we indicated that we were aware from the Tribunal's computer system that Judge Murray had allowed MJ's appeal and that the respondent's application to the First-tier Tribunal for permission to appeal was awaiting a decision. Mr Kotas objected to the admission of the decision of Judge Murray, as it was produced at the hearing without any application for its admission having been made. We deal with this issue at paras 119-123 below.

The appellant's criminal convictions

11. On 27 January 2012, the appellant was convicted at Nottingham and Newark Juvenile Court for intimidating a witness or juror with intent to obstruct, pervert or interfere with justice for which, on 17 February 2012, he was given a 12-month referral order.

12. On 4 December 2012, the appellant was convicted at Nottingham Crown Court for possessing an imitation forearm with intent to cause fear of violence. On 17 January 2013, he was sentenced to 12 months detention in a Young Offenders' institution ("YOI"). Due to this conviction, he was notified of his liability to deportation. However, the respondent stated that it was considered at that time that as a recognised refugee

who had not been sentenced to a period of imprisonment of 2 years or more, that no deportation action would be taken against him at that time. On 18 February 2013, he was given a warning letter which stated that no deportation action would be taken against him but that if he came to adverse attention again, the Secretary of State would be obliged to consider the question of his deportation.

13. On 4 October 2013, the appellant was convicted at Nottingham Crown Court for robbery and possession of an imitation firearm with intent to cause fear of violence. He was sentenced to 4 years 6 months for the robbery and 36 months in respect of the imitation firearm offence in a YOI, to run concurrently. It is these convictions that brought the appellant within the automatic deportation provisions and triggered the decision that was the subject of the appeal before the Judge.

14. The Judge had before him the sentencing remarks of the sentencing judge. The Judge noted that the appellant had used the imitation firearm to frighten his victim to hand over a mobile phone and a wallet containing a "*not inconsiderable amount of cash*". He noted that the sentencing judge described the offence as "*very serious indeed"* and said that "*custody of some length is inevitable*". The Judge noted that the sentencing judge had noted that a sentence of 8 years was indicated but, given the appellant's age at the time (19 years and his guilty plea), the sentence was reduced.

15. The appellant's custodial sentence ended on 6 December 2015 since when he has been detained at the Immigration reporting centre, The Verne.

The basis of mother's claim for asylum

16. The appellant's mother claimed asylum on the ground that she was at risk of persecution on account of her relationship with her maternal aunt's husband, who was the ousted former President Pascal Lissouba. At the age of 5 years, the appellant's mother went to live with her maternal aunt. In her evidence to the Adjudicator, she said she was "given" to her aunt who was childless. She lived with her maternal aunt and her husband in the Republic of Congo from 1975 until 1979 when her maternal aunt and President Lissouba fled the country due to the political situation in the country. The appellant's mother remained in the Republic of Congo. She lived with her maternal grandmother. The maternal aunt and the former President returned to the Republic of Congo in 1992, when the appellant's mother started to live with them again until 14 October 1997 when President Lissouba was overthrown by Mr Denis Sassou-Nguessou, the current President of the Republic of Congo. On that date, they all fled the Republic of Congo and went to live in Gabon until the aunt came to the United Kingdom in August 1998. The appellant's mother arrived on 6 January 2002 with the appellant and his younger brother.

17. The Adjudicator heard oral evidence from the appellant's mother and her maternal aunt who was granted indefinite leave to remain as a refugee on 15 January 2001. At the time, Mr Lissouba was living in the United Kingdom. In evidence, the maternal aunt of the appellant's mother said that she knew the father of the appellant who bears the same name, albeit that the Adjudicator gives a variant of the spelling of his name at para 15 of his determination. She said that the appellant's father was killed in the conflict leading to the overthrow of her husband. The evidence of the appellant's mother was that he was killed by the forces of the current President.

18. The Adjudicator accepted the evidence of the appellant's mother and her maternal aunt, stating that he found them credible and believed the totality of their evidence.

He was satisfied that the government of the Republic of Congo would not accept the return of the niece of the former President without persecuting her. He found that there was a real risk that the appellant's mother would be persecuted as a close relative of the former President.

The respondent's decision in the appellant's case

19. In the Decision letter, the respondent made the following decisions:

i) She decided that the appellant can no longer, because the circumstances in connection with which he had been recognised as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his origin and nationality.

This is the wording in Article 1C(5) of the Refugee Convention. It provides that that the Refugee Convention ceases to apply to a person "*if he can no longer, because of circumstances in connection with which he has been recognised have ceased to exist, continue to refuse to avail himself of the protection of the country of nationality".*

This wording is also to be found in para 339A(v) of the Statement of Changes in the Immigration Rules HC 395 (as amended) (the "Rules"). Para 339A(v) sets out the circumstances in which a person's "*grant of asylum"* will be *"revoked or not renewed"*.

(We observe at this point that the relationship between Article 1C(5) and para 339A was considered in Dang (Refugee – query revocation – Article 3) [2013] UKUT 00043 (IAC)).

ii) She certified the appellant's case under s.72 of the Nationality, Immigration and Asylum Act 2002 (the "2002 Act").

Article 33(1) of the Refugee Convention prohibits refoulement of a refugee but, by virtue of Article 33(2), the benefit of the no-refoulement provision may not be claimed by a refugee who, having been convicted by a final judgment of a *"particularly serious crime"* constitutes a danger to the community. Section 72 of the 2002 Act applies for the purpose of the construction and application of Article 33(2) of the Refugee Convention. Section 72(2) provides that:

> A person shall be presumed to have been convicted by a final judgment of a particularly serious crime and to constitute a danger to the community of the UK if he is –
>
> (a) convicted in the UK of an offence, and
> (b) sentenced to a period of imprisonment of at least two years."

The consequence of the appellant's case being certified under s.72 was that there was a rebuttable presumption that he constituted a danger to the community of the United Kingdom. The respondent considered that the appellant had not rebutted the presumption.

iii) She decided that the appellant was excluded from humanitarian protection under para 339D(iii) of the Rules because there were serious reasons for considering that he constitutes a danger to the community or to the security of the United Kingdom.

iv) In relation to Article 8, she considered para 398 of the Rules. She considered that the public interest required the appellant's deportation unless there were very compelling circumstances over and above those described in paras 399 and 399A of the Rules. The respondent decided that the appellant had not provided evidence of a very strong Article 8 claim over and above the circumstances described in the exceptions to deportation described in paras 399 and 399A (para 64 of the Decision letter). She therefore refused the Article 8 claim.

The decision of the Judge

20. At paras 25-27 of his decision, the Judge considered an application for the hearing before him to be adjourned. The Judge recorded that the hearing was listed for 10.00a.m. but when it began at 1.25p.m., Counsel for the appellant (Ms S Caseley) informed him that the appellant wished to call his mother and older sister to give evidence on his behalf. Their witness statements are at items 2 and 3 of the appellant's bundle. At that point the witnesses had not arrived but Ms Caseley informed the Judge that she understood from a conversation she had had with her instructing solicitors that the witnesses had set out from their home in Nottingham to travel to the Tribunal in Newport by train at 10.30a.m. that morning.

21. At 2.35p.m. (having heard the appellant's evidence) the Judge invited Ms Caseley to telephone the appellant's sister following which Ms Caseley informed the Judge that the witnesses were unable to attend the hearing, having *"missed the train or something like that"*: Ms Caseley did not know the reason for their non-attendance but applied for the hearing to be adjourned part-heard to enable them to attend.

22. The Judge refused the application for reasons which he gave at para 27 of his decision. He noted that the notice of hearing had been sent to the appellant and his solicitors on 18 March 2016, that it was clear from the witness statements and from the telephone conversation between Counsel and the appellant's older sister that the witnesses were aware of the hearing date and time but they had offered no satisfactory explanation for their non-attendance. He concluded that it was not in the interests of justice for the case to be adjourned, informing the appellant that he would give due weight to the contents of the witness statements in the bundle.

23. The Judge found that the appellant had not rebutted the presumption in s.72 of the 2002 Act. He then turned to what he described as the second issue as follows: "*Would deportation breach the Refugee Convention and Articles 2 and 3*". At para 47 he posed the question whether the respondent could discharge the burden of showing that over the last 14 years there has been a significant and non-temporary change in the country situation in the Republic of Congo such that a fear of persecution can no longer be regarded as well-founded. He concluded that there had been such a significant and non-temporary change in the country situation in the Republic of Congo and that there was no real risk of persecution.

24. In relation to Article 8, the Judge found that there were no very compelling circumstances over and above those described in paras 399 and 399A.

25. The Judge gave his reasons for his findings at paras 39-80 which we quote as appropriate in the course of our assessment below.

The grounds and submissions

26. There are four grounds as follows:

27. Ground 1 challenges the Judge's finding that there had been a significant and non-temporary change in Republic of Congo. Ground 1 may be summarised as follows:

    (a) The Judge erred in failing to apply the correct burden of proof. It was for the respondent to demonstrate that there has been a significant and non-temporary change in the situation in the Republic of Congo before the cessation clause can be applied.

    (b) The Judge failed to consider the risk on return as a result of the appellant's family connection with Mr Lissouba properly or at all. Alternatively, he failed to give sufficient reasons for departing from the finding by the Adjudicator that the appellant's mother (and therefore, it is contended, the appellant) was sufficiently closely connected to the former President to be at real risk.

    (c) The Judge failed to consider whether the appellant is at real risk on account of his perceived political opinion due to his family connection with Mr Lissouba.

    (d) The Judge erred in his application of the country guidance case of LM.

    (e) The Judge failed to consider the risk to the appellant on the basis of his criminal convictions and as a failed asylum seeker.

    (f) The Judge materially erred in law in his assessment of the expert report of Ms Monekosso.

    (g) The Judge failed to properly consider the evidence as to the current political climate in the Republic of Congo. He failed to consider the background relating to the 2016 Presidential election and its aftermath, made no analysis of the current political situation and failed to take into account the volatile situation.

    (h) The Judge failed to consider whether the appellant is at real risk of coming to the adverse attention of the authorities in the Republic of Congo when questioned on arrival, given that he is not expected to lie.

28. Ground 2 is that the Judge materially erred in his application of the legal test under s.72 of the 2002 Act for the following reasons:

    i) He incorrectly attributed the categorisation of the level of risk as a "*medium to high-risk offender*" at para 44 of his decision.

       Mr Neale did not pursue this at the hearing, as he accepted that there was evidence before the Judge that the appellant was a medium risk offender.

    ii) He overlooked or misstated or failed to engage with evidence that was positive and which significantly undermined his conclusions. He was therefore obliged to engage which such evidence.

29. Ground 3 is that the Judge materially erred in law in his assessment of the appellant's Article 8 claim, as follows:

i) He materially erred in law in reaching his finding that the relationship between the appellant and his mother and siblings did not amount to family life.

ii) In reaching his finding, at para 79 (viii) *"I find that inevitably he will face a difficult period of adjustment upon arrival in Congo but, in due time, with the social skills and enterprise that he has learnt here, will form a private life for himself",* he failed to consider the fact that the appellant had never had to integrate into a new society and/or culture as an adult and that he would therefore face particular difficulties over and above a normal robust individual being returned to their country of origin.

iii) The judge failed to give any or any adequate reasons for finding that there are no very compelling circumstances to outweigh the public interest in deportation.

30. Ground 4 concerns the Judge's refusal to adjourn the hearing on the basis that there was no clear reason for the non-attendance of the appellant's mother and older sister. It is said that it has since transpired that they were unable to pay for the train tickets on the day. The Judge's refusal to adjourn the hearing was unfair, taking into account the overriding objective. In this regard, reliance is placed on Nwaigwe (adjournment: fairness) [2014] UKUT 00418 (IAC) at para 14 and SH (Afghanistan) v SSHD [2011] EWCA Civ 1284 at paras 13-14. In the skeleton argument and in submissions, it was contended, in reliance upon para 6 of Nwaigwe, that the appellant had not waived his right to a fair hearing and that the adjournment request was not spurious or frivolous or vexatious. At the hearing, Mr Neale stressed that it was not the appellant's fault that his witnesses had not attended court. Asylum seekers should not be penalised for the conduct of third parties.

31. We put to Mr Neale the fact that the explanation advanced in the skeleton argument was different from the explanation given to the Judge who was specifically told by Ms. Caseley, Counsel for the appellant, that the witnesses had set out to travel by train at 10.30 am that day and that they had "*missed the train or something like that*" whereas the explanation advanced in the skeleton argument was that they could not afford to pay for the train tickets. Furthermore, these explanations were not evidenced in the form of witness statement. The factual assertions in the grounds and the skeleton argument were not more than that, mere assertions of fact.

32. Mr Neale then applied for the hearing to be adjourned part-heard, saying that he took full responsibility for not arranging for the allegations to be evidenced by witness statements. He submitted that the appellant should not be prejudiced on account of failings on his (Mr Neale's) part.

33. In the grounds, it is contended that the evidence of the appellant's mother and older sister was crucial to the appellant's Article 8 claim. The skeleton argument also argues that the evidence was material to the Judge's finding that the relationship between the appellant and his mother and siblings did not extend beyond "*normal family ties*". However, at the hearing, Mr Neale submitted that the evidence of the mother was also important to the risk faced by the appellant on return, since she was better able than the appellant to give evidence of her relationship to the former President. He submitted that this came within the ambit of ground 4 (see paras 45 and 46 below).

Assessment

34. We will deal with the issues in this case in the following order:

    i) Ground 4, in the course of which we will give our reasons for refusing the request for the appeal before us to be adjourned part-heard.

       As will be seen below, we reject ground 4. In our judgment, the appellant has had a fair hearing. It follows that the appeal before us stands to be decided on the evidence that was before the Judge.

    ii) Ground 2. For the reasons given at paras 58-69 below, we reject ground 2. We have concluded that the Judge did not materially err in law in finding that the appellant had not rebutted the presumption that he has committed a particularly serious crime and represents a danger to the community.

    iii) Ground 1, as follows:

        a) First, the contention that the Judge erred by failing to appreciate that the burden of proof is upon the respondent to show that, because the circumstances in connection with which the appellant was granted refugee status have ceased to exists, he can no longer continue to refuse to avail himself of the protection of the Republic of Congo. As explained at para 74 below, our conclusion on ground 2 impacts upon this argument.

        b) The remainder of ground 1.

    iv) Ground 3.

Ground 4

35. Ground 4 is that the appellant has not had a fair hearing because the Judge refused to adjourn the hearing. The reason why it is contended that he did not have a fair hearing is that his mother and older sister did not attend the hearing.

36. We reminded ourselves of the guidance in SH (Afghanistan) v SSHD [2011] EWCA Civ 1284 as well as Nwaigwe (adjournment: fairness) [2014] UKUT 00418 (IAC). Plainly, the appellant has not waived his right to a fair hearing. The first question is whether there was a good reason for adjourning the hearing before the First-tier Tribunal ("FtT"). However, the lack of a good reason is not determinative. The overarching question is whether it was unfair to refuse to adjourn the hearing (Nwaigwe, at paras 5, 6 and 8). This will require consideration of the question whether the appeal could be justly decided. If the Judge's decision to refuse the request before him for an adjournment was unfair, then the Judge's decision will have been reached by the adoption of an unfair procedure. If that is the case, his decision must be set aside unless we are satisfied that it would be pointless to do so because the result would inevitably be the same (SH (Afghanistan) at para 15).

37. Ms Caseley who appeared for the appellant before the Judge said, initially, that she understood from a conversation with her instructing solicitors that the witnesses had set out from their home in Nottingham to travel to the Newport by train at 10.30 a.m. that morning. However, Ms Caseley subsequently informed the Judge that the witnesses were unable to attend the hearing having "*missed the train or something*

like that". In the grounds of application for permission to appeal, it is said that the Judge refused to adjourn the hearing because there was no clear reason for the non-attendance but that it has since transpired that the mother and sister were unable to pay for the train tickets on the day. Mr Neale submitted that the appellant should not be prejudiced for any failure on the part of his mother and sister to arrange the necessary funds.

38. The difficulty with the explanation advanced is that it is not supported by any evidence. When we pointed this out to Mr Neale, he said he accepted personal responsibility for the failure to obtain witness statements from the appellant's mother and sister and requested us to adjourn the hearing part-heard` in order to enable witness statements from the appellant's mother and older sister to be submitted to explain the reason for their non-attendance at the hearing before the Judge.

39. We refused the adjournment request because even if the explanation given for the failure to the appellant's mother and older sister to attend the hearing is accepted and it is accepted that this was a good reason for seeking the adjournment of the hearing before the Judge, it does not follow that the Judge's refusal to adjourn the hearing was unfair. In considering whether his refusal to adjourn the hearing was unfair, we have considered the relevance or possible impact of the evidence of the appellant's mother and older sister to the issues in the case and we have considered what other evidence there was before the Judge on those issues.

40. The first point to note is that this is not a case of the appellant being absent from the hearing before the Judge. He was present to give evidence on any issues in the case. There is no issue in this case of the respondent's reliance upon the opinion of an expert, for example, an age assessment report, which the appellant ought to have an opportunity to refute.

41. Ground 4 contends that the evidence of the appellant's mother and older sister was crucial to the appellant's Article 8 claim. The Judge found that the appellant did not enjoy family life with his mother and siblings. We asked Mr Neale to take us to their witness statements so as to evaluate the likely probative value of their oral evidence. Our attention was drawn to paras 9 and 19 of the statement of the appellant's mother, which read:

> "9. My health even now is poor and I have regular hospital stays, sometimes I am tired and have headaches, I get the headaches worse with bad news, they hurt me constantly. I am a sufferer of HIV and take regular medication for this. The more I think about the legal proceedings, the more pain I am in. I get down and depressed about it. My daughter [the appellant's older sister] currently provides me with some support but I need all of my family around me.
>
> 19. [The appellant] and I have a good relationship. He is more mature and now he understands things. We talk to each other like adults. He is like a different person."

42. There is nothing in paras 9 and 19 which is capable of having any material impact on the Judge's finding that family life is not being enjoyed between the appellant and his mother. Nothing has been said in the grounds or the skeleton argument or at the hearing on the appellant's behalf to say what evidence the appellant's mother would give that might have a material impact on the Judge's finding if she had another opportunity to give oral evidence. Our attention was not drawn to anything in the witness statement of the appellant's older sister.

43. Furthermore, the appellant was present to give evidence about his relationship with his mother and siblings. It is evident that the Judge did not consider that his evidence established that family life was being enjoyed between the appellant and his mother and siblings. The grounds do not suggest that the appellant gave oral evidence about his relationship with his family that the Judge failed to take into account in reaching his finding that family life was not being enjoyed.

44. At a late stage at the hearing before us, Mr Neale submitted that the oral evidence of the appellant's mother was also relevant to assessing the risk on return and that this was another reason why the appellant had not had a fair hearing. In this regard, Mr Neale drew our attention to the fact that para 22 of his skeleton argument also linked the relevance of the evidence of the appellant's mother and older sister to an assessment of the future risk.

45. We drew Mr Neale's attention to the fact that ground 4, as drafted, suggested that the ground 4 concerned only the Article 8 claim. Mr Neale referred us to the sentence in para 6(ii) of the grounds which reads: "*The Judge in failing to place sufficient weight and/or take into account considerations of fairness, in particular in light of the fact these witness' attendance were crucial to the appellant's Article 8 ECHR claim, failed to give the appellant a fair hearing, …".*

46. Relying upon the words "*in particular*" at para 6(ii) of the grounds, Mr Neale submitted that the fair hearing issue was not limited to the Article 8 claim; it also extended to the Judge's assessment of the risk on return.

47. We do not accept Mr Neale's submission that ground 4 extended to the Judge's assessment of the risk on return. It is plain, in our view, that ground 4 only concerned the appellant's Article 8 claim. If it applied also to the risk on return, one would have expected this to have been expressly mentioned in ground 4, especially given the greater importance of a breach of Article 3, against which there is an absolute prohibition, in comparison with Article 8 which is a qualified right.

48. In any event, we have considered Mr Neale's submission that the hearing was unfair because the mother was unable to give evidence about the risk on return. Any assessment of the risk on return is made by a judge by considering the specific facts relied in an individual case against the situation in the country in question. Whilst it is true, of course, that an individual person such as the appellant's mother may have relevant evidence to give about the risk on return, a judge will consider background evidence placed before him or her and any expert evidence to make an assessment of the risk on return.

49. In the instant case, not only was there no dispute about the facts relied upon, the Judge had the benefit of the determination of the Adjudicator in the appeal of the mother. The Adjudicator had the benefit of the following documents: the records of the appellant's mother's screening interview and her substantive asylum, her "*Statement of Evidence Form*" (SEF) and her witness statement. The Secretary of State's representative indicated to the Adjudicator that she did not wish to cross-examine her. The Adjudicator therefore did not hear oral evidence from her but he heard oral evidence from the wife of the former president. The Adjudicator set out the oral evidence of this witness at paras 10-15 and a summary of the witness statement of the appellant's mother at para 16-17 of his determination. He accepted their evidence and gave detailed reasons, making detailed findings of fact about the events upon which the asylum claim of the appellant's mother was based. He gave

detailed reasons for finding that she was at real risk of persecution in the light of the background material then.

50. The Judge therefore had the benefit of a detailed assessment by the Adjudicator who received oral and written evidence at a time much closer to the occurrence of the events upon which the appeal of the appellant's mother was allowed.

51. The Judge also had the benefit of a witness statement from the appellant's mother submitted in the appellant's appeal. At paras 3-7 of her witness statement, she explained, albeit fairly briefly, the circumstances that led to her arrival in the UK.

52. The Judge also had the benefit of an expert report, i.e. Ms Ticky Monekosso.

53. There was no explanation before the Judge nor before us as to what evidence the appellant's mother and/or older sister would have given if they had attended the hearing that went to the facts relied upon and/or the objective situation in the Republic of Congo and that was not already contained in the material that was before the Judge or that (insofar as it concerned the situation in the Republic of Congo) could not have been dealt with by Counsel on his behalf.

54. Of course, we do not say that the appellant is obliged to advance before us all of the evidence that he seeks to rely upon in order to make good his ground that the hearing that took place before the Judge was unfair. That would be unrealistic. Nevertheless, he is not entitled to be completely silent about it. He must at least descend into some detail, sufficient to enable the Upper Tribunal to conclude that he has been denied unfairly the opportunity to adduce evidence that is relevant or material to his appeal.

55. For all of the above reasons, the question whether the appellant's mother and sister had a good reason for their failure to attend the hearing before the Judge was not material to the issue before us as to whether the hearing before the Judge was unfair. We therefore refused to adjourn the hearing before us part-heard to enable Mr Neale to obtain witness statements from the appellant's mother and sister to explain why they did not attend the hearing before the Judge.

56. For the same reasons, we are satisfied that the hearing of the appellant's appeal before the Judge was not unfair. We therefore reject ground 4.

57. It follows that the Judge was entitled to decide the appeal on such evidence as was before him.

Ground 2

58. Ground 2 challenges the Judge's finding that the appellant had not rebutted the presumption in s.72 of the 2002 Act. The Judge summarised the submissions on this issue at paras 28-38 and he gave his reasons for his finding at paras 39-46. These read as follows:

> The First Issue: Section 72 NIAA 2002
>
> 28. I have noted A's submission to the effect that the presumption under S.72 that he had committed a particularly serious crime and represents a danger to the community is rebutted.

Mrs Williams submitted that A's convictions should be regarded as very serious crimes indeed. She noted his conviction on 4 December 2012 for the possession of an imitation firearm with intent, for which he was given 12 months' youth custody, which was followed by a warning from the Secretary of State that he would be at risk of deportation in the event of a further offence.

As it was, a further offence was committed in August 2013 which again involved the possession of an imitation firearm for the purposes of robbery. There was an escalation in the seriousness of A's offending and he had no regard for his family, the victim, or the law of the UK.

29. Mrs Williams drew my attention to the Judge's sentencing remarks. Evidently, A's family had no control or influence over him and there is no reason to suppose that they would be able to control him now if he were to remain here.

30. While in custody, A has been the subject of two adjudications as a result of which his time in custody was extended by 16 days.

31. I was referred to the *'Resolve: post-programme report'* dated 14 October 2014 which is described as:

> *"… a moderate intensity cognitive-behavioural intervention that aims to reduce violence in medium- to high-risk adult male offenders."*

32. The *'Conclusion*' at page 36 says that A's

> *"… violence is considered and thought through beforehand and results from deeply entrenched beliefs. It would be important for [A] to challenge these beliefs in order to develop his consequential thinking."*

33. Page 37 refers to the OASys report that was not available to me but which referred to

> *"… some pro-criminal attitudes evident by the nature of his offence, as criminal activity was used through the use of violence and aggression in order to acquire money"*.

34. The Conclusion at page 38 addressed the importance for A to challenge beliefs which affect his involvement with authority.

35. The Summary on page 42 shows

> *"… that one risk factor to be identified for himself is money as he 'might be blinded and do whatever it takes to get it' and 'not think of consequences'. Money is important to [A] as he is keen to provide for his family."*

36. Mrs Williams concluded A's past behaviour prompts the likelihood of further offences and A must be regarded as a danger to the community.

37. In reply, Counsel submitted that when assessing the seriousness of A's crimes, account should be taken of all the circumstances including the guilty plea; his age; his evidence that only shortly beforehand had he learned of the death of his father in 1997; and *"that there was a possible financial motive for the offence (as opposed to it being just a violent offence)"*.

38. Counsel submitted that there is a low risk of re-offending as A has a good understanding of his area of risk, has completed a relapse prevention plan, has gained qualifications whilst in custody, and desires to obtain a job and support his family, in addition to which he has completed the Resolve programme. Moreover, the Respondent has failed to note the efforts which A has made to rehabilitate himself.

My Findings: Section 72

39. I remind myself that S.72(2) provides that a person shall be presumed to have been convicted of a *"particularly serious crime"* and to constitute a danger to the community of the United Kingdom if sentenced to a period of imprisonment of at least two years. The starting point therefore is the threshold of two years: A was sentenced to more than double that period, that is to say 4 years 4 months and his offences were described by the Judge as *"very serious indeed"*.

40. The court took full account of A's youth and his guilty pleas, and reduced the sentence accordingly from 8 years to 4 years and 4 months. I reject the submission that the offences to which A pleaded guilty were anything other than *"serious"* and find that the *"financial motive"* for them aggravates rather than mitigates their gravity.

41. As for future offending, the evidence before me suggests that a very real risk remains. While serving his sentence, A was reprimanded on two occasions for his behaviour and following adjudications, his period in custody was extended for 16 days as a result.

42. The Resolve report, page 33 *et seq* of the Appellant's bundle, was written as A was regarded as *"medium- to high-risk"*; his use of violence was found to be *"considered and thought through beforehand"* rather than impulsive; the reference to the OASys report on page 37 refers to *"pro-criminal attitudes"*; the conclusion at page 38 is that A's beliefs are *"so deeply entrenched that they will require significant effort to change"*; it is concluded at page 39 that he associates with *"gang lifestyle"*.

43. On the positive side, it was concluded at page 44 that A has a very good understanding of his area of risk and the negative influence that others have upon him.

44. I conclude however that, taking into account the proximity of A's convictions in 2013 for identical offences involving the use of imitation firearms, his failure to learn from previous sentences, his failure to heed the warning of deportation action if he were to commit further offences, and his categorisation as a medium to high-risk offender, there remains a very real risk of further offending.

45. I have taken into account that A has *"a very good understanding of his area of risk"* but I am not satisfied that he has taken action to reduce the risk or to change his attitude for the better. The Resolve report speaks of his propensity to premeditated violence, pro-criminal attitudes and strongly held negative *"beliefs"* and the tendency to be blinded by money.

46. Taking all these factors into account including the "*Certificates of achievement*" at pages 54-70 of his bundle, I conclude that he has not rebutted the presumption that he has committed particularly serious crimes and represents a danger to the community.

59. As we have said at para 28 above, Mr Neale did not pursue the argument in the grounds that, in relation to the risk of re-offending, the Judge incorrectly categorised the appellant as a "medium to high-risk offender". He accepted that there was evidence before the Judge that the appellant was a medium-risk offender.

60. In relation to the remainder of ground 2, it is said, in essence, that the Judge failed to take into account the following evidence that was on the positive side and which significantly undermined the Judge's conclusion; that, alternatively, the same positive evidence shows that the Judge misstated the evidence when he said, at para 45, that that "*I am not satisfied that he has taken action to reduce the risk or to change his attitude for the better".* The positive evidence that the Judge either overlooked, failed to engage with or misstated is the following:

a) The RESOLVE report which states, at page 45 of the appellant's bundle, that he is *"very keen to change his behaviour and work towards a pro-social life. This is evident in his behaviour in sessions, his engagement in the programme and his completion of the workbook".* In other words, the appellant had taken action to reduce his risk.

b) The document at page 51 of the appellant's bundle which states that the appellant had been promoted from a "learner" to "mentor" within the prison.

c) The sentence plan at page 30 which demonstrates that the appellant had made an application so as to improve his skills and has stated that he wishes to undertake a plumbing course.

d) The appellant's alternative plan, of being a film producer/work in the creative industry, which is corroborated by his qualification in "*Creative Media*".

e) The positive Incentives and Earned Privileges award (at page 48 of the bundle) in which his tutor described him as "*a role model student within the education department*" who "*sets a good example at all times*" and "*goes the extra mile to complete personal work to ensure he achieves his goals and targets*". The same tutor had described him (at page 50 of the bundle) as "*the most hard working student I have come across while delivering Employability course*" who *"always work [sic] to a perfect standard and takes real pride in his work*", being "a *positive role model for other students to follow".* Subsequently, the appellant was promoted from a Learner to a Mentor and a tutor said that "*he adds a certain maturity to the class*" and that he "*is a calming influence to others*" who "*always does what is asked of him*".

f) The conclusion in the RESOLVE report (at page 45) that "*the appellant is very keen to change his behaviour and work towards a pro-social life. This is evident in his behaviour in sessions, his engagement in the programme and his completion of his workbook*."

61. Mr Neale accepted that the Judge was not obliged to refer to every piece of the evidence and that the Judge did refer to some of the positive evidence, at para 43 of his decision. Nevertheless, he submitted that the Judge was obliged to engage with the evidence set out above because it significantly undermined his conclusions.

62. We do not accept Mr Neale's submissions. The Judge specifically referred to the RESOLVE report and specifically referred to the conclusion, at para 43 of his decision. The fact that he failed to refer *in terms* to the remainder of the evidence relied upon does not mean that he overlooked it. Where a relevant point is not expressly mentioned by the tribunal, the court should be slow to infer that it has not been taken into account: MA (Somalia) [2010] UKSC 49 at para 49.

63. The Judge saw and heard the appellant give oral evidence. Evidence that seems significant to an appellant and his or her representatives may not be considered significant by a judge in the context of all of the evidence that was before him or her.

64. In the instant case, although we have not had the benefit of hearing and seeing the appellant give oral evidence, the evidence relied upon on the appellant's behalf simply cannot be said to be significant when seen against the fact that, as the Judge noted in terms (paras 41 and 42 of his decision), the appellant was reprimanded on two occasions for his behaviour and had his period in custody extended by 16 days

as a result following adjudications; the RESOLVE report stated that the appellant's use of violence was considered to be "*thought through beforehand*" rather than impulsive; the OASYs report referred to the appellant's "*pro-criminal attitudes*"; the conclusion at page 38 of the RESOLVE report states that the appellant's beliefs were "*so deeply entrenched that they will require significant effort to change*"; and that he associates with "*gang lifestyle*".

65. It was the Judge's task to weigh the evidence before him, decide what weight was to be given to the various aspects of the evidence and reach a conclusion. There was no need for him to refer specifically to every piece of the evidence.

66. For all of these reasons, we do not accept that the Judge overlooked the positive evidence relied upon on the appellant's behalf. In our judgment, the failure to refer in terms to any such evidence is consistent with the judge not placing much weight upon it.

67. The contention that the Judge misstated the evidence is advanced simply as an alternative to the submission that he overlooked the evidence. In effect, the argument is the same. We do not need to deal with it separately.

68. Even if the Judge overlooked the evidence relied upon on the appellant's behalf (which we do not accept), the evidence is not material to the Judge's finding on the s.72 certificate on any legitimate view, given the evidence relied upon by the Judge paras 41 and 42 of his decision and that the appellant committed two serious offences that led to the deportation action against him notwithstanding that he had previously been given a warning.

69. We therefore reject ground 2. The judge did not materially err in law in reaching his finding that the appellant had not rebutted the presumption in s.72.

Ground 1

70. Ground 1 challenges the judge's finding that the cessation clause in Article 1C(5) of the Refugee Convention and para 339A(v) of the Rules applies.

71. The judge gave his reasons for his finding at paras 47-64 which read:

> The 2nd Issue: Would deportation breach the Refugee Convention and Articles 2 & 3?
>
> 47. It is common ground that following an appeal, A was granted refugee status in 2002 as a dependant of his mother. As appears from the Determination (A's bundle, pages 19-24), the Immigration Judge hearing A's mother's appeal in 2002 found that she was the niece of the deposed president Lissouba of the UPADS party and that she would face persecution upon return to Congo.
>
> The question arises therefore whether the Respondent can now discharge the burden of showing that over the last fourteen years, there has been significant and non-temporary change in the country situation in Congo such that a fear of persecution can no longer be regarded as well-founded.
>
> 48. I have noted already the country background, namely that President Nguesso of the PCT party ruled the country from 1979 to 1992 and from 1997 to date. President Lissouba of UPADS was in power from 1992 to 1997 when he was overthrown in a civil war.
>
> 49. In her letter of 9 February 2015 the Respondent referred to Country of Origin Information to the effect that in 2001 Lissouba was sentenced in absentia to 30 years' imprisonment for economic crimes and, although pardoned in 2007, has not returned

to the country. The UPADS party however won 11 seats there in the 2007 parliamentary election and 7 seats in 2013, and thus, although Mr Lissouba is it seems no longer president of the country, his own party is active there.

50. Mrs Williams referred me to the Country Guidance given by the Upper Tribunal in *LM (risks on return), Republic of Congo CG* [2008] UKAIT 00064, the head note of which is as follows:

"There have been improvements in the human rights position in the Republic of Congo since the determination of the Tribunal in BB (MCDDI – Known Political Opponent) Congo Brazzaville CG [2004] UKIAT 00223 was promulgated. The conclusion of the Tribunal in BB that past or present membership of an opposition party including the MCDDI would not lead without more to a real risk of persecution on return to Brazzaville remains valid. There continues to be a danger for some political opponents of the current regime. The test of whether there is a real risk continues to depend upon the individual's background and profile including in particular the extent of his political involvement and whether he has or is likely to come to the attention of the authorities."

51. Mrs Williams submitted that A has no political beliefs, let alone a *"political profile"* in Congo, but is merely a relative by marriage of a former president. He cannot therefore be regarded as a *"political opponent"* of the current regime and thus is not at risk on return.

52. Counsel submitted that A's family connection to Mr Lissouba is highly relevant. Failed asylum-seekers are questioned upon return and would be under suspicion. A may be regarded as a spy, especially as there are no relatives of the former president remaining in the country.

My Findings on the 2nd Issue

53. As the Upper Tribunal observed in *LM*, the test of whether there is a real risk depends upon the individual background and profile including in particular the extent of the appellant's political involvement.

54. A's background is that he left Congo in 1997 when he was just 2 or 3 years old; he spent over four years in Gabon before arriving in the UK in 2002. Since then he has attended school and college and latterly has engaged in a life of crime. He does not claim to have any interest in politics, either in Congo or the UK, and does not belong to any political party. At paragraph 19 of his statement he said that he has not *"talked about the happenings in the Congo at any great length"* and I find that he is wholly detached from Congo politics.

55. I find that the only matter which may give A a 'profile' in Congo is the family connection to former president Lissouba. Mr Lissouba is not a blood relative but is or was married to A's great aunt Albertine. A does not share the same surname as the former president, and the family connection is by marriage only. Moreover, nearly twenty years have passed since President Lissouba was deposed and, although sentenced in absentia, has since been pardoned and his party has participated in national elections in 2007 and 2013. I find that it is less than realistically likely that A would be identified on return as having a family connection to Lissouba (the connection being by marriage only and two generations apart) but, even if he was, he has no political profile whatsoever and, following *LM*, I have to conclude that he would not be at real risk upon return.

56. I must however consider whether he would be at risk in Congo as a failed asylum-seeker, or for any other reason.

57. A relies upon the expert report of Ms Monekosso dated 7 March 2016 prepared not for A but rather his brother Jaffrey, who is also the subject of a Deportation Order to Congo and whose appeal, I am told, is to be heard here on 21 April 2016.

58. I note the expert's opinion that the human rights position in Congo has improved substantially but that President Nguesso heads a dictatorial regime and that individuals with *"high-level opposition connections"* are at high risk. There is a culture of impunity for *"abusers"*.

59. At page 12 of her report the expert refers to *"general instability and insecurity risks to most people of Congo"* but I am bound to note that that is an observation as to the general state of the country and does not in itself amount to persecution.

60. The expert suggests however that Jaffrey (and by extension A) is a *"vulnerable individual"* and liable to persecution *"as punishment or vengeance for their family member's past activities or connection or as a form of intimidation"*.

The expert gives no reason for reaching that conclusion. She does not say how Jaffrey's link with his great-uncle might be identified and, if it is, why a young man with no political profile whatsoever would be of interest to the authorities, especially when Mr Lissouba's party has an active role in Congo politics.

61. Certainly, the political regime in Congo is far from ideal but I have found that A has no political profile save for the family tie to his great-uncle, deposed twenty years ago.

62. The expert says that returning asylum-seekers are detained and interviewed but, as the Upper Tribunal observed at paragraph 109 of ***LM***, it would be surprising if they were not. The appellant in ***LM*** however had been the secretary of the MCDDI party opposed to the regime in Congo before 2002 and, since her exile from that country, had worked for the president of an opposition party abroad. Plainly, LM had a significant political profile and consequently her appeal was allowed by the Upper Tribunal. By contrast, I have found that A has no active political profile and, although he is likely to be interviewed on return, it is less than realistically likely that his family connection to a historical political figure, namely Mr Lissouba, will result in treatment likely to engage the Refugee Convention or Articles 2 and 3.

63. It is suggested on A's behalf that sharing his father's surname would put him at risk. I reject that contention, which is not supported by evidence and is wholly speculative. I infer that A's father was a member of UPADS and as that party has now returned to legitimate political activity in Congo, A's link to his father, who died twenty years ago, does not realistically put him at risk.

64. In conclusion on this issue, I am satisfied that there has been a significant and non-temporary change in the country situation in Congo. I accept that the political structure in Congo falls short of western standards and I accept that there is general instability and lack of security, but not such as to represent a real risk of persecution to A.

72. There are eight strands to ground 1, summarised at para 27 (a) – (h) above, each of which we will refer to as a “ground” by way of shorthand although not individually a “ground” as such.

73. We will deal first with ground 1 a), i.e. the submission that the Judge erred by failing to apply the burden of proof correctly. It is contended that the burden of proof was upon the respondent to show that the circumstances in connection with which the appellant was granted refugee status have ceased to exist so that he can no longer continue to refuse to avail himself of the protection of the Republic of Congo.

74. We reject this submission. We agree with Mr Kotas that, given the Judge's finding that the presumption in s.72 had not been rebutted, the Judge was confined to considering the Article 3 ECHR claim. Mr Kotas did not expand upon his proposition. We are, however, obliged to give reasons, which are as follows:

i) Given our conclusion that the Judge did not materially err in law in reaching his finding on the s.72 issue, it follows that the applicant's refoulement to the Republic of Congo will not be in breach of the obligations of the United Kingdom under the Refugee Convention. This is because Article 33(2) of the Refugee Convention provides that the benefit of the non-refoulement provision may not be claimed by, inter alia, someone who having been convicted by final judgment of a particularly serious crime constitutes a danger to the community.

ii) There was therefore no need for the Judge to consider the cessation clause in Article 1C of the Refugee Convention. Whether or not the cessation clause in the Refugee Convention applied and whether or not the appellant was still a refugee, he could not avail himself of the non-refoulement provision in Article 33(1) of the Refugee Convention.

iii) There was no need for the judge to consider the cessation clause in para 339A(v) of the Rules either. This is because revocation or refusal to renew an individual's *"grant of asylum"* under para 339A(i)-(vi) only applies to asylum applications made on or after 21 October 2004 and can only relate to refugee status granted under Council Directive 2004/83/EC (the "Qualification Directive") as distinct from refugee status under the Refugee Convention which exists independently and does not require recognition by a signatory State (paras 24-37 of Dang (Refugee – query revocation – article 3) [2013] UKUT 00043 (IAC)). The appellant was a dependant in his mother's asylum claim. Her claim was made before 21 October 2004. Accordingly, the appellant was a refugee under the Refugee Convention. He was not granted refugee status under the Qualification Directive.

iv) The grounds of appeal to the FtT did not raise humanitarian protection and the Judge therefore did not deal with humanitarian protection. In any event, given the finding that the appellant had not rebutted the presumption in s.72 that he constitutes a danger to the community, he is excluded from humanitarian protection pursuant to para 339D(iii) of the Rules because there are "*serious reasons for considering that he constitutes a danger to the community…".*

iv) Thus, only the ECHR fell for consideration by the Judge. Articles 2 and 3 of the ECHR were raised on the appellant's behalf. It is well-established that a Tribunal or Court considering the matter looks at the Article 3 risk prospectively at the date of the proceedings and not by reference to some historical position, although the historical position may be relevant in deciding the future risk: para 41 of RY (Sri Lanka) v SSHD [2016] EWCA Civ 81 agreeing with the Upper Tribunal's consideration of this issue in Dang. At paras 40-43 of RY (Sri Lanka), the Court of Appeal rejected the submission advanced on the appellant's behalf that the consequence of the respondent not revoking refugee status is that there is a presumption that the refugee's removal would be in breach of Article 3. The same principles must apply to Article 2.

v) We have said above why it was not necessary for the Judge to have considered the cessation issue under Article 1C(5) or para 339A(v) of the Rules. It is plain that, at paras 47-64 of his decision, the Judge considered Articles 2 and 3 *"through the lens"* of Article 1C(5) and para 339A(v) of the Rules. By doing so, he effectively applied a presumption that removal would be in breach of Articles 2 and 3, contrary to RY (Sri Lanka). He still concluded that there was no real risk of a breach of Articles 2 and 3. We explain below why we have concluded that he did not materially err in law in reaching his finding that there was no real risk of a

breach of Articles 2 and 3. It follows that, although the Judge did err by effectively applying a presumption of risk contrary to RY (Sri Lanka) and Dang, the error was not material. It does not justify setting aside his decision.

75. We turn to the remainder of ground 1.

76. In relation to ground 1 (b), it is contended that the Judge failed to consider properly or at all the risk on return as a result of the appellant's family connection with Mr. Lissouba; alternatively, he failed to give sufficient reasons for departing from the finding of the Adjudicator in the appeal of the appellant's mother, where she was found to be are real risk of persecution because she was *"a close relative of the former President".* Mr Neale submitted that the Adjudicator had plainly thought that the appellant's mother, and therefore it is said, by extension, the appellant, was sufficiently closely related to be identified on return as having a family connection with Mr Lissouba. In this regard, Mr Neale drew attention to:

    i) The Judge's finding at para 55, that, as the appellant's relationship with Mr Lissouba was "*by marriage only and two generations apart",* there was no real risk of him being identified on return.

    ii) The Judge's finding at para 61 (that the appellant *"has no political profile save for the family tie to his great-uncle")* and at para 55 (that "*I find that it is less than realistically likely that [the appellant] would be identified on return as having a family connection to Lissouba … but, even if he was, he has no political profile whatsoever")* which, he submitted, conflated two separate risk factors, viz, (a) having a political profile as a result of political activity; and (b) political profile arising from a family connection.

77. In the particular circumstances of this case, if there is a real risk of the appellant's family connection with Mr Lissouba giving rise to Article 3 ill-treatment, this may be either because of the family connection *per se* or because the appellant is perceived to have an adverse political opinion on account of his family connection.

78. Accordingly, in our view, ground 1 (b) is linked to ground 1 (c), that the Judge failed to consider whether the appellant may be at risk on account of his perceived political opinion due to his family connection with Mr Lissouba. We will therefore deal with ground 1 (b) and (c) together.

79. Mr Neale submitted that the Judge incorrectly considered that the appellant would *only* be at real risk of Article 3 ill-treatment if he had an actual political profile of adverse interest to the authorities of the Republic of Congo. Mr Neale submitted that risk categories were not limited to actual political involvement, as is clear from para 53 of LM where Mr. Paul Melly (one of the experts before the Tribunal in LM) said that: *"Individuals could be still seriously at risk for particular reasons. For example, there might be a family dispute dating back many years, or the risk might arise because of current political activity and it was in this latter class that [the appellant in LM] fell".*

80. Mr Kotas submitted that perceived political opinion is not one of the risk categories according to the guidance in LM. In our judgement, this submission is misconceived. It is axiomatic that a person can be at risk either because of actual political opinion or perceived political opinion. Accordingly, it was not necessary for the Upper Tribunal to make that clear in LM.

81. However, we reject Mr Neale's submissions on grounds 1 (b) and (c). We do not accept that the Judge conflated two separate risk factors, as contended, or that he failed to consider whether the appellant would be at real risk of being perceived to have an adverse political opinion on account of his family connection, for the following reasons:

82. It is plain that the Judge was fully aware of the basis of the asylum claim of the appellant's mother. She was someone who had not been politically active and yet she was recognised as a refugee in February 2003. This was because the Adjudicator considered that she would be at real risk of persecution because she would be perceived to be adverse to the authorities in the Republic of Congo or because of her membership of a particular social group, or both, due to her family connection to Mr Lissouba.

83. In his decision, the Judge plainly considered whether the circumstances that gave rise to the appellant's mother having a well-founded fear of persecution at the date of the hearing before the Adjudicator in 2002 had ceased to exist such that the appellant would not be at real risk. In doing so, he was plainly aware both of the fact that the appellant's mother did not have an actual political profile and of the risk posed by her family connection.

84. It is therefore implicit, on any legitimate view, that the Judge was aware that the lack of an actual political profile did not mean that the appellant would not be at real risk of such ill-treatment. He did not need to say so in terms. Likewise, it is implicit that he was aware that the appellant's family connection to Mr Lissouba was relied upon in the appellant's Article 3 claim. It was the entire basis of the appellant's case before him that this relationship would give rise to a real risk of Article 3 ill-treatment either on account of the relationship *per se* or because it gives rise to a perceived political opinion. It is simply inconceivable that the Judge did not have this in mind when assessing the future risk, especially given that he is a very experienced judge who is undoubtedly well aware that it is possible for an individual to be at real risk of treatment in breach of Article 3 on account of perceived political opinion as opposed to actual political opinion and on account of family connection.

85. Furthermore, the Judge referred to the guidance in LM, which concerned the assessment of the risk on account of an individual's "*background and profile*", which he specifically mentioned at para 53 of his decision. The fact that the sentence in question at para 53 continued *"… in particular the extent of the appellant's political involvement"* does not mean he considered that a real risk of Article 3 ill-treatment only arises from actual political activities.

86. When paras 53-64 of the Judge's decision are read as a whole, it is evident that the Judge's mind was directed to the question whether the appellant was at real risk of Article 3 ill-treatment either due to his relationship with Mr Lissouba *per se* or because of a perceived political opinion on account of the relationship notwithstanding that he himself was "*wholly detached from Congo politics*" (para 54 of the Judge's decision).

87. On any proper and sensible reading of the Judge's decision, we are satisfied that, in drawing attention to the fact that the appellant was not politically active, the Judge was merely taking into account an aspect of the evidence before him to reach a conclusion as to the future risk, just as he took into account the relationship between the appellant and Mr Lissouba as an aspect of the evidence before him.

88. There is no question of the Judge departing from the finding of the Adjudicator that the appellant's mother was sufficiently closely related to Mr Lissouba as to be at real risk of persecution in 2002. As we have explained above, there is no question of any presumption being applied. The Judge's duty was to assess the evidence before him, including the evidence as to the past and the fact that the appellant had been granted refugee status in February 2002, and decide the future risk of treatment in breach of Article 3. That is precisely what he did.

89. We therefore reject grounds 1 (b) and (c).

90. Grounds 1 (d)-(h) can be dealt with together.

91. It is now time to set out in more detail the reasons why it is said the Judge erred in his assessment of the report of Ms Monekosso. Mr Neale submitted that the Judge materially erred in law in this regard for the following reasons:

    i) He overlooked Ms Monekosso's opinion that the appellant would be at real risk of Article 3 ill-treatment by virtue of the fact that he is a convicted criminal.

    ii) He accepted that the appellant would be likely to be interviewed on arrival in the Republic of Congo but overlooked Ms Monekosso's opinion (at page 189) that returned asylum seekers are systematically detained for investigative interview by the authorities of the Republic of Congo on arrival and often transferred to the Direction de la Sécurité du Territoire (DST), the country's principal security and intelligence organisation. In the opinion of Ms Monekosso, detention for interrogation would involve human rights abuses.

    iii) At para 55, the Judge said *"I find that the only matter which may give [the appellant] a 'profile' in Congo is the family connection to former President Lissouba*". The Judge failed to make findings as to whether the appellant would come to the adverse attention of the authorities for reasons other than his family connection, namely, the length of time he has spent away from the Republic of Congo; the fact that he has lived in the United Kingdom as a refugee since a young age; the fact that none of his family has returned to the Republic of Congo, despite his uncle having received a pardon and that there is background material to the effect that those who return from exile may be subject to "*harsh treatment*".

    iv) The Judge failed to consider Ms Monekosso's opinion (at para 202 of her report) that the appellant (for which read: " appellant's brother") is likely to be regarded as a spy.

    v) The fact that "the appellant" [Ms Monekosso was referring to the appellant's brother] has spent time in the exiled home of opposition leaders such as Paulin Makaya and Philippe Bikinkita as well as Mr Lissouba would be a source of suspicion, in the light of the security crackdown surrounding the Presidential elections.

    vi) The Judge failed to consider the evidence at pages 181-183 of Ms Monekosso's report where she identified cases of arrests, detentions and harassment of opposition politicians and activists.

92. Both the grounds and the skeleton argument pay scant regard to the fact that Ms Monekosso's report dated 7 March 2016 was prepared for the appeal of the appellant's younger brother, MJ, and not the appellant, against a decision to make a

deportation order against him. For example, at para 10 of the skeleton argument, it is said that it was Ms Monekosso's opinion at page 188-189 that "*the appellant would be treated with suspicion on return: namely, his status as a young man with criminal convictions and a background of refugee status, returning from the United Kingdom on a laissex-passer",* whereas Ms Monekosso was of course referring to the appellant's brother, not the appellant.

93. In deciding whether the Judge had materially erred in law in his assessment of Ms Monekosso's report, we began by reminding ourselves of the country guidance given in LM, the head note of which reads.

> There have been improvements in the human rights position in the Republic of Congo since the determination of the Tribunal in BB (MCDDI – Known Political Opponent) Congo Brazzaville CG [2004] UKIAT 00223 was promulgated. The conclusion of the Tribunal in BB that past or present membership of an opposition party including the MCDDI would not lead without more to a real risk of persecution on return to Brazzaville remains valid. There continues to be a danger for some political opponents of the current regime. The test of whether there is a real risk continues to depend upon the individual's background and profile including in particular the extent of his political involvement and whether he has or is likely to come to the attention of the authorities.

94. It is important to bear in mind that risk as a failed asylum seeker was argued before the Tribunal in LM (see, for example, para 52 of the decision). We also reminded ourselves of para 80 onwards of LM insofar as this concerned matters of general application as opposed to the appeal of LM. The Tribunal said, inter alia, that the government of the Republic of Congo allowed opposition parties to operate so long as they did not pose a serious challenge to its hold on power (para 82). At para 83, the Tribunal said:

> In dealing with his overall assessment of the current situation in his report Mr Melly conceded that it was clear that human rights conditions in Congo had improved to some extent. The government had substantially moved away from the extreme levels of repression seen during the earlier years after Mr Sassou-Nguesso's return to power in 1997. There was no doubt that the opposition parties enjoyed wider freedom of activity than was the case until the end of 2002 although Congo was still far from being a freely functioning democracy. There was still a serious risk to many individuals because of their own past actions or those of family members. Those suspected of connections to the armed opposition to the government were at particular risk. There remained a serious risk for individuals who had acted in ways that could spark the antagonism or suspicion of the authorities or of members of the pro-government security forces and their families were also at some risk. The individuals most at risk were not senior politicians or public figures but low profile individuals with a history of committed opposition activity or suspected past links to armed rebel groups as they were not well-known and their safety could not be monitored.

95. At para 109 of LM, the Tribunal said that it accepted Mr Melly's evidence that returned asylum seekers are questioned and that it would be surprising if they were not. In relation to the appellant LM, the Tribunal accepted the evidence of the expert, Mr Paul Melly, that she would be questioned about what she has been doing since she had last been in the country. The Tribunal did not say that all returnees are transferred to the DST for interrogation or that this is a reasonable likelihood for any involuntary returnee.

96. Whilst Ms Monekosso did provide a report that was considered by the Tribunal in LM, this only concerned the authenticity of an arrest warrant (para 90), an issue on which the Tribunal found against the appellant LM (para 93).

97. It is therefore important to note that the Tribunal in LM did not say there is a real risk of Article 3 ill-treatment merely because a returnee is a failed asylum seeker or merely because he/she is returning from the United Kingdom – home to opposition leaders such as Paulin Makaya, Philippe Bikinkita and Mr Lissouba – or merely because he/she is returning after lengthy residence in the country in which Paulin Makaya, Philippe Bikinkita and Mr Lissouba have been living.

98. There was no evidence before the Judge that the UNHCR has recommended that returns of any failed asylum seekers should be suspended. The Judge had a letter dated 14 April 2015 from the UNHCR responding to a letter from the respondent dated 20 March 2015 by which the respondent advised the UNHCR that she intended to cease the appellant's refugee status. Whilst the UNHCR urged the respondent to consider the evidence showing that the security situation in the Republic of Congo remains volatile and reassess whether it demonstrates a fundamental and durable change in conditions in the Republic of Congo before coming to a final decision on the appropriateness of ceasing the appellant's refugee status, the UNHCR did not draw attention to the fact that he had been granted refugee status and had lived in the UK for some years as risk factors.

99. We turn now to Ms Monekosso's report which is relied upon to demonstrate that a real risk of such ill-treatment arises if one or more of these facts exist as being sufficient to give rise to a perception on the part of the authorities in the Republic of Congo that the individual is actively opposed to them.

100. Ms Monekosso's opinion that the appellant's brother would be regarded as a spy is expressed at page 202. The relevant sentence reads:

> "The fact that [the appellant's brother] and his family sought asylum in the UK will reinforce the authorities view of him as those citizens now assimilate to Paulin Makaya. Their suspicions about his views and his activities as a spy would be reinforced by the fact that he has spent time in the UK, which has been the exiled home of Paulin Makaya for example and he hosted country of both [Mr Lissouba] and to Philippe Bikinkita,…"

101. It is therefore clear that her opinion that there is a real risk of MJ as a returnee being suspected of being a spy is based on the fact of being returned from the UK. This in turn is because the UK is the home of Paulin Makaya and Philippe Bikinkita. She does not give any other reasons for her opinion that there is a real risk of MJ being suspected of being a spy, nor does she provide any source for this opinion.

102. At page 187 of the appellant's bundle, Ms Monekosso responds to the question: *"Failed asylum seeker: Given his length of absence and the fact he has been deemed not to need protection any longer, it is it likely [sic] that [MJ] would face additional scrutiny upon arrival to the Congo?"* The following quote (which begins at page 188) from her answer to this question represents an important part of the appellant's case on ground 1:

> … in an Embassy such as UK, a permanent country member of the UN Security Council, there are always intelligence service as part of the Embassy Staff. This staff will inform the country authorities even before [MJ] is returned to the Congo. It is certain that [MJ] will be collected at the airport and interrogated by the country [sic] intelligence office, if he were to be returned to the Congo.
>
> …
>
> Police officers are under orders to record all information on those who are returned and mainly those with background of failed asylum cases or former exiled citizens[13]. The aim of this heavy control on returnees is to immediately identify all key activists and opposition

> party's members. They have subsequently used this data to repress returnees and to paralyse any resistance effort [sic].
> …
> Therefore, checking on arrival at Brazzaville airport is used to identify trouble makers for the ruling regime. Upon arrival [MJ] [sic] not be able to present a normal valid passport and other documentation that gives the impression they have been absent purely for study, social or business purposes. It is not possible for an individual to pass through arrival procedures in Congo unnoticed or then to live unnoticed by the authorities. Immigration control procedures are rigorous and bureaucratic.
>
> … [MJ], as a convicted young man with a background of refugee status in the UK, on his arrival would be greeted with great suspicion. "Expelled, Never to return" in his one way laissez-passer with a U.K. immigration stamp or possible accompanied by police, a security agent hired for that and many other U.K. immigration's documents and Court sentence or UK judiciary paperwork. There is therefore a high risk for [MJ] being interviewed on arrival by the Congolese authorities.
>
> Local security forces, when reading his immigration file would simply conclude that the UK forces were not capable to discipline him. They would certainly take this opportunity to harass him and to show him what is done in the country to prevent him to think about any democratic process in the country or so called bad behaviours.
>
> My interview research with Congolese contacts indicates that returned asylum seekers are **systematically detained** for investigative interview by the Congo authorities on arrival. **They are often** transferred to the Direction de la Sécurité du Territoire (DST), Congo's principal security and intelligence organisation.
>
> An individual transferred to the custody of the DST could be held for a prolonged period without access to any form of fair legitimate aim process or event [sic] to legal advice. Once in DST custody, some individuals could disappear, permanently. The DST has a poor human rights record and is not subject to any form of effective judicial oversight and accountability.
> …
> There are many testimonies from returnees that the U.K. police who accompanied them have left them [sic] on the hands of the national police without [sic] secure them any protection and without [sic] border what would happen to them later.
> …
> I cannot safely disclose my sources for this information. But I can formally confirm that they are highly credible and experienced independent human rights observers with a detailed knowledge of the situation on the ground in Congo and with direct personal observation [sic] knowledge of the events dealing with the returnees and refugees abroad.

(our emphasis)

103. The only source given is at footnote 13 which relates to the first sentence of the second paragraph quoted above. This shows that Ms Monekosso has relied upon the return of 353 refugees in 1999, some 17 years ago. Although she goes on, in footnote 13, to mention what she terms "*single fact of returnees such as Jeam Marie Mokoko, Paulin Makaya? Colonel Ferdinand Mbahou or many other troubles in Congo Brazzaville*" the question-mark after the name of Paulin Makaya itself raises questions. In any event, it is difficult to see how Ms Monekosso can justify drawing generalised conclusions from the return of these high profile individuals to be able to say that "*police officers are under orders to record all information on those who are returned."*

104. Ms Monekosso gives no reasons for saying that MJ would be returned with "UK judiciary paperwork". She appears to be simply speculating.

105. Another section of Ms Monekosso's report that is relied upon begins at page 201 of the bundle. This reads:

> In my opinion [MJ] would not be able to relocate internally in the Congo to avoid persecution as he would be the target[20] of the ruling authorities. It should be noted that New laws in European countries to send back home in Africa those who are convicted put them at risk as many [sic] suspected them for sort of radicalisation [sic], Djihadism or able to commit terrorism. These countries are not well organised to control those who are convicted in the UK and security forces feel offense [sic] by such returnees. They authorities [sic] take it as being rubbish bins [sic] of their nationals that educated [sic] to behave badly in their host country. Therefore, anyone who can raise suspicion among security matters is a target for the authorities in a country such as Congo Brazzaville under security military tension.
>
> … it would be very difficult for [MJ] to be [sic] welcome home. He would simply be undesirable. For diplomatic reasons and International protocol, the Congolese authorities would not discuss such matter. However, in the corridor, such returnees would be under heavy pressure from the security forces for the fact that they have been convicted and deported back in the Congo.
>
> … I believe that if [MJ] were to be returned to Congo there is a serious risk that he will be detained for interrogation. If he is detained, he is almost certain to be subjected to severe human rights abuse, including physical assault and inhuman and degrading treatment.
>
> Even if [MJ] is not detained officially on his return to Congo, he is highly likely to suffer harassment detention or even assault on an extra-judicial basis, at the hands of government elements. The risk of extra-judicial killing cannot be completed excluded.
>
> I believe that he will be regarded by the Congo authorities in the current security crackdown for the incoming president elections, with good reasons, as a suspected person and a young man in his fighting age, who could be committed opponent of the present government and its army.
>
> The fact that [MJ] and his family sought asylum in the UK will reinforce the authorities view of him as those citizens who now assimilate to Paulin Makaya. Their suspicions about his views and his activities as a spy would be reinforced by the fact that he has spent time in the UK, which has been the exiled home of Paulin Makaya for example and the hosted country for both former president Lissouba and to Philippe Bikinkita, former founding commander of the Ninja militia and close relative of opposite leader Bernard Kolélas.
>
> The authorities will certainly suspect that [MJ] has had contacts with the exiled opposition leadership. [MJ] will be regarded as a possible source of information on the opposition both in Congo and the exiled opposition in Europe.
>
> There is no assurance that deported person such as [MJ], with a convicted sentence and deported by force in his country of origin would be treated correctly in the Congo as an innocent civilian. These factors place [MJ] at high risk of being detained for questioning, either on an official basis or on an extra-judicial basis.
>
> …
>
> As a convicted young from the UK, [MJ] is also at risk of suffering vengeance attack by elements in the security forces, on his arrival. Vengeance attacks and extra-judicial killings by hard-line security elements remain a feature of Congo.
>
> Even if [MJ] is not detained, he will be at serious risk of informal persecution…
>
> For these reasons, I believe that [MJ] is at high risk of being detained on arrival in Congo. I believe that he will be seen as a potential troublemaker and an adherent of a group that is seen as subservice and a challenge to the official power structure.

(our emphasis)

106. In this section of her report, the only "source" given is at footnote 20 which relates to the first sentence quoted above. Footnote 20 does not in fact give a source.

Astonishingly, it simply repeats the information contained in the paragraph in the main body of the report where the footnote appears. Footnote 20 reads:

> Anyone who can raise suspicion among security matters is a target for the authorities in a country such as Congo Brazzaville under security military tension. In addition, New laws in European countries to send back home in Africa those who are convicted put them at risk as many [sic] suspected them for sort of radicalisation [sic], Djihadism or able to commit terrorism. These countries are not well organised to control those who are convicted in the UK and security forces feel offense [sic] by such returnees. They authorities [sic] take it as being rubbish bins [sic] of their nationals that educated [sic] to behave badly in their host country.

107. The similarity between the contents of footnote 20 and the contents of the paragraph to which it relates is obvious. If footnote 20 was intended to provide a source for the information in the sentence to which it relates, it does not in fact provide a source.

108. Accordingly, it is clear that the entire case for the appellant rests on a report produced for his brother in circumstances where no sources are provided for the key passages relied upon, save in relation to footnote 13 which we have dealt with. Ms Monekosso gives no explanation about the origin of the information obtained or the steps taken to verify the information save that, in relation to her opinion that returned asylum seekers are "*systematically detained for investigative interview*" with the authorities on arrival and "*often transferred"* to the DST, she says she "*cannot safely disclose her sources*".

109. At page 167 of the bundle, Ms Monekosso says "*I am familiar with Congolese society and I have stayed in Congo Brazzaville for five years, where I studied journalism at the University of Brazzaville*". However, she does not say when she lived in Congo Brazzaville. In her report, she makes several references to having obtained information from interviewees but she does not explain when these interviews took place. This is not an insignificant point given that footnote 13 refers to events in 1999.

110. At page 174, Ms Monekosso says that MJ is vulnerable but does not explain why. At page 175, she says:

> "There are general instability and insecurity risks to most people in Congo. But these are not the reason [sic] of my conclusion about his safety. He is at risk for the specific reasons outlined above. For the reasons I have given in my report, it is my belief that if [MJ] is returned to the Republic of Congo, he is at high risk of being detained, on either an official or extra-judicial basis. If he is detained he will be at extremely serious risk of suffering human rights abuse. Even if he is not detained, he will be at serious risk of suffering extra-judicial harassment, persecution and assault by elements of the government security forces. …
>
> … The evidence of numerous individual cases mentioned in this report has shown that ordinary citizens are at high risk of suffering human rights abuse. I have seen detailed evidence of numerous cases of detention, torture and harassment suffered by army officers or solders on innocent citizens….
>
> Vulnerable individuals such as [MJ] who is a convicted young man in the UK would be persecuted either as punishment or vengeance for their family members past activities or connections or as a form of intimidation, to deter them from "causing trouble" in the future.

(our emphasis)

111. Ms Monekosso's opinion that "*ordinary citizens are at high risk of suffering human rights abuses*" is simply not supported by anything said in the earlier part of her report. The only evidence of individual cases she mentioned in her report appear later

in her report, where she mentions Paulin Makaya (for example, at pages 176 and 182), founding president of the Congolese Movement for Democracy and Integrated Development (MCDDI party), and Modeste Boukadia (page 181), President of the National Council of State of South Congo and Circle of Democrats and Republicans of Congo and various individuals mentioned at page 183 described as "*political prisoners*". Indeed, she specifically says (at page 173) that "*general levels of serious human rights abuse have reduced*" and "*there is a high risk to individuals seen as likely to have high-level opposition connections or seen as likely to assist the campaign of opposition movements in a practical manner*". Whilst the examples she gave in her report are consistent with the guidance in LM, that individuals who are opposition activists are at real risk, her view that ordinary civilians are at *"high risk"* goes well beyond the country guidance. Nowhere in her reports does she describe precisely what evidence she relies upon for her view that ordinary civilians are at high risk of human rights abuses.

112. We have also taken into account the following assessments made previously of the evidence of Ms Monekosso:

i) In MD (Women) Ivory Coast CG [2010] UKUT 215 (IAC), the Tribunal received written and oral evidence from Ms Monekosso as an expert witness. At paras 83-93, the Tribunal sets out Ms Monekosso's description of her background. The Tribunal then assessed her evidence. It plainly had serious difficulties with her evidence. We have set out at Appendix A to this decision paras 76 to 215 of MD, for convenience. It suffices for us to draw attention to the following difficulties by way of summary:

a) The Tribunal considered that it was clear from Ms Monekosso's oral evidence that, contrary to her first report which conveyed the impression that she had had face-to-face meetings with the President of the Ivory Coast, its Prime Minister, Foreign Minister and other senior government officials, it was clear from her cross-examination that the meetings that occurred were with a group of 200 journalists of which Ms Monekosso was one and that she had not personally spent any time with the President on her visit to the Ivory Coast in December 2007 (paras 96 and 97).

b) Ms Monekosso informed the Tribunal that the only evidence she had on the issue in the case came from a Miss Diabate. However, Ms Monekosso had not informed Miss Diabate of the purpose of the interview. Indeed, the Tribunal found that Ms Monekosso had misled Miss Diabate as to the purpose of the interview (para 177). Having obtained the information from Miss Diabate, Ms Monekosso did not appear to have attempted to verify it through any independent sources (para 213).

c) The Tribunal drew the conclusion from her oral evidence that Ms Monekosso was prepared to mislead an interviewee in the course of journalism on the basis that the means justified the ends (para 181).

d) It became apparent to the Tribunal that Ms Monekosso's direct knowledge of matters relating to the Ivory Coast was in fact limited (para 176).

e) In the judgment of the Tribunal, *"Ms Monekosso's approach was not only misleading and regrettable but also prejudiced the integrity of the information provided"* (para 185).

f) There was more than one instance of Ms Monekosso using a source material that in fact related to another country (para 192).

g) Ms Monekosso's errors went "*beyond the mere typographical*" (paragraph 204.

ii) The Tribunal in MD concluded that her evidence fell to be treated with caution (para 170), that *"[t]here is something of the campaigner in her, seeking to advance the cause of women in Africa for which she must be applauded but in our view this has led to the loss, in part, of a rigorously objective approach"* (para 208) and that "*Ms Monekosso's evidence should be approached with care"* (para 217*)*.

iii) MD went on appeal to the Court of Appeal in MD (Ivory Coast) v SSHD [2011] EWCA Civ 989. The Tribunal's assessment of the evidence of Ms Monekosso was not the subject of challenge.

iv) Ms Monekosso had previously given expert evidence to the Tribunal in SK (FGM, ethnic groups) Liberia CG [2007] UKAIT 0001. One issue before the Tribunal was whether a small sub-set of the Krahn tribe practised female genital mutilation (FGM) even though as a general matter the Krahn tribe may not practise it. On this issue, the Tribunal said that it did not consider that any significant weight could be placed upon the report of Ms Monekosso whose description of where Sinoe – the place – was located was accepted on behalf of the claimant in that case to be wrong. The Tribunal further said that the passage of Ms Monekosso's report in which she dealt with Sinoe generally lacked coherence (para 55).

113. We have concluded that the difficulties we have described with the report Ms Monekosso prepared for MJ and that was relied upon in the appeal before the Judge, when seen in the context of the problems with her expert evidence previously identified by the Tribunal in the country guidance case of MD and the fact that the UNHCR has not recommended that removals to the Republic of Congo be suspended, are so significant that, on any legitimate view of the evidence that was before the Judge, her report was wholly insufficient to demonstrate that there was a real risk that the appellant would be subjected to Article 3 ill-treatment merely because he may be seen as a failed asylum seeker or an expelled refugee or merely because he is returning from the United Kingdom where other leading figures opposition figures have been or are still in exile or merely because he would be returning after a lengthy residence in the UK or merely because he is a convicted criminal.

114. We turn to consider the evidence as to more recent events that was before the Judge (i.e. pages 71-163 of the bundle). A referendum to amend the constitution was held on 25 October 2015 which was boycotted by the main opposition coalition. It was the subject of major demonstrations. The amendment was nevertheless passed on 27 October and confirmed by the Constitutional Court on 6 November 2016. This amendment enabled President Ngeussou in November 2015 to run for a third term in the Presidential elections held in March 2016. There was unrest in the country with many demonstrations and a crackdown by the government on opposition activists, in the run-up to the referendum and the presidential elections, with arbitrary arrests and detentions of political activists. For example, the Press release dated 2 November 2015 (page 92) from the International Federation for Human Rights says that, in the period prior to the referendum, there was violent repression of peaceful demonstrations. The Amnesty International bulletin dated 1 February 2016 (pages

82-83) refers to clashes between the security forces and protesters which led to the death of at least 16 protesters and bystanders in Brazzaville and Pointe Noire alone. In its bulletin dated 31 March 2016 (page 71), Amnesty International states that the results of the Presidential election on 20 March 2016 were rejected by the opposition and that the Congolese authorities have conducted a series of arrests against leading opposition figures, including senior campaign officials of opposition candidates as well as other activists and protesters.

115. In our view, there is nothing in this background material that shows that there is a real risk of Article 3 ill-treatment for any returnee simply because he/she is returning as a refugee who is being expelled or as a failed asylum seeker or as a convicted criminal or on being returned after a lengthy absence or by reason of the fact that the individual is being returned from the UK.

116. In our judgment, the evidence at pages 71-163 of the appellant's bundle shows that it continues to be the case, as was decided in LM, that those at real risk are individuals who are actively opposed as well as those who are at real risk of being *perceived* to be actively opposed to the authorities in the Republic of Congo. It continues to be the case that the individual's background and profile – in our view, this includes the individual's past and any family connections – will require assessment to decide whether there is a real risk that the individual will be perceived to be in opposition to the authorities. As the Tribunal said in LM, the individuals most at risk are low profile individuals with a history of committed opposition activity.

117. In assessing the future risk of ill-treatment, the Judge was plainly aware that the appellant was a convicted criminal. He was plainly aware that the appellant had been granted refugee status. He took into account (at para 62) the appellant's relationship with Mr Lissouba, who he correctly described as a "*historical figure*" given that there was nothing in the background before the Judge to show that Mr Lissouba has participated, whether from the UK or by returning to the Republic of Congo, in any activities against the authorities in the Republic of Congo in the years that have elapsed since the appellant's mother was granted refugee status. The Judge correctly said (at para 55) that the relationship with Mr Lissouba was by marriage only – since dissolved, we observe – and two generations apart. He was plainly aware that the appellant would be returning after a lengthy absence from the UK. The Judge found that, although the appellant is likely to be questioned on return, it was less than realistically likely that his family connection to Mr Lissouba will result in treatment in breach of Articles 2 and 3. He considered whether the fact that the appellant shares the same surname as his father puts him at real risk. His conclusion was open to him on the evidence before him including the recent background and the report of Ms Monekosso.

118. It would have been preferable if the Judge had engaged with the more recent background before him and in greater detail with the report of Ms Monekosso; in particular, if he had engaged with her opinion that the appellant is at real risk as a returnee who is a convicted criminal. Nevertheless, having considered the more recent evidence and Ms Monekosso's report ourselves, we have concluded that the Judge did not err in law. Even if we are wrong about that, we are satisfied that any error was not material for the reasons we have given. There would be no reason for the appellant to lie about his background, including the fact that he was granted refugee status 13 years ago when he was a young boy, on being interviewed on arrival. The Judge did not materially err in law in finding that the appellant's

background is less than realistically likely to lead to a real risk of a breach of Articles 2 and 3.

119. As we have said above, the decision of Judge Murray in MJ's appeal was produced at the hearing before us. Mr Kotas objected to it being admitted in evidence.

120. Mr Neale submitted that the errors of law contended in grounds, in relation to the Judge's (i.e. Judge Troup's) assessment of Ms Monekosso's report, were material given that Judge Murray had accepted the expert opinion of Ms Monekosso.

121. Judge Murray said at para 44 of her decision that she accepted the expertise of Ms Monekosso relying upon the fact that she gave evidence in LM. She failed to note that Ms Monekosso's evidence to the Tribunal in LM appears to have been limited to the authenticity of the arrest warrant, an issue on which the Tribunal concluded against the claimant in that case. Her misapprehension about the role that Ms Monekosso's evidence played in LM may explain why she accepted the totality of Ms Monekosso report without subjecting it to any analysis, saying, at para 46 *"I find that the expert's report is sourced and well-reasoned".* However, even if we are wrong in saying that Judge Murray may have misapprehended the role that the evidence of Ms Monekosso played in LM, this makes no difference for the following reasons:

122. Where the outcome of an asylum claim depends on the credibility of the facts relied upon, different judges faced with substantially the same facts or evidence may on entirely rational grounds come to different conclusions: Otshudi v SSHD [2004] EWCA Civ 893. In MJ (Iran) v SSHD [2008] EWCA Civ 564, the Court of Appeal said, at paras 15 and 16, that it is "*undesirable but unfortunately not uncommon in the asylum system to find that siblings or spouses' appeals have been separately heard. …. In principle no factual res judicata or issue estoppel is created by one determination in relation to others."*

123. We are, of course, mindful of the fact that, unlike Otshudi, there is no dispute as to the facts upon which the appellant and MJ sought to resist their deportation under Article 3. The different outcomes of their appeals were due only to the different approaches of the judges to the same report from Ms Monekosso. The fact that Judge Murray accepted the evidence of Ms Monekosso cannot, without more, demonstrate that the Judge materially erred in law. Furthermore, in the circumstances of this case, given the difficulties with Ms Monekosso's report that we have explained and given the difficulties previously found by the Tribunal with the evidence of Ms Monekosso, we are satisfied that the fact that Judge Murray uncritically accepted the report of Ms Monekosso does not mean that the Judge materially erred in law in his assessment of her report or in reaching his conclusion that the appellant was not at real risk of Article 3 ill-treatment in the Republic of Congo. There was therefore no prejudice to the respondent by our admitting the decision of Judge Murray.

124. Ground 1 therefore fails.

125. We turn to ground 3.

Ground 3

126. Ground 3 challenges the Judge's decision on the appellant's Article 8 claim. The judge gave his reasons for finding that the decision is proportionate at paras 65-80 of his decision, which read:

The 3rd Issue: Article 8

65. Counsel helpfully set out at paragraph 33 of her skeleton argument that due to the fact that A's sentence is one of 4 years and 4 months' imprisonment, paragraph 398 of the Rules provides that deportation is conducive to the public good. Given that paragraphs 399 and 399A do not apply, it will only be in very compelling circumstances that his right to family/private life would outweigh the public interest in deportation.

66. It is A's case that his circumstances are very compelling: the Respondent says that they are not.

67. As for the Respondent's case, at paragraph 54 *et seq* of her letter of 13 November 2015, the Respondent observed that A has neither family life with children nor a partner.

68. A's mother claimed in her witness statement to suffer from HIV and needs the support of her son. Mrs Williams submitted that that claim is not corroborated, but in any event A has been in detention since 2013 and his mother had been able to cope without him.

69. The Republic of Congo is a Francophone country: in evidence, A had said that although he can understand French he is only able to speak a little of the language. Mrs Williams submitted that French was A's only language until he arrived in the UK in 2002 at the age of 7. French is his mother's primary language, a French interpreter had been requested for her and it is reasonable to conclude that A speaks to her in her own language.

70. Mrs Williams went on to submit that A has received an education in the UK; he has gained GCSEs and has gained the certificates of achievement, to be found at pages 54-70 of his bundle. It was submitted that he can benefit from the skills that he has learned here, upon his return to Congo.

71. The expert report at page 29 refers to the high unemployment rate in Congo and describes the *"poor quality of education and training"* there as *"major obstacles"*. Mrs Williams submitted that A by contrast has had a full education and will thus have an advantage on the labour market in Congo.

72. On A's behalf, Counsel submitted that A has resided in the UK since the age of 7, he has not visited Congo since he was 2 or 3 years old, he has no knowledge of the culture of that country, his conduct in prison has been *"excellent"*, A's mother and siblings all have refugee status in the UK and would be unable to visit him in Congo, and he has no friends or family in that country.

73. I was referred to *JZ (Zambia)* [2016] EWCA Civ 116 which concerned a Zambian youth who had committed an offence in the UK at the age of 17 and was sentenced to 4½ years, having arrived here when he was 9 never having returned to Zambia. The Court of Appeal found that the private life considerations at paragraph 399A are capable of constituting exceptional circumstances should the Tribunal consider them to be so.

74. I am required by section 117A of the Nationality, Immigration and Asylum Act 2002 to have regard to the considerations listed in sections 117B and C.

75. With regard to 117B, I accept that A speaks English to a good standard but I go on to find that he is not yet financially independent.

76. As for 117C(6), A is a foreign criminal who has been sentenced to a period of imprisonment of at least four years and in his case the public interest requires deportation unless there are very compelling circumstances over and above those described in Exceptions 1 and 2.

77. By section 117C(4), Exception 1 applies where:

    (i) C has been lawfully resident in the UK for most of his life,

    (ii) he is socially and culturally integrated in the UK, and

(iii) there would be very significant obstacles to his integration into the country to which he is proposed to be deported.

78. I note that the provisions of Exception 1 match paragraph 399A of the Immigration Rules. Following *JZ (Zambia)*, I find that the correct approach in applying rules 398 to 399A of the Immigration Rules is not to carry out a freestanding analysis of the Article 8 factors. The Secretary of State had already carried out that exercise in drafting rules 398 to 399A. Those rules form a complete code explaining how article 8 operates in cases where a foreign criminal is resisting deportation. The decision-maker must take account of the proposed deportee's Convention rights through the lens of the Immigration Rules. The rules emphasize the high public interest in deporting foreign criminals. In a case to which rules 399 and 399A do not apply, very compelling reasons will be required if they are to constitute "exceptional circumstances" which outweigh the public interest in deportation.

79. At paragraph 35 of her skeleton, Counsel lists *"very compelling circumstances"* which I have considered and find as follows:

(i) A, who is now aged 21, has resided here since the age of 7:

I accept that A has spent 2/3rds of his life here and only 1/3rd in Africa (the Congo about 2 years, Gabon about 4 years). Thus, it can be said that he has been lawfully resident here for most of his life but it cannot be said that he has adopted the social and cultural norms of the UK: he has had a wholesale disregard for the law and has committed very serious offences, and repeated the offence of carrying an imitation firearm with intent soon after his release from Youth custody in 2013. He paid no heed to the Respondent's warning that he would be deported if convicted of further offences. In considering A's circumstances and background, I find that they are not so compelling as to be outweighed by the public interest in deportation

(ii) A has no knowledge of the language or culture of Congo:

I find that the language in that country is French, that that was A's only language until he arrived in the UK at the age of 7 and, although A has told me in evidence that he understands French but is only able to speak a little, I find it to be more than realistically likely that he converses with his mother in French and that his command of the language is greater than he suggests. In any event he would be able to improve his language skills rapidly upon return, given his background in the language. Moreover, I find that since his arrival in the UK, A has been raised in a household with his mother and two siblings who were born in the Congo. It is more than realistically likely therefore that his family and particularly his mother have passed on to him some knowledge of the culture of the Congo.

(iii) A was 19 at the time of the offence and *"had youth on his side so as to rehabilitate"*:

I find those to have been the circumstances when A was sentenced, but in the absence of a OASys report and objective evidence of the prospects of rehabilitation, I do not find them to be compelling. He continues to have youth on his side which will enable him to adjust to life in his homeland.

(iv) A's conduct since the commission of the offence *"has been excellent"*:

Contrary to that submission, I find that A was the subject of two Adjudications while serving his sentence as a result of which his release date was put back by 16 days. I accept that he gained a range of Level 1 City & Guilds certificates while serving his sentence, but they are neither exceptional nor compelling.

(v) A's mother suffers from HIV and needs A's assistance:

I have considered that submission above and have found that A's mother has been able to manage without A's assistance for the last three years.

(vi) A's mother and siblings all have refugee status in the UK, are not able to travel to Congo and there would be a permanent and irreversible severance of family life:

I find that A is now an adult of 21 years and that the relationship with his mother and siblings does not extend beyond usual family ties and, in any event, contact can be maintained by Skype and other forms of electronic communication.

(vii) Length of residence of a nine-year period was accepted in *JZ (Zambia)* as a factor capable of constituting *"exceptional circumstances"*:

I find that having regard to section 117C(6) and my findings in subparagraph (i) above, the length of A's residence in the UK is outweighed by the public interest

(viii) A has no friends or family in Congo:

In evidence, A told me that he is an ambitious and enterprising young man who seeks to become a film producer. I find that inevitably he will face a difficult period of adjustment upon arrival in Congo but, in due time, with the social skills and enterprise that he has learnt here, will form a private life for himself.

80. Having considered A's case with the utmost care, I find that there are no *"very compelling circumstances"* to override section 117C(6). The offences that he committed were extremely serious. He has no partner or children to take into account. I am bound to give the public interest factor the great weight that it requires and accordingly the deportation order must stand and take effect."

127. Ground 3 is that the judge failed to give any or any adequate reasons for finding that there are no very compelling circumstances to outweigh the public interest in deportation, for the following reasons:

i) In finding that the relationship between the appellant and members of his family in the United Kingdom "*did not extend beyond usual family ties*", the Judge failed to give due weight to the evidence of the appellant's mother and siblings in the witness statements in the bundle and failed to treat each family member as a victim contrary to Beoku-Betts [2008] UKHL 39. In reaching his finding that the relationship between the appellant and members of his family did not amount to family life, the Judge had failed to take into account / place any weight on the following factors:

a) The mother's health is said to be deteriorating as a result of the threat of deportation of her son (para 9 of her witness statement).

b) Financial support would not be available to the appellant upon return to the Republic of Congo, as stated in cross-examination at the hearing.

c) The appellant's family would effectively be broken up as a result of his deportation and the effect that this would have on family members, according to para 20 of the statement of the appellant's older sister (at page 15 of the bundle).

d) The Judge failed to consider whether Skype and electronic means of communication were viable / available before indicating that this would remedy any severance of family life. The applicant's older sister had said in her witness statement, at para 17, that "*Keeping in touch if he was not in the UK would be difficult, everyone has their own lives and we cannot continue to keep in touch only over the phone".*

ii) In finding at para 79 (viii) *"I find that inevitably he will face a difficult period of adjustment upon arrival in Congo but, in due time, with the social skills and enterprise that he has learnt here, will form a private life for himself",* the Judge

failed to consider the fact that the appellant had never had to integrate into a new society and/or culture as an adult and that he would therefore face particular difficulties over and above a normal robust individual being returned to their country of origin.

128. There is simply nothing in the challenge to the Judge's finding that the appellant did not enjoy family life with his mother and siblings. The factors listed at i) a)-d) of the preceding paragraph are not relevant to any assessment of whether family life is being enjoyed, although they may be relevant to proportionality.

129. We have set out above (para 41) paras 9 and 19 of the witness statement of the appellant's mother. It is plain that she did not say anything that demonstrates that she and the appellant enjoy family, nor did his sister. The Judge therefore did not err in law in failing to refer to their evidence at para 79 (vi) when he made is finding that family life was not being enjoyed. We are satisfied that he did not err in law in reaching his finding that family life is not being enjoyed.

130. In relation to proportionality, it is necessary to remember that the appellant received a total sentence of 4 years 6 months. This means that para 398 of the Rules required him to show very compelling circumstances over and above those described in paras 399 and 399A.

131. The Judge was plainly aware that his decision would result in the break up of the appellant's family, as para 79 (vi) of his decision where he referred it contact being maintained by Skype, demonstrates. He did take into account the health of the appellant's mother at para 179 (v). We therefore reject the submission that he failed to take these matters into account or the effect that separation would have on the members of this family. That just leaves the evidence given in cross-examination that the appellant would not have financial support. However, the Judge noted that the appellant had said in evidence (para 179(viii) of his decision) that the appellant had told him that he is an ambitious and enterprising young man who seeks to become a film producer. There is therefore nothing in this point. The suggestion that the Judge failed to take into account that the appellant has never had to integrate into a new society amounts to no more than an attempt to re-argue the evidence.

132. The submission that the Judge failed to give adequate reasons for finding that there are no very compelling circumstances to outweigh the public interest fails to reflect the correct question, i.e. whether there were very compelling circumstances over and above those described in paras 399 and 399A. That is the question the Judge considered. In our judgement, he gave adequate reasons.

133. We therefore reject ground 3.

Decision

The decision of the First-tier Tribunal did not involve the making of an error on a point of law. The appellant's appeal to the Upper Tribunal is therefore dismissed.

Signed Date: 12 July 2016
Upper Tribunal Judge Gill

APPENDIX A

Extracts from MD (Women) Ivory CG [2010] UKUT 215 (IAC)

"Assessment of Evidence of Ms Ticky Monekosso

76. We need to make some comments about our approach to the oral evidence and reports of Ms Monekosso who explains that she was commissioned to write her reports by the appellant's solicitors in her capacity as an independent expert on the affairs of the Ivory Coast.

77. There are a number of general observations that we would wish to make. Our starting point is the Asylum and Immigration Tribunal Practice Directions where at paragraph 8A.4 (now Practice Direction 10 of February 2010) it is stated that an expert should assist the Tribunal by providing an objective, unbiased opinion on matters within his or her expertise and should not assume the role of an advocate.

78. Practice Direction 8A.5 (now 10.5) reminds us that an expert should consider all material facts, including those which might detract from his or her opinion. Paragraph 9A.6 (now 10.6) points out that an expert should make it clear:

    a) when a question of issue falls outside his or her expertise; and

    b) when the expert is not able to reach a definite opinion, for example because of insufficient information.

79. The role of a country expert is thus to assist the Tribunal giving expert evidence in a field where specialist knowledge is required, in particular providing comprehensive and balanced factual information relating to the issues that the Tribunal must resolve.

80. In that regard, it is important to bear in mind that the UTIAC is itself a specialist Tribunal that has its own level of expertise and therefore it is for the Tribunal on the basis of the totality of the material before it, including the opinion of the country expert, to conduct its own assessment and reach its own conclusions.

81. A competent expert's report is always entitled to respect and due consideration but from the point of view of the judicial decision-maker, such reports may sometimes (if not often) amount in the end to just one among other items of evidence which have to be weighed in the balance.

82. As held by the Tribunal in SK [2002] UKAIT 05613, the Tribunal builds up its own expertise. Naturally an expert's report can assist, but that does not mean that heavy reliance is or should necessarily be placed on such reports. All will depend upon the nature of the report and the particular expert. The Tribunal is accustomed to being served with reports of experts, many of whom have their own points of view which the reports seek to justify. The whole point of the country reports is to bring together all relevant material. From them, the Tribunal will reach its own conclusions about the situation in the country and they will see whether the facts found in relation to the individual before it establish to the required standard, a real risk.

83. Ms Monekosso described herself as an independent journalist and a French citizen, originally from Cameroon. She told us that her professional experience and knowledge has been accumulated over more than twenty years as an independent journalist reporting on human rights, development issues and related humanitarian affairs in Africa. She stated that she had visited many African countries on a regular basis. Ms Monekosso described her career background as that of a freelance journalist and independent consultant with a number of media groups, international organisations, non-government organisations and the private sector for twenty years.

84. Ms Monekosso holds a Masters Degree in Mass Communication Studies and Journalism, a post graduate Diploma in Audio-visual Communication, post graduate studies in Communications and Cultures, post graduate studies in Applied Anthropology as well as a Graduate Diploma in Economics and other qualifications.

85. She states that she has prepared a number of research studies on the United Nations Information System.

86. Ms Monekosso obtained an International Press Award in 2000. Ms Monekosso was a Programme Support Officer (1993-1995) with the Regional Bureau for Africa and the Middle East at the International Organisation for Migration (IOM) Geneva Headquarters, gathering information on human rights and historical research on migrations in Francophone Africa and Maghreb countries.

87. Ms Monekosso worked as an independent consultant in communications with public information organisations in what she describes as the "United Nations System" including the United Nations Information Centre (UNIC/Brazzaville), the UN Information Office (Geneva) and other associated organisations.

88. Ms Monekosso is a founding member of Femmes Africa Solidarité (FAS) that she describes as a Geneva-based African women's' NGO dealing with "gender mainstreaming in management and resolution of conflict in Africa – monitoring and assessing women and children's conditions in African countries; Communications and public information advisor to the group".

89. Her CV states that she was based at the UN Headquarters in Geneva between 1995 and 2005, that she reported on humanitarian issues, development economies and Africa related diplomacy for a number of organisations that included BBC News on-line (Africa and World Services) and various African and pan Africa news agencies. In particular, and notably under the heading "Journalism", she states that she has conducted research "into the position of refugees and the provision of humanitarian relief in Côte d'Ivoire, Congo and the Central African Republic for monthly country bulletins issued by Writenet /UNHCR and Writenet /UNHCR special reports on Côte d'Ivoire and the Central African Republic".

90. Ms Monekosso states that she remains a regular visitor to Africa "for meetings and other professional trips" and that she has extensive knowledge of Africa and has "regular contact with friends and journalist colleagues living in Africa from where I get up-to-date first-hand information".

91. Ms Monekosso describes herself as having "detailed country expertise on Sub-Sahara Africa" and that she has "developed extensive specialist knowledge on social structures and traditions, the position of women in local issues in several regions of Africa – Central Africa and the Great Lakes, West Africa and the Horn of Africa". Further that she has substantial experience of detailed case-specific research into social and legal issues and the position of women in these regions.

92. Ms Monekosso further claims that in her work as an expert witness, she has carried out a large number of detailed investigations into issues including:

> "The customary punishment of women such as customary adultery laws, national legislation related to nationality laws, rights of sexual minorities, ethnic of origin dispute and the impact of post-colonial borders …"

93. Ms Monekosso describes her current occupation as that of Office Director for Afromedi@net. She describes Afromedi@net as a:

> "Leading Network Journalist and Researcher specialised in African issues. The office Afromedi@net is based in France and working in partnership with Hawksmoore Bureau BUK-focuses on investigative journalism and providing up-to-date first-hand information and independent analysis on human rights, development and humanitarian affairs in Africa".

94. Ms Monekosso's language skills include fluency in Douala, she qualifies that claim by adding *"Cameroonian language".*

95. Ms Monekosso produced two reports in respect of the appellant.

Ms Monekosso's first report

96. In her first report dated 19 June 2008, she explained that she had last visited the Ivory Coast between 1 and 8 December 2007 when she described having had "a high level political meeting with the country authorities". She visited Abidjan and met President Gbagbo and on a visit to Bouake in the North she met the Prime Minister and the Head of *Forces Nouvelles*, Guillaume Soro. On a visit to

Yamoussoukro she met the Ministers of Foreign Affairs and of Communication and other members of the current government and what she describes as "many other important personalities including traditional leaders". Ms Monekosso tells us that she discussed with them a number of the country's political matters that included economic and humanitarian conditions. Further that she discussed in private with a number of Ivorian journalist colleagues who lived and worked in the Ivory Coast and with other foreign press correspondents to the country, matters concerning conditions in the country and in the region.

97. In the course of her evidence before us, it became clear that such meetings were largely the result of her having attended the Annual Congress of the International Francophone Press Union where she was one of approximately 200 journalists visiting the country for eight days with the programme being focused on the Côte d'Ivoire's current situation and its position in Francophone Africa. In the course of Ms Monekosso's cross-examination, it became apparent that these were not, as we had first thought, face-to-face meetings with the President of the Ivory Coast, its Prime Minister, Foreign Minister and other senior government officials, but meetings that occurred as one of this group of 200 journalists. Ms Monekosso had not personally spent any time alone with the President on her visit in December 2007.

98. Ms Monekosso explained that she retained regular contacts with her friends and journalist colleagues living in the Ivory Coast, "from whom I get up-to-date first-hand information".

99. Ms Monekosso explained that her report drew "on a wide range of sources some of which may not be familiar". The report set out what was described as *a "a brief guide to major sources"* from which it was apparent that she was largely endorsing material from international news agencies such as Agent France Presse (AFP) and Reuters. Account was also taken of US State Department reports and what she described as *"a range of Côte d'Ivoire domestic and externally based electronic media sources reflecting diverse points of view".*

100. In that latter regard, Ms Monekosso acknowledged that "*some have a pro or anti-government slant and must be treated with caution but they provide useful insights into debates and trends and tips about insider news and politics*".

101. The three issues that Ms Monekosso was asked to address in her report were described by her as follows:

> "1. Firstly, whether women in Côte d'Ivoire share a fundamental condition of social inferiority compared to men and whether FGM, marriage and/or domestic violence are expressions of discrimination against women in the Côte d'Ivoire.
>
> 2. Secondly, whether the appellant would be at real risk of persecution in Odienne for defying the institution of her customary marriage by giving birth to a child outside that marriage and if so to what extent would she be at similar risk in the rest of Côte d'Ivoire.
>
> 3. Thirdly, if the appellant is not at risk of persecution for her actions in defiance of her customary marriage in Côte d'Ivoire outside Odienne, I am asked to state whether the appellant, as a single mother, could reasonably and without due harshness live outside Odienne".

102. As to the first issue, it was Ms Monekosso's understanding that only forty per cent of the female population of the Ivory Coast were literate.

103. The practice of Female Genital Mutilation (FGM) was common especially among the rural population in the North and West. Sixty per cent of women had undergone FGM in the Ivory Coast. This is the figure seen in the OGN but a more accurate indication of the variable incidence of FGM appears in paragraph 86 where as little as 13% and 18% have been incised in central and central west ranging to as high as 88% in some areas.

104. Spousal abuse occurred frequently in the Ivory Coast and as many as seventy per cent of Ivorian women had experienced domestic abuse. Nevertheless domestic violence was widely regarded as a private family problem.

105. At paragraph 12 of her report Ms Monekosso claimed that the law prohibited sex discrimination as it did discrimination of all kinds, but that in practice, women occupied a subordinate role in Ivorian society.

106. In rural areas women and men divided the labour. Government policy encouraged full participation by women in social economic life but there was considerable informal resistance among employers who considered women of child-bearing age less dependable then men. Women were under-represented in some professions and in the managerial sector as a whole. Some women also encountered difficulty with obtaining loans because they could not meet the lending criteria mandated by the banks.

107. Ms Monekosso continued that in the Ivory Coast the state organised religion and traditional society all played a part in creating and maintaining the social inferiority of women compared to men by coercing female conformity with norms of customary behaviour.

108. The State had failed in practice to protect young women and children from FGM. It did not afford women property rights in marriage or on dissolution of marriage. Moreover, the state discriminated against women in the matter of adultery and it did not outlaw marital rape. This is corroborated by what we have said in paragraphs 71 to 75 above.

109. Ms Monekosso referred to what she described as “three powerful customary norms” that women were expected to obey. Firstly, that women should undergo FGM; secondly, that they should get married and have children; thirdly that women should not dishonour their communities.

110. For Ivorian women to attain any honourable condition they had to be married although they were only expected to marry once and beforehand they were required to be circumcised. Adultery was a criminal offence for women. For men on the other hand polygamy was respectable. Ms Monekosso stated that “men are not punishable under the criminal law for marital rape or adultery”. (For reasons which later appear, this is not accurate).

111. Ms Monekosso considered that these norms “marked women as second class because they are coercive”. Traditional society enforced these norms and serious transgressions were punished. Traditional societies had customary powers to investigate, try and punish individuals. In secular matters most cases were adjudicated upon in informal hearings often convened by the village chief.

112. Traditional society in effect sought to guide women and reinforce their acceptance of living within community norms as second class citizens.

113. There were rituals of purification as well as punitive measures to deter and curb the tendency to deviate from these norms. Every extended family or tribe evolved its distinct ethical code.

114. In the case of adultery, customary decisions might be taken that women were punished by cutting their backs with razors. The results of mutilation or “*scarifications*” would communicate that the women was an adulteress. She was then beaten and repudiated in public.

115. On the issue of FGM, Ms Monekosso placed reliance on what she described as the preliminary results of the MICS 2006 Report. MICS refers to “The Multiple Indicator Cluster Survey Programme” developed by UNICEF that assists countries in filling data gaps for monitoring the situation of children and women through statistically sound, internationally comparable estimates of socio-economic and health indicators.

116. Those results showed that nearly eighty seven per cent of women in Northern Ivory Coast had been the victims of FGM/Cutting (FGM/C). FGM/C was still practiced among most population groups in the Ivory Coast even though the prevalence of such was higher within some ethnic groups, the Muslim population and in rural areas.

117. Ms Monekosso referred to the UNICEF MICS 2007 analysis that showed that there was a strong social consensus around these mutilations initially done to prepare a young girl to womanhood. FGM practices affected an increasing number of younger girls and even babies. These practices continued despite the adoption almost ten years ago of a law prohibiting FGM. In Ms Monekosso’s opinion, FGM was an extreme expression of discrimination against women in the Ivory Coast because they were forced to undergo FGM before being considered full members of Ivorian society. In addition, those women who refused to undergo FGM were “socially rejected, stigmatised and ostracised”.

118. Ms Monekosso described FGM as a "gender based form of violence and a typical form of domestic violence practiced within the family".

119. She considered that given the presence of FGM in the Ivory Coast, the State had failed to protect women, particularly girls from FGM. This is clearly one of the more controversial passages of Ms Monekosso's evidence to which we will return later. Whilst there is no doubt that the practice is widespread, its impact is variable and we will need to consider the steps taken by the authorities to counter it. Ms Monekosso pointed out that, until 1998, there was no law that specifically prohibited the practice which was considered illegal only as a violation of general laws prohibiting crimes against persons.

120. However, the Law Concerning Crimes against Women enacted in December 1998 specifically forbade FGM and subjected those who performed it to criminal penalties, imprisonment of up to some five years and a fine of approximately $650 to $3,500 (360,000 to 2 million CFA francs) and there were double penalties for medical practitioners.

121. As regards marriage in the Ivory Coast, this was an institution highly esteemed by Ivorian society and women especially were expected to get married and stay married. If a woman could not get married she was considered to be of low morality.

122. Unmarried women were not seen as full members of society. They lacked social status. Unmarried women were considered blameworthy by society. Marriage and children conferred more value and status on women than education which was believed to reduce a woman's prospect of marriage so in the Ivory Coast there was one official form of marriage recognised by law which was married under ordinance.

123. According to the Ivorian Civil Code, only marriages that were performed by a registry were legal. Official polygamy was outlawed in the Ivory Coast although it continued to be widely practiced, particularly in Muslim communities. However in Ivorian society, male polygamy was common and respected. Further, both customary and Islamic marriages conferred marriage status on women even though those marriages did not prevent their husbands entering into other polygamous marriages.

124. Customary or traditional marriages usually took place by agreement between families and were commonly confirmed by the payment of a dowry. Many such marriages were arranged marriages or even forced marriage. Nearly all Ivorian marriage was customary. Even couples contracting a marriage under ordinance, performed a customary marriage first.

125. Husbands were regarded as the head of the household. Spousal abuse (usually wife beating) occurred frequently and it was not specifically penalised, nor was marital rape. A woman was presumed to have consented to sexual intercourse by marriage even if a union was at an early age and/or forced.

126. In relation to inheritance rights, Ms Monekosso explained that on the death of a spouse, household property was divided according to the Marriage Act. A surviving female spouse ranked fifth among those eligible to inherit and she was excluded from inheritance if there were children because the children got this share in that case.

127. Ms Monekosso referred to Article 391 of the Penal Code that stated that "adultery is not only grounds for divorce but also an offence punishable by imprisonment of two months to one year. A woman found guilty of adultery is punished along with her partner".

128. Notably, at paragraph 48 of her report, Ms Monekosso continued as follows:

> "Only the female spouse is punishable under the criminal law if found guilty of adultery, together with her partner. **A male spouse cannot be punished for adultery**." (Emphasis added).

129. Ms Monekosso continued that men were heads of household and were permitted to rape and abuse their spouses with impunity.

130. Although the law specifically penalised anyone who forced a minor under 18 years of age to enter a religious or customary matrimonial union, twenty six per cent of 15 to 19 year old girls were married in the Ivory Coast and the state failed to protect children from forced marriage in traditional ceremonies rather than to illegal registration.

131. In Ms Monekosso's opinion, whether marriage was legal, customary, forced or consensual, it was the fundamental expression of the inferiority of women in the Ivory Coast. It institutionalised their inferior status compared to men.

132. Ms Monekosso explained there was no reliable statistical data on the extent of domestic violence in the Ivory Coast, though according to the Association Ivoirienne de Défense des Droits de la Femme (AIDF), seventy per cent of women in the Ivory Coast were victims of domestic violence. This is consistent with the 2006 MICS report (from a survey sample of 13,000 persons) which indicated that nearly 2 out of 3 (roughly 60% or more) thought a husband had the right to hit his wife. (But we recall, this figure was significantly less in Abidjan, 44%, less than half, suggesting the different attitudes in urban areas.)

133. The inferior status of women and the considerable number of newspaper reports suggested that domestic violence was widespread throughout the country. Women who complained of domestic violence were socially excluded and suffered tremendous pressure from their families. Traditional attitudes did not permit women to reject domestic violence. Much of this is supported by the US State Department report to which we have referred in paragraphs 72 to 73 above.

134. Ms Monekosso considered that the prevalence of domestic violence in the Ivory Coast was an expression of social inferiority because wife beating which was a criminal offence that constituted grounds for divorce under civil law was common in the Ivory Coast but the police rarely intervened in domestic disputes.

135. Ms Monekosso continued that the courts and police viewed domestic violence as a problem to be addressed within the family unless serious bodily harm was inflicted or the victim lodged a complaint in which case criminal proceedings could be initiated. However a victim's own parents often urged withdrawal of a complaint because of the effect of social stigma on the entire family.

136. It was Ms Monekosso's opinion that the prevalence of domestic violence in Ivorian society was an expression of the inferior status of women compared to men.

137. On the second issue, (the risk of persecution in Odienne or elsewhere for defying the institution of her customary marriage by giving birth to a child outside marriage), it was Ms Monekosso's considered opinion that if the appellant returned to Odienne she would face ritual punishment for adultery and abandoning her husband. In secular matters most cases were adjudicated upon in informal hearings often convened by the village chief but that in any event, family and community members might also apply disciplinary procedures even trying and torturing individuals for serious violations of norms, such as adultery.

138. The vast majority of norms, taboos and prohibitions were directed towards protecting the community.

139. Every extended family or tribe evolved its distinct ethical code which it would act to preserve. The observance of tradition was a matter of honour and having a child born of adultery could be considered a crime of honour. Furthermore, the Muslim society in the Ivory Coast would regard the appellant's actions as particularly taboo, offensive and humiliating.

140. Customary laws relating to adultery "undoubtedly existed". It was however "*uncertain*" whether the appellant could be punished under Article 391 for adultery given that she was not married under the ordinance. Nevertheless Article 391 reinforced the legitimacy of customary law which punished women for adultery rejecting forced marriage, and in the appellant's case disobeying her father and also her husband. By customary law the appellant had broken the contract under which she was married. It would, in Ms Monekosso's opinion, "be impossible to defy these customary laws".

141. As to the existence of risk to the appellant outside Odienne, Ms Monekosso pointed out that Muslim social and community structures were highly traditional and placed great importance on marriage and female fidelity. The appellant's particular circumstances would thus prevent her from seeking the assistance of local Muslim communities elsewhere in the Ivory Coast as these communities would seek to punish or ostracise her.

142. Ms Monekosso referred to the security climate in the Ivory Coast and the forthcoming national elections and was of the view that it was thus certain that the police would control the appellant as they would other ordinary citizens. The police in the South would regard the appellant with suspicion

as a Muslim woman from the North. She would be interrogated for information concerning *Forces Nouvelles*.

143. In addition, there were credible reports that gendarmes entered homes and businesses to extort money, that police detained persons overnight in police stations where they beat detainees and forced them to pay bribes. The police also harassed persons of northern origin or with northern names. (We note the latter claim was sourced from a 2006 US State Department Report).

Ms Monekosso's view of appellant's situation

144. Ms Monekosso believed that during interrogation it was "certain" that the appellant would be asked about her marital status as was usual for young women when confronted by the security forces. If she was identified as a single mother and a Muslim then it was "certain" that the security forces would try to abuse her for they would be able to do so with impunity. They would act in the knowledge that the appellant had nobody to intervene on her behalf.

145. Ms Monekosso continued that the appellant would require official identity papers to access public services, develop a business or pass through checkpoints that were commonly established on roads by the security forces. Without an official identity the appellant would have to live as a '*non-person*' deprived of access to public services or formal sector employment, on the margins of society.

146. The appellant would require identity papers to prove that she was Ivorian given the proximity of national elections and the suspicion on the part of the security forces that the Ivory Coast Northern neighbours would seek to infiltrate the country to influence the election results.

147. Ms Monekosso considered the relevance of the appellant's name that identified her as a Douala, a Northerner and a member of a cross-border ethnic group. As such she would face discrimination from the security forces and could not present herself as a member of any community.

148. Ms Monekosso considered that it would be extremely difficult for the appellant to live in any provincial region outside of her home area because she would be viewed with suspicion and socially ostracised. As a woman living alone without access to land or economic assets, the appellant would find it extremely difficult to be accepted and would have no ready access to a basic means of livelihood and she would be at risk of maltreatment or sexual exploitation. Thus the appellant would be certain to suffer social exclusion and severe discrimination even in areas far from the North.

149. The judiciary would not offer effective protection to a lone woman who had an elicit child from an adulterous relationship even if her marriage was traditional as opposed to a marriage under ordinance.

150. As to the third issue, that essentially focused on whether or not the appellant could safely and internally relocate outside Odienne. Ms Monekosso acknowledged that in Abidjan, the capital, "*the social climate (was) more relaxed*". The appellant would however be without any means of support in business, employment or farming.

151. Ms Monekosso considered that the appellant would face prostitution or being trafficked in West Africa. Indeed wherever she went as a Douala, Ms D would "*lack the privileged and protected social position which married women enjoy*".

152. Away from her home area, the appellant without access to land would find herself in exceptional difficulty to survive in a rural area. She would not be accepted in a rural community elsewhere in the Ivory Coast where discrimination was at its worst. As a young woman from the Douala community without any family links in the new area she would be considered to be a foreigner.

153. Ms Monekosso continued that the appellant's status as a single Muslim mother in the Ivory Coast would leave her in an acutely isolated and weakened position where she would face discrimination, stigmatisation, ostracism and rejection.

154. Being a Muslim and single mother was a case of dishonour in the Ivory Coast and would lead to all kinds of suspicion, that the appellant was "*an adultery mother or a sex worker*". The appellant would find it exceptionally difficult to live as an independent single mother elsewhere in the country as the entire Muslim and Douala community would consider her to be the "*wife of …*" even if it was a forced marriage.

155. Further the appellant if returned to the Ivory Coast as a young woman who had been to Europe was likely to be rejected by Ivorian society. Many people would assume that she had been a sex worker. She was likely to be marginalised in society.

156. Ms Monekosso continued that such risks would be sharply increased if it were known that the appellant committed adultery and was raising an illicit child and that she had run away from a forced marriage and had defied domestic violence. The appellant's risk would be increased as she would be perceived as a woman of low morality and a likely prostitute. If the appellant sought to move elsewhere she would lack access to a source of income or land and would also be regarded with suspicion in social terms.

157. In addition, Ms Monekosso considered that given the number of myths well-known in the country about traditional matters and witchcraft, other communities would not wish to have a '*Muslim fugitive woman*' living in their community. Not having acted in accordance with tradition, the appellant would be widely perceived by any community as threatening and dangerous; for other ethnic groups to harbour such an individual would be embarrassing. This stigma and discrimination would seriously affect the appellant's attempts at relocation.

158. Ms Monekosso thus concluded her report as follows:

> "The institutions in Côte d'Ivoire who should in theory protect an individual such as Ms D are in fact completely ineffective. The judiciary is highly corrupt; the police and army are characterised by frequent resorts to brutality and show no concern for protecting women against harsh traditional social practices, regardless of the letter of the law that bans domestic violence".

Ms Monekosso's second report

159. In her second report dated 8 October 2008 Ms Monekosso set out in French and also in translation the provisions of Article 391 of the Ivory Coast's Penal Code. It will be as well to set out the translation:

> "Adultery is not only grounds for divorce, but also an offence punishable by imprisonment of two months to one year. A woman found guilty of adultery is punished along with her partner. For her husband's adultery to be punishable, however, he must have committed the act in the marital home or have had an ongoing sexual relationship with a woman other than his wife outside the marital home. The man's partner is not punished. Divorce proceedings may be averted or halted by the offending spouse's collusion or forgiveness."

160. Ms Monekosso continued that she now recognised that it was:

> "Immediately apparent that paragraph 48 of my original report was mistaken in suggesting that the penal code did not criminalise or punish male spouses for adultery."

161. Ms Monekosso continued that:

> "Plainly, a male spouse may be criminally liable for adultery but in more limited circumstances than female spouses. A female spouse is exposed to criminal liability for any act of adultery, whereas a male spouse is only liable for an adulterous act in the marital home or for a series of adulterous acts with a woman.
>
> It would seem that a male spouse is not punishable under the penal code for single acts of adultery with different women outside of the marital home".

162. Ms Monekosso's report continued by reference to information she had received from Fatimata Diabate who was described as:

> "The Training Officer of the Association of Women Jurists of the Ivory Coast, who was admitted to the Bar of Abidjan in [date] and who practices as an advocate, that in practice it is very much more difficult for a woman to bring a charge of adultery against her spouse than it is for a man to do so against his spouse. Ms Diabate is from the Northern Ivory Coast as is the appellant". (The square bracket reference is Ms Monekosso's who did not subsequently provide us with any information as to the date of Ms Diabate's admission to the Abidjan Bar).

163. Ms Monekosso summarised the information that she had gleaned from Ms Diabate. Indeed, many of the paragraphs that follow begin or end with the expression "*Ms Diabate advised that …*"

164. Ms Monekosso was told by Ms Diabate, that before a male spouse could be prosecuted for adultery, consent was required from two sources firstly the Procureur de le Republique and secondly from a court bailiff. There were no restrictions governing the commencement of criminal proceedings against women for adultery. In practice therefore, Ms Diabate advised that only female spouses were punishable under Article 391. Ms Diabate had however, further advised that there were no reported cases in the Ivory Coast concerning the prosecution of female spouses under Article 391. That was not to say there had not been any prosecutions, but the court archive could only be consulted with the permission of the Procureur de le Republique and then only after a legal process to determine whether access was necessary and relevant to the needs of the country.

165. Ms Diabate advised that it was much more common for husbands to use traditional or informal institutions to punish their female spouses for adultery.

166. Ms Diabate advised that a woman such as the appellant would be publicly shamed and blamed. The appellant would be required to take the Calabash and make several tours of the village roads. The appellant would be forced to confess her adultery in the various compounds that housed the community and beg for forgiveness. Local community leaders would question the appellant in front of her husband. The appellant's husband would have the choice of pardoning, punishing, tolerating or repudiating his wife. Punishments could range from forced servitude on the husband's land for both the appellant and her child, beatings followed by repudiation, ritualistic cutting of the appellant's back to leave scars indicating that she was an adulteress, ostracism or even honour killings.

167. Ostracism was a particularly devastating form of punishment in that the appellant would no longer be allowed to share the life of her community. So severe was the punishment of ostracism, that every member of the community would dread it and do everything possible to avoid it. It deprived one of access to land and any means of livelihood.

168. Notably, Ms Monekosso conceded that she had no personal knowledge of the rituals or punishments observed by the Muslim community in Odienne. Every extended family or tribe would have evolved its own distinct ethical code. Ms Monekosso sourced that information from the following: "Crime and African Traditional Religion", S A Adewale.

169. Ms Monekosso concluded her second report by repeating that it was unrealistic to expect a lone Muslim woman with a child to live an independent life which would not be unduly harsh in the Ivory Coast pointing out that:

> "Apart from or outside a traditional family or community network of support such a life would be below the minimum level for subsistence, alternatively, the appellant would be forced into prostitution and trafficking".

Ms Monekosso's Oral Evidence and evaluation

170. In addition to her written reports, we have had the opportunity of listening to and evaluating Ms Monekosso's lengthy oral evidence before us over a period of two days. Although we do not underestimate or undervalue the expressed opinion of someone whose professional experience and knowledge of related humanitarian affairs in Africa has extended over more than twenty years, we have nevertheless concluded that her evidence falls to be treated with caution. Our reasons for so finding are as follows.

171. At an early stage in her oral evidence we asked Ms Monekosso to explain to us why there was no report directly from Ms Diabate. Her response was as follows:

> "Women do not want to be named publicly. I did not ask Ms Diabate for a statement **I told her I was preparing the report as a journalist not that I was preparing a report for the court.** In my experience I have learned every time I have asked questions from people, if I say it is for a court to be publicised they would be a little afraid. **I told her that I was not going to name her.**" (Emphasis added)

172. When it was drawn to Ms Monekosso's attention, that her evidence (insofar as it related to the Ivory Coast's Civil Code Procedures and particularly Article 391 of the Penal Code) appeared to us to be second-hand, her candid response was as follows:

> "**The only evidence I have in this matter is what I was told by Ms Diabate**". (Emphasis added)

173. When asked as to whether Ms Diabate had provided details of the proof required in terms of establishing the fact of adultery, Ms Monekosso responded that she did receive an explanation from Ms Diabate:

> "But I do not think I mention that in my report because that was not asked of me and I did not want to give more information than I was asked – but there are several forms of proof according to the ethnic groups".

174. When asked if she had undertaken any research studies in the Ivory Coast her response was evasive in her stating:

> "It depends on what you mean. I am an investigator."

175. On being further pressed, Ms Monekosso explained that she worked with a colleague who conducted research for the UNHCR under the auspices of Writenet which was in fact an UNHCR bulletin. Ms Monekosso had worked "*most for the confidential press and the public press*".

176. Whilst we are mindful that an expert can be perfectly well-qualified to speak about the territory without herself having been there (see for example, K [2005] EWCA Civ 1627) we have concluded upon a consideration of Ms Monekosso's evidence, oral and documentary, that her expertise has significant limitations in the sense that she has a wide-ranging interest in Pan African/ethnic affairs as a journalist, with a very keen interest in African issues. She last visited the Ivory Coast for one week with a group of some 200 journalists in December 2007. However, it became apparent to us in the course of her oral evidence, that her direct knowledge of matters relating to the Ivory Coast was in fact limited.

177. Much of her evidence in relation to the Ivory Coast was derived from what she was told by Ms Diabate in the course of a telephone interview that Ms Monekosso admitted had been conducted in circumstances where Ms Diabate had been misled as to its purpose. Ms Monekosso on her own admission misled Ms Diabate when assuring her that any information that she gave would not be the subject of a report or for a Court's evaluation. She also said that she would maintain the confidentiality of her source.

178. Although much of Ms Monekosso's report is clearly derived from the same sources as we have set out above, we are concerned about certain aspects of the report and, in particular, her evidence about punishments meted out in traditional communities upon those accused of adultery. Mr Bedford both before us and in his skeleton argument (see for example paragraph 54 of his skeleton) was clear that Ms Monekosso was:

> "… the principal source of the evidence that female adultery is severely punished by traditional society for which she is reliant on Ms Diabate, Training Officer of the Association of Women Jurists in the Ivory Coast and Barrister in Abidjan: Monekosso's report Oct. 2008 paras 11 to 15".

179. Ms Monekosso gave evidence that Ms Diabate had given her permission to mention her name and she admitted that Ms Diabate was unaware that it was for court proceedings. When asked to explain, Ms Monekosso responded:

> "I think I need to go back to my recollection. Generally I say to people they won't be quoted just to reassure them. That is the best way to preserve my contact for me to be able to approach them in the future without any problem – but as a journalist I am free to mention them – it is up to me to deal with it … In our profession we are free to quote or not quote someone".

180. When asked if it was so, even if it meant breaking a promise, Ms Monekosso responded:

> "Yes – even if it would cause a scandal – **we have the right and in some instances when we are asked to reveal our sources we can refuse … that is how we work in general – apart**

> **from the formal interviewing most of the time we just have an informal discussion rather than a formal interview**". (Emphasis added).

181. It was put to Ms Monekosso that her answers meant that she was prepared to mislead an interviewee in the cause of journalism on the basis that the means justified the ends. To this Ms Monekosso responded that it was:

> "… a working technique an investigative technique and we get in step by step to obtain the most credible information".

182. Ms Monekosso continued that she recalled telephoning Ms Diabate and informing her that she was a journalist gathering information on the Ivory Coast but that:

> "I didn't mention at any time court proceedings. As a journalist and woman I must have mentioned to her that I was interested in women's' rights in the Ivory Coast. I asked the questions about adultery and I said to her that I wanted to find out about traditional practices since it was not written law – and she gave me all the details on what she knew so I did not mention the court or any hearings".

183. When asked in what context Ms Monekosso informed Ms Diabate that her name would not be mentioned, Ms Monekosso responded in general terms as follows:

> "I told her not to worry. Once I have introduced myself as a journalist I say *'Listen I just want some information – I won't mention your name anywhere – it's not a formal interview'*. This is to put people at ease. Then they would not have to ask me *'Would you publish my name?'*."

184. Ms Monekosso continued:

> "It was better that she should feel I was writing for a female magazine".

185. In our judgment, Ms Monekosso's approach was not only misleading and regrettable but also prejudiced the integrity of the information provided. She should have appreciated that an interviewee would be likely to speak in different terms if told that what she had to say was for the purposes of a court report as distinct from information given in the course of a casual discussion about her work with a friend or acquaintance.

186. Formal interviews attributable to an official speaking on behalf of an organisation for whom she works with the knowledge that the material will be used for the purposes of a Tribunal's proceedings are likely to provide different information from an off-the cuff, unattributed expression of opinion. Far from providing more reliable information, (as Ms Monekosso appears to have thought), we would have thought it is likely to be less reliable; all the more so, if it is the sole source for that information.

187. At paragraph 18 of her first report, Ms Monekosso told us that:

> "Men are not punishable under the criminal law for marital rape or adultery".

188. In the same vein at paragraph 48 of her report Ms Monekosso stated:

> "Men are permitted to rape and abuse their spouses with impunity".

189. By the time of her second report, Ms Monekosso acknowledged that she was mistaken in suggesting that the penal code did not criminalise or punish male spouses for adultery and that:

> "Plainly a male spouse may be criminally liable for adultery …".

190. At paragraph 7 of her first report, Ms Monekosso quoted from a source that asserted that:

> "In secular matters, most cases are adjudicated upon in informal hearings, often convened by the village chief but in any event family and community members may also apply disciplinary procedures, even trying and torturing individuals for serious violations of norms, such as adultery".

191. In fact, the document from which Ms Monekosso was quoting, related to Uganda and as Ms Kiss rightly noted, Ms Monekosso has not since submitted alternative written background evidence demonstrating such practices in the Ivory Coast.

192. This was not the only occasion in the course of Ms Monekosso's first report where her evidence as to the position of women in Ivorian society was sourced from material relating to a different country. At paragraph 20 of her first report, Ms Monekosso had stated as follows:

> "Traditional society in effect seeks to guide women and reinforce their acceptance of living within community norms as second class citizens. There are equally rituals of purification, as well as punitive measures to deter and curb the tendency to deviate from these norms. Every extended family or tribe evolves its distinct ethical code."

193. That contention was sourced as a footnote to her report from the following: *"Crime and African Traditional Religion",* S.A. Adewale.

194. When cross-examined, Ms Monekosso was informed by Ms Kiss, that she had obtained a copy of Mr Adewale's report from which it was clear that it did not relate to the Ivory Coast but to Nigeria. There was no mention of the Ivory Coast in the document. Ms Monekosso was therefore asked on what basis (given that she again referred to the same report at paragraph 11 of her second report) she relied on it as being of probative effect in relation to conditions in the Ivory Coast.

195. Ms Monekosso's response largely evaded the issue. She sought to explain that she worked:

> "… on different ethnic groups across Africa and these ethnic groups often have the same traditions but with different approaches".

196. There may or may not be traditions which cross national borders or ethnic groupings. In some cases, therefore, it may be possible to derive support from information from other countries. Where, however, this is relied upon, we would expect to see the source carefully explained and suitable consideration given as to whether a correlation is established.

197. Ms Monekosso continued that insofar as Mr Adewale's report was concerned he talked about adultery and that:

> "… even if it is not the same practice in the Ivory Coast – in the Ivory Coast itself the practice is different but the logics of punishment are more or less the same".

198. When asked why she had not made these matters clear in her report, Ms Monekosso stated that she worked:

> "… on traditional questions. My aim is towards the '*ethnic*' rather than the '*country*'."

199. Ms Monekosso was aware that Mr Adewale was Nigerian and provided no satisfactory explanation as to how a traditional paper on African Traditional Religion had direct relevance to the appellant who comes from a Muslim background.

200. Although in paragraph 11 of her second report, Ms Monekosso said that she had "no personal knowledge of the rituals or punishments observed by the Muslim community in Odienne" she had then referred to an extract from Mr Adewale's report. When asked to explain how, at paragraph 14, she could thus state that the appellant would suffer "beatings followed by repudiation, ritualistic cutting of the appellant's back to leave scars, indicating that she is an adulteress, ostracism or even honour killing", she failed to provide an adequate response and accepted that she had no specific evidence that the Muslim community in Odienne practised beatings and the treatment that she had earlier identified. She had relied on the information given to her by Miss Diabate although she again accepted that Ms Diabate's information was based "on the people of the North without being specific about the people in Odienne".

201. Ms Monekosso came from Cameroon. We had seen references to Nigeria and Uganda. What Ms Monekosso appeared to be talking about was in global terms over all the continents of West Africa and was thus not limited to the Francophone areas. We were not persuaded that such parallels might properly be drawn, at least without a suitable level of caution, not expressed in her report.

202. Ms Monekosso also told us about the existence of "secret societies" in the Ivory Coast of which we observed there was no mention in either of her reports. Her explanation for its omission was unsatisfactory, saying that it was implied although not expressly stated. We were not told where the implication is said to have arisen.

203. In oral evidence, Ms Monekosso accepted that her reports contained a number of errors and in that regard we are mindful of the observations of the Tribunal at paragraph 58 of SD Lebanon [2008] UKAIT 00078:

> "The fact that an expert has included a quote attributing it to a report which does not in fact include that quote, raises questions about the accuracy of the expert's report in other respects … Experts … can make mistakes. On the other hand we cannot dismiss this error out of hand as a trifling matter either, given the Tribunal is entitled to expect the material quoted in an expert's report is actually taken from the document indicated to be the source of the quote and that sources for any quotations are adequately indicated."

204. We have found that Ms Monekosso's errors, as Ms Kiss aptly described them, went "*beyond the mere typographical*".

205. On 20 June 2008, Senior Immigration Judge Gill adjourned the appeal to give the Home Office time to consider additional evidence lodged by the appellant. SIJ Gill issued specific directions and asked Ms Monekosso to produce her background source. Ms Monekosso's report dated 19 June 2008 did not comply with that observation.

206. It was Ms Kiss who managed to ascertain that the source for the material referred to in paragraph 190 (disciplinary action, even amounting to torture, taken by local chiefs for adultery) related to Uganda to which we have above referred in paragraph 192.

207. Further in her second report, having stated no personal knowledge of the Douala, Ms Monekosso then relied on the report of Mr Adewale which was sourced from an article that was predominantly a polemic about the Yoruba in Nigeria.

208. It is against this background that we assess the evidence of Ms Monekosso insofar as it relates to risk on return. Ms Monekosso is a journalist who uses investigative techniques in order to seek information. When asked if she had published any recent papers since she left university, Ms Monekosso explained that her techniques were simply investigative, describing herself as an investigator. There is something of the campaigner in her, seeking to advance the cause of women in Africa for which she must be applauded but in our view this has led to the loss, in part, of a rigorously objective approach.

209. We find it difficult to follow the logic of Ms Monekosso's uncertainty as to whether the appellant could be punished under Article 391 for adultery given that she was not married under ordinance. If the appellant had entered into a customary marriage, there was no reasonable prospect of her being prosecuted. That Ms Monekosso maintained that the risk was "uncertain" and expressed reluctance to change her position, does not properly reflect the evidence as the Record of Proceedings reveals. Ms Monekosso acknowledged at paragraph 9 of her second report, that there were no reported cases of female spouses being prosecuted for adultery under Article 391.

210. Having finally accepted that the appellant would not be prosecuted by the law, she then insisted that the appellant would face punishment by traditional methods in her home town. She "did not think the law would consider her legally married…" and accepted that the appellant would "not be prosecuted by the law – but by traditional methods in her home town".

211. In that regard we would refer to the following extract from our record:

> "Ms Kiss: You say family and community members may also apply disciplinary procedures?
>
> Ms Monekosso: I made a mistake.
>
> Q. I have obtained the documents in relation to which you have sourced that claim (Ssenyonjo International Law Policy the Family 2007**). It seems you have not added that it actually relates to Uganda why didn't you mention it?**

Ms Monekosso: **I think I made a very big mistake maybe I was doing some research.**

Chairman: **Why did you not bring this matter to our attention of your own volition?**

Ms Monekosso: **It was only this morning when I saw this document – no one asked me to bring it to your attention.**

Ms Kiss: **This is a document upon which you rely – surely you cannot say you didn't know all that was in the document till this morning?**

A. **The contents of that document had nothing to do with what I wrote in that paragraph. This document talks of the Constitution in relation to Uganda and the rights of women, I am talking about traditional punishment - I am so sorry.**

Ms Kiss: **How can you say what you said in paragraph 57 and source it to an unsound document which is talking about another country to that which you are referring to in this report?**

Ms Monekosso: **I made a mistake."** (Emphasis added)

212. We turn now to what appears to have been Ms Monekosso's essential source of information on the Douala, namely that gleaned from Ms Diabate. For the reasons we have given, the weight that we attach to this information is limited. Ms Diabate is the Training Officer of the Association of Women Jurists of the Ivory Coast, a practising advocate of uncertain experience. This does not assist us in evaluating her evidence.

213. Having obtained the evidence of Ms Diabate, Ms Monekosso does not appear to have attempted to verify it through any independent sources. When referred to the US State Department Reports, in which there were no known incidents of resorts to physical punishment, Ms Monekosso's attitude was somewhat dismissive.

214. She admitted that she was mistaken in relation to earlier evidence that women in the Ivory Coast did not have property rights.

215. Ms Monekosso continued that there was:

> "… something I noticed in the Civil Code. Ms D's husband's age is very significant indeed. In 2003 he was 70 meaning today 75 and if one considers the birth certification in the olden days he could be 80 but the 1964 Law which abolished polygamy and brought about civil marriage, did not abolish the existing polygamous marriage or the customary marriage".

216. At this point in her evidence, Ms Monekosso was reminded that the appellant's marriage took place in 2004/2005 and therefore the Marriage Act of 1964 would not have permitted a polygamous marriage that post-dated it.

217. We are thus reinforced in our view that Ms Monekosso's evidence should be approached with care and we are not persuaded (unless the legal provisions permitting it were strictly proved) that a marriage celebrated after 1964 might be a lawful polygamous marriage, even if the first marriage had been conducted before 1964."