CONSEIL DE L'EUROPE

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COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

FORMER SECTION IV

CASE OF N. v. FINLAND

(Application no. 38885/02)

JUDGMENT

STRASBOURG

26 July 2005

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of N. v. Finland,

The European Court of Human Rights (Former Section IV), sitting as a Chamber composed of:

Sir Nicolas BRATZA, *President*,
Mr J. CASADEVALL,
Mr M. PELLONPÄÄ,
Mr R. MARUSTE,
Mr S. PAVLOVSCHI,
Mr L. GARLICKI,
Mrs E. FURA-SANDSTRÖM, *judges*,
and Mr M. O'BOYLE, *Section Registrar*,

Having deliberated in private on 5 July 2005,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 38885/02) against the Republic of Finland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a national of the Democratic Republic of Congo ("the applicant") on 31 October 2002.

2. The applicant, who had been granted legal aid, was represented by Mr Thomas Bergman, a lawyer for the Refugee Advice Centre in Helsinki. The Finnish Government were represented by their Agent, Mr Arto Kosonen, Director, Ministry for Foreign Affairs.

3. The applicant alleged that he would face inhuman treatment contrary to Article 3 of the Convention if deported to the Democratic Republic of Congo ("the DRC"). He further complained under Article 8 of the Convention that his deportation would violate his right to respect for his private and family life.

1. *The admissibility proceedings*

4. The application was allocated to the Former Section IV of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1.

5. The President of the Chamber and subsequently the Chamber decided, on 5 and 12 November 2002 respectively, to apply Rule 39 of the Rules of Court, indicating to the Government that it was desirable in the interests of the parties and the proper conduct of the proceedings not to expel the applicant pending the Court's decision.

6. By a decision of 23 September 2003, the Court declared the application admissible.

2. The proceedings on the merits

7. Having considered the parties' initial written submissions on the merits (Rule 59 § 1) the Court decided, on 3 February 2004, to pursue its examination by taking oral evidence in Finland. It appointed as its Delegates Judges Lech Garlicki and Elisabet Fura-Sandström.

8. The fact-finding mission took place on 18-19 March 2004 in Helsinki. The Delegates were accompanied by the Registrar, Mr O'Boyle, and several members of the Registry. There appeared before the Court's Delegation:

(a) *for the Government*

Mr A. KOSONEN, Director of the Unit for Human Rights Courts and Conventions in the Ministry for Foreign Affairs, *Agent*
Ms Annikki VANAMO-ALHO, Director of the Refugee and Asylum Affairs Unit in the Ministry of the Interior,
Mr Tuomas HELINKO, Senior adviser in the Refugee and Asylum Affairs Unit of the Ministry of the Interior,
Ms Päivi ROTOLA-PUKKILA, Legal Officer in the Unit for Human Rights Courts and Conventions of the Ministry for Foreign Affairs;
Ms Virpi KOIVU, official in the Unit for Public International Law, Ministry for Foreign Affairs, *Advisers*

(b) *for the applicant*
Mr Thomas BERGMAN, LL.M., of the Refugee Advice Centre, *Counsel*,
Ms Sari SIRVA,
Ms Päivi KESKITALO, and
Ms Jenny WIDÉN, lawyers at the Refugee Advice Centre, A*dvisers*

9. The Court took testimony from the applicant, his common-law wife E., Mr Matti Heinonen and Ms K. K.

10. Following the Court's fact-finding mission the applicant and the Government each filed further observations on the merits. The Chamber having decided, after consulting the parties, that no hearing on the merits was required (Rule 59 § 3 *in fine*), the parties replied in writing to each other's observations.

11. On 1 November 2004 the Court changed the composition of its Sections (Rule 25 § 1) but this case remained with the Chamber constituted within former Section IV.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

12. The applicant, born in 1972, originates from the former Zaire (currently the DRC). He arrived in Finland on 20 July 1998 and immediately applied for asylum.

A. The applicant's asylum interview in Finland

13. On his arrival in Finland the applicant filed an asylum request written in French, stating that he had left the DRC 13 months ago; that he had been trained to join the presidential guards and had been working as an informant in Office D of the special force responsible for protecting the then President Mobutu (*Division Spéciale Présidentielle*; "the DSP"); that he had belonged to the President's and the DSP Commander-in-Chief's inner circle; that he had been arrested in Angola while in the possession of a DSP badge and a photograph of Mobutu; that his life was in danger on account of his position and his Ngbandi origin; and that Laurent-Désiré Kabila's regime (who had seized the power in the DRC in May 1997) had put out a warrant of arrest on former DSP agents. The applicant named three high-ranking officers within the DSP whose grades he also indicated.

14. According to the record of the asylum interview with the applicant on 22 July 1998, it was conducted with the assistance of a French interpreter. The applicant stated that he had been born on 2 December 1972 in Gbadolite in former Zaire; that he was a Christian of the Ngbandi tribe; that he had been a DSP agent by profession; that he had resided at *Pavillon* no. 22 at the presidential compound Camp Tshatshi in Kinshasa; that he was single; that his mother tongue was Lingala and that he also knew French, Kigongo and Swahili. He indicated the names of his parents and sister. He had gone to elementary and high school for a total of 12 years and had undergone a one-year training programme to become a *garde civile*. He had performed his military service in 1989-90, receiving the grade GT 2 (regional guard, class II). He also indicated his salary while working in the DSP.

15. The applicant further stated that he had been an asylum seeker in the Netherlands from 9 August 1993 to 26 October 1995, when he had been deported. On his return he had been living at Camp Tshatshi together with the President's nephew, a named general. He had had at his disposal two rooms, a living room, a shower and parking spaces for his two cars. He had also had a considerable amount of money at his disposal.

16. Asked why he did not carry a passport on arriving in Finland, he had stated that it had remained with a (named) Commander in the President's administration when the applicant had left the DRC.

17. Asked to describe his departure from the DRC, the applicant stated that he had left Kinshasa by boat to go to the airport in Brazzaville (the Republic of Congo) on 17 May 1997. At the end of June 1997 he had continued by train to Point Noir and from there by boat to Cabinda in Angola. There he had been staying for three months in order to acquire an Angolan identity card; he had been living in a house owned by a local. He had then travelled to Luanda by plane; he had run into some difficulties as he had not been speaking Portuguese; he had been arrested but had been allowed to continue his journey after he had paid some money. He had stayed in Luanda in the Petragol neighbourhood for one month, following which he had been detained in the Viana prison for three months (in October 1997), the authorities having taken him for a soldier in Mobutu's forces as he had been unable to speak Portuguese. During his detention a rifle had been used to hit him in the shoulder and he had been forced to dig graves. In 1998 he had been transferred to an army prison in Bengela, where he had spent a further five months. Prisoners had been forced to take part in armed fighting but the applicant had managed to avoid this due to his injured and infected shoulder. The fighting had occurred at the diamond mines where Angolan rebels (the Savimbi guerrilla) had been fighting President José Eduardo do Santos's troops.

18. After a fellow detainee, Antonio, had promised to help him out of prison the applicant had arrived in the Namibian border town Santa Clare on 14-15 July 1998. With the assistance of a "merchant" he had left for South Africa through Namibia on 16-17 July, travelling under a cover on a truck. From Johannesburg he had departed for Amsterdam on a KLM flight on 19 July. The airport staff had helped him embark on the plane even though he had possessed no documents. From Amsterdam he had continued on a KLM flight to Helsinki on 20 July. Antonio had arranged for someone to explain to the applicant how to get to Helsinki. In Amsterdam the applicant had been able to transfer to the plane for Helsinki simply by showing his boarding pass.

19. As for his reasons for leaving the DRC in 1997, the applicant stated that when President Mobutu had fled and had been replaced by Laurent-Désiré Kabila, the latter's regime had started killing all who had been working under Mobutu. Were the applicant to return to the DRC he too would be killed as a former DSP agent. In addition, he was of the Ngbandi tribe to which Mobutu also belonged.

20. Asked how he had organised his trip the applicant stated that Antonio had paid USD 15,000 for the whole "package". The applicant had possessed some money of his own as well as diamonds. Before leaving the DRC he had stolen diamonds from "the office of the Lebanese"; actually, it

had not been a theft but "a question of saving a life". The diamonds had belonged to Mobutu's son; the applicant had sold them in Angola for USD 20,000, aided by a friend named Roberto. The applicant had not seen which country's passport Antonio had organised for him to use.

21. Asked about his political activities the applicant stated having worked as a secret agent for Mobutu's army from 1990 (in the office of the DSP and Office D of the *Bureau d'Intelligence*). Under the cover of a civilian in the street he had been listening in on the opposition's criticism of Mobutu and had denounced various individuals critical of the regime. In 1993 the (named) Commander of Office D had sent him to the Netherlands to denounce individuals criticising Mobutu. After he had reported their names to the Commander their families in Zaire had been apprehended. The applicant had travelled to the Netherlands on an Angolan passport under the name of Alexandre.

22. Asked whether he had ever been convicted and sentenced, formally wanted by the authorities or tortured or threatened, the applicant answered in the negative.

B. The refusal of asylum in the Netherlands

23. Responding to a request for assistance from the Finnish authorities, the Dutch Ministry of Justice, in December 1998 confirmed – after having matched the applicant's fingerprints – that he had applied for asylum in the Netherlands in 1993, that his request had been refused in December that year and that his objection to the refusal had been declared unfounded in April 1994.

24. It emerges from the material forwarded by the Dutch authorities that when seeking asylum in 1993 the applicant had referred to his father as a military official; that from 1991 the two had been leaking information about the DSP to the opposition group UDSP and had eventually been arrested; that the applicant had been playing on the same football team as President Mobutu's son; that on 27 July 1993 he had been granted leave to play a match after which he had managed to escape during a meal with the team; and that afterwards he had travelled to the Netherlands via Bandundu, Ilebo, Lumubashi, Lusaka, Namibia and South Africa.

25. The Dutch authorities had concluded that the applicant's account in 1993 had not been credible.

C. The refusal of asylum in Finland

26. On 6 March 2001 the Directorate of Immigration (*ulkomaalais-virasto, utlänningsverket*) ordered the applicant's expulsion to the DRC and prohibited him from re-entering Finland, or from entering Sweden, Norway, Denmark or Iceland for two years. The Directorate found the applicant's

account of his having belonged to President Mobutu's and the DSP Commander's inner circle not credible. The applicant had also failed to prove his identity. If returned, the applicant would not face any real risk of treatment contrary to Article 3 merely on account of belonging to the same tribe as the former President or having worked as a lower-ranking official in his administration. As far as the Directorate was aware, only higher-ranking officials who had been abusing their office risked prosecution by the Kabila regime. That regime had actually been quite accepting of officials having worked for Mobutu and many such officials of senior rank had already returned to the country. The regime in the DRC had changed again in 2001, following which the general situation in the country had improved.

27. The Directorate of Immigration further noted that the applicant had been found guilty on two counts of shoplifting in August 1999.

28. The applicant appealed to the Administrative Court of Helsinki on 26 April 2001.

D. The proceedings before the Helsinki Administrative Court

29. At the hearing before the Administrative Court on 17 May 2002 the applicant – assisted by counsel and an interpreter – stated that he was the son of an officer in the DSP and had been sent to military service at the age of fourteen. He had passed his school examination in 1990. His first missions for the DSP had involved infiltrating dissident student associations at universities. About 15 secret agents had been operating at different faculties. During a mission to Lumumbashi he had been investigating cobalt smuggling to South Africa. He had travelled to Johannesburg as a "student" and had denounced someone who had eventually been arrested. He had sworn two oaths of loyalty, one for the FAZ (*Forces Armées Zairoises*) and a further one for President Mobutu and the DSP. The latter had been responsible for the President's security and had been led by a general and his deputy, both of whom the applicant named. The President's son Kongulu, a captain by rank had been N.'s friend; they had slept in the same *pavillon* (no. 22 in the first zone of Camp Tshatshi), with the President's uncle Zimanga Mobutu and his children. The first zone of the compound had comprised altogether 35 *pavillons*, intended only for the President's family. The compound had also comprised a second, less protected outer zone. N. drew a map of the compound to show where *pavillon* no. 22 had been located in relation to the presidential quarters. He also drew a map of the presidential offices as well as of those of the DSP and FAZ. He indicated on the map the location of the President's special entrance and exit as well as the football field on the compound.

30. After the applicant had returned from South Africa the DSP commander had assigned him for a mission to the Netherlands. After he had disposed of his Zairean passport in Johannesburg "people smugglers" had

handed him a different one. The aim of this mission had been to denounce people who were falsifying Mobutu's signature to collect money. Moreover, as President's Mobutu's son had not been allowed to enter Belgium to trade in cobalt and diamonds the applicant and other DSP agents were assigned to organise his illegal entry into Belgium on a regular basis so he could do his business. A further aim of this mission had been to denounce dissidents in the Netherlands so that reprisals could be taken on their families in Zaire.

31. The applicant had been escorted out of the Netherlands by police towards the end of 1995. During a further DSP mission to the region of Goma, where troubles had begun with Rwandan refugees entering Zaire, he had found out that Laurent-Désiré Kabila's rebel troops had been infiltrating and poisoning Zairean soldiers.

32. Around the end of 1995 it had been discovered that information on President Mobutu's health was being leaked to Kabila's troops, involving a suspected traitor within DSP. The main suspect – the head of the postal and telecommunications services who had masterminded the tapping of mobile phones – had eventually fled to USA but had returned when Kabila had taken over power.

33. As for the events surrounding the overthrow of President Mobutu, the applicant had been woken up by DSP agents during the night 16-17 May 1997 as the DSP could no longer protect the President against Kabila's troops. The President had told his security staff he would leave for Gbadolite the next morning and that a general within FAZ/DSP "had to die" as he had asked the soldiers to lay down their guns and surrender to Kabila's troops. A general had been appointed Prime Minister during the emergency state. President Mobutu had told his son Kongulu that he should leave the country as the last member of their family. The applicant had been with Kongulu in the presidential *Palais des Marbres* when word came that the general in question had been killed. In the morning of 17 May the rebels had entered Kinshasa. The DSP commander had already left for Brazzaville after dispatching the President by plane to Gbadolite. The applicant and others (some 600 persons in total) had crossed the river to escape from Kinshasa to Brazzaville in *canoës rapides*. From Brazzaville they had planned to fly to Gbadolite. From the Brazzaville airport ("Maya-Maya") Kongulu had telephoned to ask for a plane to pick them up. The pilot had refused to fly the plane out of Brazzaville as it had been the property of the Republic of Congo. The group had then decided to split up and to take different routes. The applicant and two or three others had gone by train to Pointe Noire and from there by boat to Cabinda in Angola. As he had spoken no local language, he had found a Lingala-speaker and had been able to procure an Angolan identity document paper. The group had nonetheless been arrested at the Cabinda airport as they spoke no Portuguese. Immigration officials had detained them in a room but after the group had bribed a commander they had been able to leave by plane to

Luanda. It had been quite common for Zaireans to enter Angola by bribing border officials.

34. In Luanda N. had failed to obey a police officer in the street since he had not understood Portuguese. He had been detained at the Viam police station, where he had been assaulted. Marks of this were still visible on his body. He had been transferred to the Bengela prison where he been forced to dig graves. Some prisoners had been "recruited" to fight in the army of the Angolan leader Eduardo against the rebel leader Savimbi. N. had avoided this, as he had been injured in the shoulder and could not carry a fire arm.

35. The applicant had eventually been able to bribe a Lingala-speaking captain to let him "escape". His friends had brought the necessary money and the captain had accompanied him to Santa Clara at the Angolan-Namibian border. In Santa Clara, Angolan shop owners had organised "people smuggling" to Johannesburg via Windhoek.

36. The DSP agents had not intended to leave Zaire for good. When President Mobutu had been forced to escape to Morocco to avoid being taken hostage by pro-Kabila agents, N. had decided to go to Johannesburg to join the DSP commander and another DSP general, following which they had repeatedly re-entered Zaire to lead troops in the fighting against Kabila's army. The two generals had eventually been arrested on the orders of President Mandela following a request by Kabila.

37. Replying to questions from his counsel, the applicant further explained that President Mobutu had left for Morocco in a Russian cargo plane used for smuggling weapons to the rebel leader Savimbi in Angola. A Mercedes-Benz car had been driven onto the plane so the President could sit properly. While in Brazzaville the applicant and others in his group had watched on CNN how civilians in Kinshasa had been showing the houses of Mobutu's supporters to the rebels. The applicant would have been killed instantly had he returned then. Mobutu supporters who had been denounced had either been shot, burned alive by being placed in a car tyre set on fire or burned inside cars, as CNN had shown. If the applicant were to be returned to the DRC, those in power and even civilians would recognise him and he would be "attacked" since he had been close to Mobutu. If returned to DRC, a soldier such as himself could even be killed by DSP soldiers currently protecting President Kabila.

38. Replying to questions from the lawyer for the Immigration Board, the applicant reiterated the name of President Mobutu's son: Kongulu (a.k.a. "Saddam Hussein"). The applicant further contended that he had sought asylum in the Netherlands for infiltration purposes.

39. When asked by a judge whether he had had "his" passport on him when leaving Johannesburg for Amsterdam, the applicant answered in the negative. He had paid one of the "people smugglers" who had been working with airport staff to let him go through to the gate only with a boarding pass.

40. N. had originally wished to go to Australia but this had not been possible to organise due to the number of transits and the need to show a passport. He had not wished to go to France, where many Zaireans were living and he could have been recognised as someone who had been close to Mobutu. The "agent" organising his trip had suggested Finland and the applicant had accepted. As the itinerary had been Johannesburg-Amsterdam-Helsinki he had received two boarding passes already in Johannesburg. The name on his boarding pass had been Joao or something to that effect. There had been no need for him to show a passport. He had financed the ticket by having sold diamonds in Angola. The President's son had given him diamonds before they had parted. In Amsterdam a person had showed the applicant to the gate for the plane for Finland.

41. The applicant had not been in touch with his mother, father or sibling as the phone numbers had changed with the new Government.

42. Questioned further by another judge the applicant stated that the President's son had authorised DSP agents to take diamonds from the mines. He had been able to cross the border to Angola without any verification taking place. When he had been detained, the diamonds had been in his briefcase which had been locked with a code. He had carried it personally to Luanda and had left it in a house there. When he had been arrested the other members of his party had taken care of his belongings, including the briefcase. The diamonds had been unpolished. As he had had to bribe persons and help various friends out he had sold the last ones in Johannesburg. Their total value had been at least USD 45,000. He had had "a little bit" of money left when he arrived in Finland.

43. Questioned further by the third judge the applicant explained that his military service had lasted nine months in total; he had been trained as a commando in DSP. After this he had returned to school. His training to become a *garde civile* had occurred at the age of 17-18. After nine months of training he had returned to DSP and had been expecting to be promoted to lieutenant. He had grown up with the President's son Kongulu from the age of three, when he had arrived in Kinshasa. Kongulu, two years older, had died in 1999. The applicant had not sought to contact Kongulu's family and did not know their whereabouts. Kongulu had had three brothers, one of whom had died in AIDS. The applicant had been sent to undergo military service as a punishment for being stubborn.

44. Questioned about his work and life in Finland the applicant stated that while he was volunteering in the Helsinki refugee reception centre, he was afraid of making friends with other Congolese as they might find out that he had been in DSP and take revenge on him. Two other nationals of the DRC had received residence permits in Finland.

45. In its final pleadings to the Administrative Court the Immigration Directorate considered the applicant's account not credible. There were significant contradictions in his account of his military service as well as

discrepancies between the asylum record and his oral statements. While he had recounted many facts, he was not generally credible.

46. Counsel for the applicant underscored that the asylum record from the interview on 22 July 1998 had been very meagre. In his oral statement the applicant had given a detailed and coherent account and his credibility was beyond doubt. The Immigration Board was claiming on very weak grounds that he was not credible. If there was any hesitation as to his credibility, the scales should tip in his favour. He risked persecution in DRC due to his nationality, ethnicity and political opinion. He not only feared ill-treatment emanating from the current regime but also from individual civilians seeking revenge. As he had no home to return to in the DRC he would be easily recognisable as a stranger and risk being questioned. The general human rights situation in the DRC was poor: security forces were carrying out killings and torture was wide-spread.

47. Counsel noted that all four interpreters had experienced difficulties following N's vivid account. The asylum record indicated wrongly that the applicant had been living in the presidential palace whereas he had been living within the presidential compound.

48. On 20 June 2002 the Administrative Court refused the applicant's appeal by two votes to one. The majority noted that he had been appearing under different names. As an asylum seeker in the Netherlands he had stated that he had been a player on the DRC national football team led by President Mobutu's son. The applicant's father was said to have been working in the DSP. When seeking asylum in Finland the applicant had stated that he had worked in the DSP; that he had formed part of Mobutu's inner circle; that he had been the childhood friend of Mobutu's son; that he had been sent to the Netherlands to denounce asylum seekers from the DRC; and that he had assisted Mobutu's son in entering Belgium from France. At the oral hearing the applicant had provided a fairly extensive and detailed account of his activities in the DRC following his removal from the Netherlands as well as of his escape via Brazzaville to Angola during Kabila's coming to power. The account of his escape via Namibia and Johannesburg in 1998 had resembled significantly the account he had provided to the Dutch authorities when entering that country in 1993. The Administrative Court did not find credible the account of his itinerary in 1998, including his having been able to embark on the plane from Johannesburg without a valid ticket and passport. In those circumstances and considering that it had not been possible to verify his true identity the Administrative Court was not convinced of his general credibility. Moreover, the information he had presented regarding the DSP, Mobutu's son's family life and the presidential compound did not in itself show that the applicant had been in the DRC in such a position as to be of particular interest to the current regime. Hence he was not likely to have any justified

fear of being persecuted or subjected to inhuman or degrading treatment or to any other serious violation of his rights, if returned to his country.

49. The dissenting judge found the applicant's account inconsistent despite its richness in detail. It did not therefore permit the drawing of any reliable conclusion as to his relationship with President Mobutu's administration or as to whether he had worked in the DSP and, if so, in what position. Considering his detailed account the applicant could, on the one hand, have belonged to Mobutu's and his relatives' inner circle without having had any direct contact with the President himself. On the other hand, the applicant could also have received the information regarding Mobutu's administration from other sources. As his identity and background had not been convincingly established it could not be assessed whether the reason for his departure from the DRC had been persecution within the meaning of section 30 (1) of the Aliens Act. He could therefore not be granted asylum. Despite the lack of clarity of his account it could not be excluded however that he had been one of Mobutu's personal guards. This lack of clarity should be interpreted to the applicant's benefit. According to the UNHCR Instructions of January 1998, soldiers of the DSP were assessed as being at a particularly significant risk of being subjected to inhuman or degrading treatment or other serious violations of their rights. The applicant therefore remained in need of protection within the meaning of section 31 of the Aliens Act and should have been granted a residence permit to that effect.

50. The dissenting *référendaire*, relying on essentially the same reasons as the dissenting judge, concluded that the applicant should have been granted asylum as being in need of protection from persecution within the meaning of section 30 (1) of the Aliens Act.

51. The applicant applied to the Supreme Administrative Court for leave to appeal asked for stay of enforcement.

E. The applicant's intended removal

52. On 30 October 2002 the applicant was detained by the police and informed that he would be deported on 5 November 2002. His counsel was informed that the Supreme Administrative Court would not grant or rule on his request for a suspension of the deportation order. He was later informed that the applicant would be removed from the country on 6 November 2002.

53. On 5 November 2002 the Government of Finland decided not to deport the applicant to the DRC until the Court had examined the applicant's application, following the Court's interim measure under Rule 39 of the Rules of Court (see § 5 above).

F. The applicant's common-law wife E.

54. The applicant and his common-law wife E. met each other in 1999 in Helsinki while they were both asylum seekers. They lived together in a reception centre for nine months until her deportation on 22 February 2000, her first asylum request having been refused.

55. In April 2002 E. visited the applicant for five days after her prohibition on re-entry had expired. As a result of this visit E. became pregnant. After this they kept up the contact by phone and mail.

56. On 28 October 2002 E. arrived in Finland and filed a fresh request for asylum the same day. She moved in with the applicant in the reception centre in Helsinki. On 31 October 2002 the Directorate of Immigration refused the request as being manifestly ill-founded.

57. In January 2003 a child was born to the applicant and E. The applicant's acknowledgement of paternity was confirmed by the Helsinki District Court in February 2003.

G. Proceedings before the Supreme Administrative Court

58. On 4 March 2003 the Supreme Administrative Court granted the applicant leave to appeal but went on to refuse his appeal without an oral hearing. It found it established that on 10 August 1993 N. had applied for asylum in the Netherlands, claiming to be a football player and alleging that his brother and father had been working in the DSP. On his arrival in Finland on 20 July 1998 he had filed a hand-written statement in French to the effect that he had left the DRC 13 months earlier (i.e. in June 1997) as President Mobutu and his close entourage had been chased out of the country. In Angola he had been detained because he had been in possession of a badge issued by the DSP and a photograph of President Mobutu. In his asylum interview on 22 July 1998 the applicant had claimed to have been a secret agent in the DSP and an infiltrator, whose actions in the Netherlands had led to the arrest of asylum seekers' family members in the DRC. Following his deportation from the Netherlands he had allegedly been living with the nephew of the former President.

59. The applicant had claimed to have been detained for eight months in Angola, whereas in Zaire he had not been arrested, tortured, threatened. Neither had any warrant of arrest been put out in respect of him.

60. When arriving in the Netherlands the applicant had presented a identity document issued in former Zaire on 25 October 1984, indicating as his date and place of birth 2 December 1972 in Kinshasa. He had claimed to have gone to school in Kinshasa in 1978-1991. In Finland he had presented no identity document but had claimed to have been born in Gbadolite. He had allegedly gone to school for twelve years and had performed his military service in Kinshasa in 1989-90.

61. According to the records, the applicant had appeared under four different names. In his appeal to the Administrative Court he had explained the reasons for using those different names. The Supreme Administrative Court nevertheless considered that his identity and ethnic origin had remained unclear, which weakened the credibility of his account.

62. The Supreme Administrative Court further noted that his statements about the reasons for his arrests in Angola had differed. In particular, his allegation that he had, on that occasion, been carrying a DSP membership card and a picture of President Mobutu was not credible. Neither did the Supreme Administrative Court find credible all aspects of his account of his journey to Finland.

63. In sum, the applicant had not shown in a credible manner that he had remained in the DRC until 17 May 1997. Neither had it been established where he had been residing between his expulsion from the Netherlands in October 1995 and his arrival in Finland in July 1998. Even assuming that he had been sent to the Netherlands to infiltrate other asylum-seekers from his country, the Supreme Administrative Court did not find it credible that he would have gone there as an infiltrator in the manner recounted by him had he really belonged to Mobutu's close entourage. Taking all the elements into account, it was justified to suspect that his various accounts were not based on facts which had actually occurred. This also weakened his overall credibility. His account as presented to the Finnish authorities could not therefore be used as the sole basis for the court's decision.

64. The five judges on the Supreme Administrative Court unanimously concluded as follows:

> "Taking into account the recent developments in the DRC which have taken place since the applicant has allegedly left the country, the period of time which has passed since his departure, the significant lack of credibility in respect of his allegations concerning the risks he will be facing on his return to the DRC, the fact that he has not even claimed that he has had any contact with the local authorities who have been in office since the change of the regime on 17 May 1997 or that he would have come to their knowledge, the Supreme Administrative Court cannot consider that the applicant is facing a real risk of becoming a subject of interest to the present rulers. Therefore, [the applicant] does not have a well-founded fear of persecution for reasons of his ethnic origin, membership of a particular social group or political opinion within the meaning of Section 30, subsection 1, of the Aliens' Act. Thus, he cannot be granted asylum. Even though the general security situation in Kinshasa, the capital of the DRC, is still very delicate, there is no well-founded reason to assume that [the applicant] would face a risk of being subjected to serious human rights' violations or to inhuman or degrading treatment in his country of origin. Thus, he cannot be issued a residence permit on the basis of his need of protection either."

65. The Supreme Administrative Court furthermore found that the applicant's family life as established in Finland was not such as to attract protection under Article 8 of the Convention, given that neither parent had a valid residence permit or any other connection with Finland.

H. Ms. K.K.

66. K.K. arrived in Finland on 14 February 2002 and filed for asylum or a residence permit on humanitarian grounds on account of her background in the DRC. She claimed to have been a soldier in the DSP. She had been arrested following the murder of President Laurent-Désiré Kabila in January 2001. She had been detained for some nine months during which she had allegedly been raped repeatedly by guards. Her request was refused by the Directorate of Immigration on 21 November 2002. She then appealed to the Helsinki Administrative Court which held an oral hearing on 30 January 2004.

67. On 8 March 2004 the Administrative Court, by two votes to one (with the *référendaire* also dissenting), upheld the refusal of asylum but referred the question of a residence permit back to the Directorate, instructing it to issue K.K. with such a permit. The Administrative Court reasoned as follows:

> "The appellant is no longer likely to be arrested in her country of origin on account of the investigations into the murder of (President) Kabila. The appellant's personal prison experiences do not result from (her) belonging to a (specific) group in society or from her political views. Hence she cannot be granted asylum.
>
> Following the change of President in (the DRC) in January 2001 the general security and human rights situation in the country has improved. The appellant has stated having resided in Kinshasa prior to leaving the country. The Kinshasa area is relatively calm. The fact that armed confrontations are still occurring, particularly in the Eastern parts, and that the country's human rights situation is not yet stable, is not as such a sufficient ground for granting (the appellant) international protection. When, however, account is taken of the entirety of the circumstances as recounted by the appellant as well as of the information available from international news sources regarding the treatment of soldiers serving the Mobutu regime, it is justified to find that the applicant might, on account of her military background and her past experiences, risk being subjected to inhuman or degrading treatment in her country of origin. (She) is therefore in need of protection within the meaning of section 31 of the Aliens Act and shall, for this reason, be issued with a residence permit."

68. The dissenters found, even assuming K.K.'s account to be truthful, that there was no reason for supposing that she would still risk ill-treatment or other serious violations of her rights if returned to the DRC. The dissenters relied on the progress which had taken place in the country as well as on the fact that she had been of no particular interest to the authorities following the *coup d'états* in 1997 and 2001. She was therefore not in need of protection.

69. In a letter of 16 April 2003 submitted to the Court in support of the applicant's case Ms. K.K. stated that she had formed part of the DSP as first sergeant-major based at Camp Tshatshi in Kinshasa. She had been working in the reconnaissance unit of the Camp Commander (*au service des renseignements pour la sécurité des militaires*). She had been arrested on 20

March 2001, a few days after the then President Laurent-Désiré Kabila had died together with all soldiers of the (former) FAZ who had been on duty during the *coup d'état* on 15-16 January 2001 (when President Kabila had been assassinated). After several former military officials had been killed in prison the applicant and her family had decided to seek asylum abroad.

70. K.K. confirmed having worked with the applicant, whom she had recognised as having been a military official dealing with security matters in the General Staff of the DSP (*militaire évoluant à la sécurité d'état major de la DSP*).

71. At the hearing before the Court's Delegates in Helsinki (see below) K.K. handed in a copy of her military passport (*carte d'identité de service pour les forces armées zairoises*) indicating her grade as first sergeant-major. She also handed in some photographs depicting herself and other soldiers in a uniform specific to the DSP.

I. Appeal proceedings in the case of E.

72. On 17 June 2003 the Helsinki Administrative Court refused E.'s appeal against the refusal of asylum or a residence permit on humanitarian grounds. It quashed the decision of to expel E. and returned the matter to the Directorate of Immigration as the child born to E. in Finland had not been covered by the initial decision.

73. In a further decision of 16 July 2003 the Directorate of Immigration refused E. and her new-born child a residence permit and ordered their expulsion to Russia.

74. Following E.'s appeal the Administrative Court, on 10 October 2003, stayed enforcement of the expulsion order.

75. On 10 August 2004 the Administrative Court refused E.'s appeal. It found, *inter alia*, that in the circumstances at hand E. and her family could, in the first place, be expected to settle and lead their family life in Russia, that being the country of origin of E., her child with the applicant and her two other children in Russia.

76. E.'s further appeal remains pending with the Supreme Administrative Court.

J. Oral evidence before the Court's Delegates

1. The applicant

77. Before the Court's Delegates the applicant maintained that he had been working for the DSP which had sent him to be trained in the *garde civile*. He stated the names and ranks of the commander of the *garde civile* and the Headquarters of the FAZ, of which the DSP had formed part.

Officials in the DSP had been better paid than ordinary soldiers in the FAZ. The applicant's father had been one of Mobutu's body guards.

78. The applicant had been gathering information used for protecting President Mobutu. He had formed part of the bataillon de sécurité which had been responsible for that protection. Some DSP members had been responsible for guarding the President physically, whereas others had been assigned to information-gathering. The applicant had been working in the DSP headquarters. He had been infiltrating students at different universities and gatherings of Mobutu opponents. On each occasion there had been either six or twelve DSP members attending, in civilian clothes but armed. They had interfered with the gatherings and had identified the leaders who needed to be killed. After the applicant had denounced the persons in question other agents, specialised in torture, had taken over. His reports to his superiors, which had always been oral, had been forwarded to the President.

79. The first (inner) zone at Camp Tshatshi had accommodated the presidential office as well as the headquarters of the Defence Department and the DSP. The applicant had been living with the children of the President's older brother. The residential premises within the first zone had served as hotels previously. The applicant had had three service vehicles at his disposal.

80. The applicant had met K.K. for the first time around 1989. He had taken the initiative to address her as she had been obliged to respect him as the son of an officer. He had not been working closely with K.K. as she had formed part of the *garde républicaine d'honneur* which had been in charge of the security of the Camp Tshatshi, its soldiers and families and had been led by a different commander. As he had been working in the DSP headquarters he had effectively occupied a higher position than K.K. Unlike the applicant, she had been living in the second zone of the compound. He had not had any social contact with K.K. Even though she had been of higher rank, she and other officers had been required to show respect for the applicant and others forming part of the Mobutu family.

81. The applicant confirmed having filed for asylum in the Netherlands in 1993 in order to carry out his mission for the DSP which had been to infiltrate DRC asylum-seekers critical of Mobutu in order to denounce them to the Mobutu administration. He had denounced more than ten persons in this way. He had not been the only agent involved in such activities in the Netherlands.

82. At the time of seeking asylum in the Netherlands the applicant had stated being a member of the Basaït tribe "for camouflage purposes". For the same purposes his whole account to the Dutch authorities had been untruthful.

83. The applicant confirmed being able to speak French, English, Swahili and some Kikongo.

84. The applicant had been issued with an identity card by the FAZ, indicating that he had been working in the DSP. Given his urgent departure from Kinshasa in 1997 he had not taken along that card or any other personal documents. He had only taken the diamonds. At any rate, as at the time passports were being handed out only for travel to specific locations he had not had a passport at hand.

85. In Angola he had "purchased" an Angola identity card. Later, in connection with "paying" for being released from prison he had been able to "purchase" an Angolan passport. The Angolans were suspecting all individuals originating from former Zaire of supporting the rebel leader Savimbi in the fight against the Angolan President Eduardo. Even with his Angolan identity papers he could not avoid being arrested as he had addressed the police officers in Lingala and they immediately suspected his papers had been falsified.

86. As to the certificate of his degree (*brevet*) which he had brought with him to Finland by hiding it in his shoe, the applicant claimed it had been seized by the Finnish border police never to be seen again.

87. As far as the applicant was aware, no warrant of arrest had been issued in his regard in the DRC.

88. The applicant's uncle, a general, had been the commander of the DSP. They had been in contact both professionally and within the family circle. The applicant's father had been commander of the information service.

89. As the Supreme Administrative Court's refusal of his appeal had been reported in newspapers and on the Internet the whole Congolese community in Finland had learnt of the reasons underlying the applicant's asylum claim.

90. The applicant had not had any contact with his family (parents, sister or other relatives) since the day when he had left Kinshasa for Brazzaville in 1997. The new regime had changed all telephone numbers and the applicant had not been able to make contact.

91. When the applicant and E. had met in 1999, E. had asked about his background in the DRC. He had told her he had been a friend of the President's son but had declined to elaborate, telling her such information was secret. If they were to go to Africa one day, he would tell her more.

92. The applicant stated that the interpreter assigned to him had found it difficult to translate the applicant's account during his asylum interview on 21 July 1998. This had become obvious to the interviewing police officer but the applicant had not raised the point at the time.

93. When the applicant and K.K. had met again in Finland he had asked K.K. to send a letter to the Court after their respective asylum claims had been refused. He had not assisted her; someone else had helped her write the letter in French.

2. The applicant's common-law wife E.

94. E. confirmed being a Russian citizen. She had known the applicant for some five years. She had one child by the applicant and two by her ex-husband. After having been removed from Finland she had remained in contact with the applicant by telephone and correspondence. The applicant had never disclosed anything to her about his life or family in the DRC. When she had asked him about his work there, he had declined to reveal anything, saying the information was secret. For the same reason, he had also declined to enter into any details regarding his mission to the Netherlands. Some time before her removal from Finland in 2000 he had told her he could not return to the DRC as the threatening situation there could lead to both of them being killed. They had never discussed his work or his country further.

95. E. further stated that while living in Russia her two older children had been subjected to constant verbal abuse due to the colour of their skin. They had been unable to attend school for this reason. The family had also experienced harassment by the authorities (arbitrary fines, etc.). Her two older children were being cared for by her mother in Russia. E. had divorced in 2000 and her older children had no contact with their father.

96. E. considered that if she, the applicant and their mutual child had to settle in Russia they would have no means of survival as the applicant would never be able to find employment.

97. E. had never considered joining the applicant were he to return to the DRC as their predicament would be similar to the one they would be facing in Russia; the applicant had no relatives, residence or means in the DRC. Should the applicant be threatened on their return on account of his secret work before leaving his country, she too would fear for her life.

3. Mr Matti Heinonen

98. Mr Heinonen has been the head of the Africa section in the Directorate of Immigration since 1999. From 1995 to 1999 he was working as an adviser in charge of preparing decisions on asylum claims by Congolese and others persons of African origin. He was responsible for refusing the applicant's claim for asylum.

99. Mr Heinonen found it striking that the asylum interview with the applicant had been extremely short. Even though the processing of his claim had lasted around two years in view of the application of "the Dublin Convention", the applicant had never wished to elaborate on the brief information he had given at the outset and had never referred to any sort of persecution. During this period of time the applicant could, for example, have submitted photographs showing him with Mobutu family members. On the evidence before it, the Directorate of Immigration had had to assume

that he had not been part of Mobutu's close family or of the DSP. Even assuming he had formed part of the DSP, it had to be assumed that he had been a low-ranking informant.

100. Mr Heinonen also found it remarkable that the applicant had not been able to provide any identity card, travel document, certificate of education or the like. Neither did the asylum file contain any indication of such a document having been presented at the applicant's arrival in Finland. Apart from his oral statements the only information relating to his background which the Directorate of Immigration had at its disposal was the material forwarded by the Dutch authorities.

101. Mr Heinonen did not share counsel's assessment that the applicant's account had been consistent and precise. It had contained many controversial points: for example, while he had claimed to originate from the Ngbandi tribe in Equateur, he did not speak Ngbandi but Lingala, Kikongo and Swahili. Kikongo is being spoken in the Bas-Zaire where he had claimed to originate from when seeking asylum in the Netherlands. Other elements had also suggested that he originated from Bas-Zaire. Moreover, while claiming that he had been arrested in Angola as he had not mastered Portuguese, the most common language spoken there is actually Kikongo. By way of further example, although he had claimed to have "purchased" an Angolan passport he had stated, on arriving in Finland, that he knew neither the country nor the name of the passport he had been travelling on. Moreover, if as he claimed, he had brought diamonds along to Brazzaville, why would he have ventured into Angola, at the time a very dangerous country?

102. Mr Heinonen confirmed that on arriving in Finland the applicant had volunteered the information that he had been an asylum seeker in the Netherlands under a different name. It should be borne in mind, however, that the applicant was not a first-time asylum seeker and had provided many details to the Dutch authorities in support of his first asylum claim.

103. Even assuming that the applicant had been a member of the DSP, he would not face any danger if returned to that country at present. As had emerged in the case of K.K., she had been able, as a lower-ranking DSP member, to continue as a soldier in the army of Mobutu's successor Laurent-Désiré Kabila. A former DSP member maintaining connections with rebel or foreign forces in the pursuit of seeking to overthrow the current DRC government would certainly be of interest to that government and could be given international protection in Finland. N., however, had not put forward any such elements.

104. Mr Heinonen had taken part in a fact-finding mission to Kinshasa in 2000. Since that year the situation in the DRC had improved drastically. Already that year, however, the applicant could have been returned to the DRC without facing any problems other than economic ones.

105. The Directorate of Immigration was dealing with dozens of cases a year involving DRC citizens. In a few of those cases asylum or a residence permit had been granted, either in view of the person's need for protection or on humanitarian grounds.

106. In the mid-1990s the Finnish Central Criminal Police had concluded that 70-80 % of some 100 documents relied on by asylum seekers from former Zaire had been falsified. Some of the asylum-seekers had also been in the possession of blank documents (such as birth certificates) as well as official stamps.

107. As for the conclusion reached by the Supreme Administrative Court in the case of K.K., Mr Heinonen suggested it might have been motivated by her gender and the allegations of sexual abuse she had made.

108. Mr Heinonen was not aware of any DSP member having suffered ill-treatment on his or her return to the DRC from a European country. Some countries had been sending back up to 100 persons a year. In a few cases the Finnish authorities had monitored the person's return closely to ensure that it had been safe.

109. As for the applicant's prospects of settling with E. and their child in Russia, Mr Heinonen indicated that in accordance with current practice even a common-law spouse of foreign origin could be granted a three-month visa before being able to seek a one-year residence permit and eventually Russian citizenship.

4. Ms K. K.

110. K.K. had completed her military training in 1972, following which she had been sent to work in the DSP, being part of the female platoon. She had first seen the applicant around 1989 but had never been close to him. She knew he had been working in the "*bataillon special*" but his rank had been unknown to her. They had been greeting one another in passing at Camp Tshatshi. She had also seen the applicant during parades on the compound. She had understood that he had been part of Mobutu's entourage as he had been speaking the President's language Ngbandi and had occupied a good position at Camp Tshatshi. Ngbandi-speakers had been in a privileged position during Mobutu.

111. After President Mobutu had been removed from power in 1997 the DSP had been discontinued and former members had been tortured, subjected to forced labour and malnourished. Those who had remained in the country had eventually been offered re-training in President Kabila's army. Eventually K.K. and other colleagues had been offered to assume essentially the same duties as before, namely to guard the entrance to Camp Tshatshi and to verify the identity of anyone accessing or leaving the compound. She had not seen the applicant after the soldiers on the compound had been told to vacate it in the aftermath of the *coup* in 1997.

112. K.K. confirmed having been questioned following the *coup d'état* on 15-16 January 2001, together with other members of the former DSP and FAZ who had been on duty on 15 January. She had been detained from March until 31 December 2001, when she had been released after her family had bribed a person in charge. She had been told by that person to leave the country immediately, which she had done.

113. K.K. was not aware of any case involving ill-treatment of a former DSP member having been returned to the DRC.

114. All members of the DSP were also soldiers of the FAZ. Those detached to the DSP received an emolument in addition to their salary from FAZ. K.K. stated the same salary as that indicated by the applicant in his testimony.

115. When they had been in charge of protecting Mobutu the DSP members' uniform had been distinct from the one worn by ordinary soldiers of the FAZ. When they had been protecting Kabila they had been wearing civilian clothes.

116. After both K.K.'s and the applicant's asylum claims had initially been refused K.K. had sent a facsimile to the Court at the applicant's urging. He had not written it for her; someone else had helped her write it in French.

K. Documentary evidence

1. Country-of-origin assessments by UNHCR

(a) 1998 guidelines

117. In guidelines issued by the United Nations High Commissioner for Refugees ("UNHCR") in January 1998 regarding refugees and asylum seekers from the DRC, soldiers of the DSP were generally assessed as a category risking persecution on account of association with the former (Mobutu) regime. UNHCR noted that these soldiers were mainly from Mobutu's tribe (Ngbandi) or region (Equateur). Members of the Ngbandi tribe were not however assessed to be at risk purely on account of their ethnic origin.

118. Among the other categories assessed to be at risk were high-ranking officers of the FAZ; members of the *garde civile* (with the exception of its commander-in-chief to whom an exclusion clause in the Refugee Convention might be applicable); leading and active members of pro-Mobutu parties and other political allies, except for current sympathisers or members of the opposition who were not playing a substantial role within those parties; and Mobutu family members and close collaborators, especially those from the Ngbandi tribe or the Equateur region.

(b) 2002 position paper

119. A UNHCR position paper of June 2002 urged States to exercise very serious caution in cases of involuntary return of individuals with a military profile or background. Security agencies and immigration authorities systematically arrested former militaries, in some cases even those returning voluntarily, where previous negotiations with the Ministry of Defence had not taken place.

(c) 2002 country report

120. A country report prepared for the Eighth European Country of Origin Information Seminar in June 2002 stated the following of particular relevance to the present case (pp. 99-100):

"*Former members of the* Forces armées zairoises *(FAZ)*

Not all, but many of the former Mobutu soldiers have been persecuted since President Kabila came to power in May 1997. Some were taken to Kitona military base, ostensibly for ideological and military training. Many of them were caught up in that base at the time of the resumption of the war in August 1998. Many are feared to have lost their lives there or have been accused of being in alliance with Rwanda or with the armed opposition, and indeed many of them have been targeted. There are some who have joined the new army, so it cannot be said that all of them are targeted by the government, but indeed some have been. Another element that creates a potential problem for members of MPR and former Mobutu soldiers is the aforementioned perception that some former members of the Mobutu government are plotting to launch an attack on Kinshasa from Brazzaville. Some of the FAZ soldiers, particularly the members of the *Division spéciale présidentielle* (DSP), which was the bodyguard corps of President Mobutu, also fought in the wars in Brazzaville and joined the Congo-Brazzaville army. Many of them still remain there. Since about 1999 there have been reports and fears on the part of the DRC government that some of these people are organising and regrouping with an intention of returning by force to Kinshasa and recapturing state power. So these people will still remain at risk, whether or not they may be directly or not at all involved in plots against the DRC government. Indeed some of them are currently in custody. There have been attempts by the two governments to create an understanding by actual agreements not to attack each other, but there still seems to remain a kind of mistrust between them. As a result, at least the Kinshasa regime fears that there could be an attack from Brazzaville. Another significant factor is that many of these ex-FAZ joined the MLC armed political group and as a result were also evidently fighting against the Kinshasa government. Now that some form of power-sharing agreement has been signed, if it is implemented, one would assume that these former soldiers will end up in the national army. This may happen, but again this agreement has yet to be actually implemented. By and large the risk of persecution will depend on the specific circumstances of the particular individual. As regards the question of how important the military rank of a former Mobutu soldier is in this context, it has to be borne in mind that in some of these armies a rank may not always mean what it does in better established armies. Particularly in the DRC, a low-ranking soldier may politically have more power than a top general. There have been cases where a sergeant would beat up a major. Yet, the major, coming from an ethnic group that is not closely allied to the president, would not hit back or get the sergeant, corporal or even private who attacked him punished.

He would not dare to touch him, although he is e.g. only a private, because he comes from Katanga. Without connections to influential persons at the top, being a general does not really mean much under such circumstances. In the case e.g. of Rwanda a Tutsi private may be able to challenge the power of a Hutu senior officer, not because he has been ordered to do so by the president or by someone else, but because he feels that he can do anything with impunity, that nobody will touch him because he happens to come from the ethnic group that is supposedly or really in power.

Family members of Mobutu officials

It would be possible that the children of such a soldier, be it a high-ranking officer or a private, would be targeted by the new authorities due to the fact that their father held the respective position during the Mobutu regime. Sometimes people are abused without any justification at all. On the other hand, even a civilian, linked to someone who was in a powerful position, may have been responsible for abuses for which he may be held liable or be subjected to reprisals. To cite an example, when a general's or minister's son drives an expensive foreign car or a military Land Cruiser, misuses power - or others only think he misuses power - or makes a lot of money, people would assume that he would not have that power and/or money if he was not related to the minister. Hence, when that minister leaves power, that individual, too, could be at risk. While this does not happen on a regular basis, it is however a real possibility. ..."

(d) October 2003 report

121. According to a further UNHCR assessment of October 2003, certain individuals who had either been deported or had returned voluntarily to the DRC could face serious problems if interrogated by security forces upon arrival in Kinshasa. Should the authorities discover that a deportee had a political or military profile, or had sought asylum abroad owing to such a background, he or she could be at risk of arbitrary detention and ill-treatment ("International Protection Considerations Regarding Asylum Seekers and Refugees from the Democratic Republic of the Congo", p. 100, § 393).

2. Country-of-origin assessments by the British Home Office

122. The Immigration and Nationality Directorate of the Home Office has been issuing annual and even more frequent assessments of the situation in the DRC. The country report of October 2004 – which also relies on sources going back to 2002 – made the following assessment of the current situation *inter alia* with regard to the groups mentioned below:

" Persons Associated with the Mobutu Regime

6.107 An information response by the Canadian Immigration and Refugee Board (IRB) dated 3 April 2003 about the treatment of former diplomats and other individuals perceived as sympathisers with the former President stated that:

'According to *Le Potentiel*, many exiled high officials have returned to the country (1 Nov. 2002). The same Congolese newspaper added that 'Mobutists' are now present everywhere, including in government positions (*Le Potentiel 28* Mar. 2003). Referring to 'people who were linked to former President Mobutu and the MPR [*Mouvement Populaire de la Revolution* - Mobutist political party],' a November 2002 report stated that 'persecution may result from either having held a very senior visible position in the party, the government or the security forces, or from overt opposition to the current government.' (ACCORD/UNHCR 28 Nov. 2002).'

6.108 Two further IRB reports dated 2 March 2004 and 26 March 2004 indicated that there was no particular adverse treatment of members of the Ngbandi tribe, or the Mbunza ethnic group, or persons from the Equateur province [associated with the former President Mobutu], based on interviews with the president of the Congolese human rights group ASADHO, and a journalist specialising in the Great Lakes region. The sources explained that the transition institutions (government, parliament, senate, army and others) comprise individuals from various ethnic groups including the Ngbandi and Mbunza, like those of other tribes in Equateur.

6.109 Another IRB response dated 10 April 2003 reported that the Congolese human rights group *Journaliste en Danger* was not aware of any ordinary Congolese citizen who had been prevented by the Congolese authorities from renewing a passport issued during the Mobutu regime. On the contrary the authorities had encouraged people to replace their old Zairian passports for the new Congolese ones.

6.110 A country fact finding report of 2002 by the Belgian General Commission for Refugees and Stateless Persons (CEDOCA) reported that after Laurent Kabila ousted Mobutu in May 1997 many high-ranking officials of the former Mobutu regime were arrested and imprisoned in the CPRK Prison in Kinshasa. Others managed to avoid being arrested by leaving the country. The report stated that the security situation improved for persons closely associated with the Mobutu regime when Joseph Kabila came to power in January 2001, and even more so, after the Sun City Peace Accord was signed in April 2002. A large number of persons closely associated with the Mobutu regime had now returned to the DRC.

6.111 The CEDOCA Report also stated that distant relatives of Mobutu living in Kinshasa had not encountered any problems through being associated with Mobutu, and also that negotiations took place in 2002 between Kinshasa and Rabat to repatriate the remains of Mobutu. According to the report, persons who were closely associated with the MPR during the Mobutu regime were not at risk of persecution by the security forces and could therefore return to the country if they were abroad. The report concluded that 'If Mobutu's followers are not suspected of collaboration with the rebels, they are no longer persecuted. Affiliation to Mobutu's former MPR [political party] does not involve the risk of political persecution.'

6.112 According to a CNN Online news report dated 23 November 2003, close relatives of Mobutu returned to the DRC from exile in 2003. Manda Mobutu, the son of the former president, returned to the DRC in November 2003 from exile in France, with his sister, Yanga, to prepare his political party for the elections due to take place in 2005. Manda's half-brother, Nzanga Mobutu, returned to the DRC from exile in August 2003. According to a news report by 'The Independent' (UK newspaper) dated 28 November 2003, the Mobutu sons returned to the DRC with President Joseph Kabila's blessing, and Leon Kengo wa Dondo, a former prime minister under the

Mobutu regime and other persons associated with the Mobutu regime had also returned to the DRC.

Former Soldiers of Mobutu Regime including FAZ

6.113 An information response dated 26 March 2004 by the IRB about the treatment of a person whose family members had served in the army under former President Mobutu stated that:

> 'The President of the African Association for the Defence of Human Rights (*Association africaine de défense des droits de l'homme*, ASADHO) said during a 25 March 2004 telephone interview that his organization is not aware of any particular treatment that would be imposed on a person merely because members of his or her family had served in the former army, under the Mobutu regime. He added that most members of the Zairean Armed Forces (*Forces armées zaïroises*, formerly FAZ) are currently serving in the Congolese Armed Forces (*Forces armées congolaises*, FAC) (ASADHO 25 Mar. 2004).'

6.114 According to a country fact finding report of 2002 by the Belgian general Commission for Refugees and Stateless Persons (CEDOCA) the security situation in the DRC for former soldiers of the FAZ has improved since Joseph Kabila became president in January 2001. According to the CEDOCA report, in 2002, many former FAZ soldiers were serving in the current Congolese army. In 2002, all the key positions in the *Forces armées congolaises* (FAC) high command were occupied by former FAZ soldiers and an estimated 20,000 to 25,000 former FAZ soldiers were living in Kinshasa. The same report concluded 'When ex-FAZ members are not suspected of collaboration with the rebels, they are no longer persecuted.'

6.115 During the course of a country of origin information seminar in June 2002, sponsored by UNHCR and the Austrian Centre for Country of Origin and Asylum Research and Documentation (ACCORD), which was addressed by representatives from Amnesty International and UNHCR, it was stated that the rank of a soldier might not always mean what it did in better established armies. It was stated that a low-ranking soldier may politically have more power than a top general, by virtue of his ethnic group and connections to influential persons.

6. 116 According to a report dated 4 May 2004 from the United Nations (UN) Integrated Regional Information Networks (IRIN) an agreement had just been reached between the DRC and the neighbouring Republic of Congo to repatriate former combatants in both countries. IRIN stated that:

> 'Similarly, the RoC [Republic of Congo] has, since 1997, been home to some 4,000 soldiers of the defunct Special Presidential Division of the late DRC president, Mobutu Sese Seko, and of his Zairean Armed Forces, or FAZ. The presence of these former soldiers has caused both Congos to trade mutual accusations of supporting coup makers, despite the existence of a non-aggression pact. In March, authorities in Kinshasa accused Brazzaville, and the ex-FAZ, of taking part in the 28 March [2004] attack on military targets in the DRC capital, Kinshasa. . . . In 2002, both Congos signed an agreement with the International Organisation for Migration for the repatriation of the ex-FAZ and former soldiers seeking refuge in RoC but nothing concrete has been achieved.' "

II. RELEVANT DOMESTIC LAW

123. Section 18 b of the Aliens Act 1991 (*ulkomaalaislaki, utlänningslagen*; 378/1991), as amended by Act 537/1999, provided – before the whole Act was replaced by the new Aliens Act 2004 (301/2004) – that the spouse of a person residing in Finland and any unmarried child under 18 whose guardian was a person residing in Finland, had to be regarded as family members of that person.

124. If the person residing in Finland was a minor child, his guardian was to be deemed a family member. People who were continuously sharing a household and cohabiting in a relationship resembling marriage had to be deemed to be in a situation comparable to that of spouses proper. A requirement for this comparison was that they had been cohabiting for a minimum of two years, except if a child had been born to them in which case this time-limit did not apply.

125. Amongst others, the family member of a foreigner residing in Finland on the strength of a permit issued on the basis that he or she was a refugee or otherwise in need of protection, equally had to be issued a residence permit unless reasons relating to public order or safety or other weighty reasons militated against issuing such a permit. The overall consideration also had to take into account the possibility for a lawfully resident foreigner in Finland to move back to his or her home country or to a third state, if the family ties as a whole could be deemed to be strongest to such a country, in order to lead a family life there.

126. According to section 20, subsection 1 (537/1999) an alien who entered Finland without a residence permit could be issued with a fixed-term residence permit:

1) if he or she had held Finnish citizenship or had at least one parent who was or had been a Finnish citizen,

2) if prior to entering Finland he or she had lived with a spouse resident in Finland or continuously had shared a household and cohabited without being married with a person resident in Finland; or

3) if refusing a residence permit would be clearly unreasonable.

127. According to section 30 (537/1999), as in force from 1999 to 2004, an alien was to be granted asylum and issued a residence permit if, owing to well-founded fear of persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion, he or she was living outside his country of origin or habitual residence and if, owing to such fear, he or she was unwilling to avail himself of the protection of the said country. The following constituted special grounds for not granting asylum:

1) particular reasons relating to Finland’s national security;

2) he or she had committed a crime against peace, a war crime or a crime against humanity according to the terms of international agreements or had committed another serious crime other than a political offence;

3) he or she had previously stayed in a country which had acceded to the Convention Relating to the Status of Refugees or had stayed in another safe country and applied for asylum there or had had the opportunity to do so;

4) according to the Convention between Denmark, Finland, Iceland, Norway and Sweden concerning the Waiver of Passport Control at the Intra-Nordic Frontiers (Finnish Treaty Series 10/1958), another signatory to the Convention was obliged to readmit the alien in question;

5) in compliance with the Convention Determining the State Responsible for Examining Applications for Asylum Lodged in one of the Member States of the European Communities that was concluded in Dublin on 15 June 1990 (later the Dublin Convention), another contracting State was obliged to take responsibility for an asylum seeker (1183/1997).

128. According to section 31, an alien residing in Finland could be issued with a residence permit as being in need of protection if he or she, in the country of origin or habitual residence, was threatened by capital punishment, torture or other inhuman or degrading treatment or could not return there because of an armed conflict or environmental catastrophe.

129. According to section 37 (2) (537/1999), an alien whose continued residence in Finland required a residence permit, but to whom it had not been issued, could also be refused entry.

130. According to section 38 (537/1999), an alien was to be refused entry as soon as it had been possible to ascertain that his entry into or residence in Finland could not be permitted. All the relevant matters and circumstances had to be taken into account when considering a refusal of entry. These included at least the duration of his or her stay in Finland, the relationship between a child and a parent, family ties and other ties to Finland. No one could be returned to an area where he or she could be subjected to treatment within the meaning of section 30 or 31 or to an area from which he or she could be sent onwards to such an area.

131. According to section 43 (154/1995), an alien could be prohibited from entry to Finland for a maximum of five years or until further notice in a decision concerning deportation or in a decision concerning refusal of entry made by Directorate of Immigration. The entry prohibition order could be revoked by the Directorate of Immigration, either entirely or for a limited period, owing to changed circumstances or for an important personal reason.

132. According to section 57(4) (537/1999), a decision of an administrative court in response to an appeal against a decision of the Directorate of Immigration could be appealed against only if the Supreme Administrative Court had granted leave to appeal. Leave could be granted only if it was important to have the issue decided by the Supreme

Administrative Court for the application of the law in other similar cases or for reasons of uniform judicial practice or if other weighty grounds militated in favour of granting such leave.

133. According to the Government Bill for the Amendment of the Aliens Act (Government Bill 50/1998), in cases of doubt, the case should be decided in the asylum seeker's favour, provided that all the information available had been verified and the authorities were generally convinced of the reliability of the information provided by the asylum seeker.

134. The current conditions and procedure for granting asylum or a residence permit on grounds of protection are stipulated in chapter 6 of the Aliens Act 2004.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

135. The applicant complained about his impending expulsion to the DRC which, if enforced, would violate Article 3 of the Convention. This provision reads as follows:

> "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

A. The parties' submissions

1. The applicant

136. The applicant maintained that he had a well-founded fear of persecution in the DRC because of his having worked in the special force in charge of protecting former President Mobutu (the DSP), his being of the same Ngbandi ethnicity as the former President and because of his close connections with the former President's family. According to credible and objective human rights reports, corruption and abuse of power remained rampant in the DRC which had to be considered a dictatorship. The information which the applicant had given to the Finnish authorities regarding his past was of sensitive nature and had placed him in a difficult position: while his name had not been mentioned in the published version of the Supreme Administrative Court's decision, he was easily recognisable, being the only Congolese asylum seeker in Finland who had previously requested asylum in the Netherlands and who had a Russian common-law wife. Following the publication of the Supreme Administrative Court's

decision, the applicant had become afraid to show himself outside his room in the reception centre, since his work for the DSP had become known to the other Congolese asylum seekers.

137. The applicant considered that he had provided a consistent and precise account of the circumstances surrounding the events which had taken place in the DRC in May 1997 when President Mobutu had been overthrown and the applicant had been forced to flee the country. He had also related in detail his activities for the DSP before the take-over of power. According to the UNHCR Country-of-Origin Report on the DRC of June 2002, many of the former Mobutu soldiers had been persecuted since Laurent-Désiré Kabila had seized the power. Many were feared to have lost their lives at the Kitona Military Base, where they had been taken, or had been accused of being in alliance with the regime in Rwanda or with the armed opposition in the DRC, and indeed many of them had been targeted. According to the same report, the ethnic origin of a former Mobutu soldier was sometimes more important than his military rank.

138. The later developments in the receiving country had not enhanced the applicant's situation to any significant degree as no change in the attitude towards former DSP members had been reported. According to the UNHCR assessment in October 2003, certain individuals who had either been deported or had returned voluntarily to the DRC could face serious problems if interrogated by security forces upon arrival in Kinshasa. Should the authorities discover that a deportee had a political or military profile, or had sought asylum abroad owing to such a background, he or she could be at risk of arbitrary detention and ill-treatment.

139. The applicant took issue with the finding of the majority of the Supreme Administrative Court that his identity and ethnicity had remained unclear. In the Netherlands he could not admit to being of the same ethnicity as former President Mobutu as this "would have worked against him in the asylum process". He also had to conceal or change some other facts in order not to reveal his close connections to the President's inner circle and the real purpose of his stay in the Netherlands.

140. As to the Supreme Administrative Court's finding that he had been using four different names, the applicant pointed out that one of these he had only used for travelling to Finland, whereas another one was a nickname the use of which was common in the DRC. A third name was his code name while working for the DSP, including in the Netherlands.

141. As to the Supreme Administrative Court's finding that he had not been able to prove his whereabouts after having been deported from the Netherlands in 1995, the applicant contended that the only document he had been able to take along when leaving the DRC in a hurry in 1997 was a document (*brevet*) showing his education. This had been lost when he had arrived in Finland.

142. The applicant furthermore challenged as being highly speculative the Supreme Administrative Court's finding that it was not credible that he had gone on a mission to the Netherlands as an informant in the way recounted, had he really had very close connections to the immediate circles of President Mobutu.

143. Finally, the applicant considered that the Government had failed to specify in what respect they considered his statements before the Court's Delegates unreliable.

2. The Government

144. The Government noted that the Directorate of Immigration, the Administrative Court and the Supreme Administrative Court had concurred in finding the information given by the applicant to be unreliable. The authorities had further taken note of the two minor criminal offences which he had committed in Finland. Furthermore, as he had been using several names the Finnish authorities had been unable to ascertain his real identity.

145. The Government moreover observed that according to reports on the human rights situation in the DRC the fact that a person belonged to a certain ethnic group or might have worked for President Mobutu or his close family members did not as such give reason to believe that the person had a well-founded fear of persecution in his country of origin. Only office holders in high positions in President Mobutu's regime, and who had abused their power, faced such a risk after the seizure of power by Laurent-Désiré Kabila's forces.

146. The Government underscored that in its decision of March 2003 the Supreme Administrative Court had observed that the applicant had left his country more than six years ago, whereas the risk of persecution should be assessed according to present-day conditions. The conditions had improved since Joseph Kabila had come to power after his father in January 2001.

147. The Government accepted that in the asylum interview and in the oral hearing before the Administrative Court the applicant had been able to provide general information on the events in the DRC in May 1997. Most of the information recounted by the applicant was nonetheless generally known to the public. His account of his own role in those events and his escape to Finland had been inconsistent and imprecise. He had not presented any details showing any personal engagement in political activities. Moreover, some of the information he had given in support of his application for asylum in the Netherlands had differed significantly from the information he had provided in Finland.

148. The Government also noted that the applicant had never contended that he had been arrested or convicted or that any search warrant had been issued against him in his country of origin. Nor had he ever stated having been subjected to torture or threats. On these grounds, and for the reason

that the applicant had used several identities, his statements as a whole had not been considered reliable.

149. The Government furthermore noted that further *coup d'états* had been attempted in Kinshasa in March and June 2004, though some reports suspected that they had been orchestrated by the current President Joseph Kabila, who reportedly was fearing an election loss and had attempted to postpone the general elections with reference to the unrest. All in all, the situation in the receiving country had improved: with the conclusion of the Global and All-Inclusive Agreement on the Transition in the DRC in December 2002 the most significant parties to the civil war had emphasised their commitment to the peace process.

150. The Government further noted that some of the applicant's statements to the European Court had not been put to the Supreme Administrative Court, for example his allegedly close connection to President Mobutu's son and his alleged purchase of an Angolan identity card.

151. Finally, the Government considered that the applicant had been unable to state accurate details to the Court's Delegates concerning his alleged activities in the DRC. His oral statements to the Delegates therefore had to be considered unreliable.

B. The Court's assessment

1. Findings of fact

152. The Court recalls that in order to carry out its own assessment of the facts it appointed two of its members as Delegates in order to take oral evidence from the applicant, his common-law wife, another asylum seeker originating from the DRC (Ms. K.K.) and a senior official in the Finnish Directorate of Immigration with extensive experience of processing asylum claims from the relevant part of Africa and who had refused the applicant's request in the first instance.

153. Having regard to the overall impression formed by the Delegates, the Court finds K.K. to be a credible witness whose testimony clearly supports the applicant's own account of his having worked in the DSP and having formed part of President Mobutu's inner circle. It is to be noted that no testimony of K.K. was available to the Finnish authorities when the applicant's case was being considered by them.

154. The Court has certain reservations about the applicant's own testimony before the Delegates which it considers to have been evasive on many points and is not prepared to accept every statement of his as fact. In particular, his account of the journey to Finland is not credible.

155. In light of the overall evidence now before it the Court finds however that the applicant's account of his background in the DRC must, on

the whole, be considered sufficiently consistent and credible. It can accept therefore that he fled the DRC in May 1997 at the time when Laurent-Désiré Kabila's forces were overthrowing President Mobutu's regime. The Court further finds it sufficiently credible that, although the applicant was not senior in military rank, he could be considered to have formed part of the President's and the DSP commander's inner circle.

156. Finally, the Court also finds sufficiently credible the applicant's statement that as an official in the DSP he took part in various events during which dissidents seen as a threat to President Mobutu were singled out for harassment, detention and possibly execution.

157. The Court would note in this connection that the Finnish authorities and courts, while finding the applicant's account generally not credible, do not appear to have excluded the possibility that he might have been working for the DSP. Moreover, the Finnish authorities and courts did not have an opportunity to hear K.K.'s testimony with regard to the applicant's background in the DRC. It cannot be said therefore that the position of the Court contradicts in any respect the findings of the Finnish courts. Neither is there any indication that the initial asylum interview was in any way rushed or otherwise conducted in a superficial manner (cf., *a contrario*, *Hatami v. Sweden*, no. 32448/96, Commission's Report of 23 April 1998, §§ 97 *et seq.*).

2. Risk of treatment contrary to Article 3

158. The Court recalls that Contracting States have the right, as a matter of well-established international law and subject to their treaty obligations including their obligations under the Convention, to control the entry, residence and expulsion of aliens. The right to political asylum is not protected in either the Convention or its Protocols. The decision of a Contracting State to expel a person may nevertheless give rise to an issue under Article 3 of the Convention, and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person concerned faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the receiving country. In such circumstances Article 3 implies the obligation not to expel the person in question to that country (see, e.g., *Chahal v. the United Kingdom*, judgment of 15 November 1996, *Reports of Judgments and Decisions* 1996-V, p. 1853, §§ 73-74 with further references).

159. As the prohibition provided by Article 3 against torture, inhuman or degrading treatment or punishment is of absolute character, the activities of the individual in question, however undesirable or dangerous, cannot be a material consideration. The protection afforded by Article 3 is thus wider than that provided by Article 33 of the 1951 Convention relating to the Status of Refugees (*ibid.*, p. 1855, §§ 79-80).

160. The Court's examination of the existence of a risk of ill-treatment in breach of Article 3 must necessarily be a thorough one in view of the absolute character of this provision and the fact that it enshrines one of the fundamental values of the democratic societies making up the Council of Europe. In determining whether substantial grounds have been shown for believing that a real risk of treatment contrary to Article 3 exists, the Court will assess the issue in the light of all the material placed before it and, if necessary, material obtained of its own motion (*ibid.*, p. 1859, §§ 96-97). The assessment of the existence of the risk must be made on the basis of information concerning the conditions prevailing at the time of the Court's consideration of the case, the historical position being of interest in so far as it may shed light on the present situation and its likely evolution (*ibid.*, p. 1856, § 86).

161. As the applicant left the DRC eight years ago it cannot be excluded that the current DRC authorities' interest in detaining and possibly ill-treating him due to his past activities in President Mobutu's special protection force (the DSP) may have diminished with the passage of time, including a further *coup d'état* in 2001. It is also of some importance, though not decisive, that according to his own account the applicant had never been in direct contact with President Mobutu and had not attained any senior military rank when forced to leave the country. The Court notes however that UNHCR and other reports indicate, in respect of former FAZ members, that factors other than rank – such as the soldier's ethnicity or connections to influential persons – may also be of importance when considering the risk he or she might be facing if returned to the DRC (see §§ 120 and 122 above). While a number of Mobutu supporters appear to have been returning voluntarily to the DRC in the recent years (see § 122) the Court does not place any decisive weight on this fact when assessing the risk facing the present applicant if he is compelled to return.

162. The Court considers that decisive regard must be had to the applicant's specific activities as an infiltrator and informant in President Mobutu's special protection force, reporting directly to very senior-ranking officers close to the former President. On account of those activities the Court finds that he would still run a substantial risk of treatment contrary to Article 3, if now expelled to the DRC. In this respect the applicant's case differs from *Vilvarajah and Others v. the United Kingdom*, where the Court found that the evidence before it concerning the background of the applicants, as well as the general situation, did not establish that their personal position was any worse than the generality of other members of the Tamil community or other young male Tamils who were returning to their country. While in the still unsettled situation there existed the possibility that the applicants might be detained and ill-treated as appeared to have occurred previously in the cases of some of them, a mere possibility of ill-treatment, in such circumstances, was not in itself sufficient to give rise to a

breach of Article 3 (judgment of 30 October 1991, Series A no. 215, p. 37, § 111).

163. The Court would add that the risk of ill-treatment to which the applicant would be exposed if returned to the DRC at this moment in time might not necessarily emanate from the current authorities but from relatives of dissidents who may seek revenge on the applicant for his past activities in the service of President Mobutu. The Court recalls that in *H.L.R. v. France* it did not rule out the possibility that Article 3 may also apply where the danger emanates from persons or groups of persons who are not public officials. It is true that the Court went on to hold that even in such a scenario it must be shown that the risk is real and that the authorities of the receiving State are not able to obviate the risk by providing appropriate protection (in that applicant's case against reprisals by drug traffickers). The general situation of violence existing in the country of destination (Colombia) would not in itself entail a violation of Article 3 in the event of the applicant's deportation. In addition, the Court found no relevant or sufficient evidence to support the claim that his personal situation would be worse than that of other Colombians, were he to be deported (judgment of 29 April 1997, *Reports* 1997-III, pp. 758-759, §§ 40-42).

164. The current applicant's case differs from H.L.R. v. France in that the overall evidence before the Court supports his own account of his having worked in the DSP, having formed part of President Mobutu's inner circle and having taken part in various events during which dissidents seen as a threat to the President were singled out for harassment, detention and possibly execution (see §§ 153 and 156 above). In these circumstances there is reason to believe that the applicant's situation could be worse than that of most other former Mobutu supporters, and that the authorities would not necessarily be able or willing to protect him against the threats referred to.

165. Neither can it be excluded that the publicity surrounding the applicant's asylum claim and appeals in Finland might engender feelings of revenge in relatives of dissidents possibly affected by the applicant's actions in the service of President Mobutu. It is relevant in this connection that the applicant himself does not appear to have played any active role in making his asylum case known to the public and, in particular, to other DRC nationals currently in Finland.

166. As the protection which is therefore to be afforded to the applicant under Article 3 is absolute the above finding is not invalidated either by the nature of his work in the DSP or by his minor offences in Finland.

167. In these circumstances, and having assessed all the material before it the Court concludes that sufficient evidence has been adduced to establish substantial grounds for believing that the applicant would be exposed to a real risk of treatment contrary to Article 3, if expelled to the DRC at this

moment in time. Accordingly, the enforcement of the order issued to that effect would violate that provision for as long as the risk persists.

II. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

168. The applicant further complained that his expulsion would violate his right to respect for his private and family life as, in Finland, he had a common-law wife, whose asylum procedure remained pending, and a young child born there. He invoked Article 8 of the Convention which, as far as relevant, reads as follows:

> "1. Everyone has the right to respect for his private and family life, ...
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

A. The parties' submissions

1. The applicant

169. The applicant underscored that while he and E. were not married the family had been living together in a reception centre in Helsinki in a relationship comparable to that of spouses in accordance with section 18 b of the Aliens Act 1999. Accordingly, they were entitled to protection under Article 8 to the effect that they be allowed to pursue their family life together. Realistically speaking, this could only happen if they were allowed to remain in Finland. Returning as a family to the DRC was impossible due to the applicant's fear of torture or degrading treatment. As for Russia, the applicant would have to obtain a residence permit to which he was not entitled as a matter of right. At any rate, living in Russia would cause him undue hardship due to the prevailing racist attitude towards Africans. E. had left Russia because of the racist attacks against her and her Russian-African children, which she had relied on in her own asylum application.

2. The Government

170. The Government contested the applicant's allegation, recalling that no right of an alien to enter or to reside in a particular country is as such guaranteed by the Convention. Neither the applicant nor E. held a permit allowing them to remain in Finland. E. had been staying in Finland only for a relatively short time (from April 1999 to February 2000) until her first asylum request been refused and she had been deported to Russia. Her next

stay in Finland (in April 2002) had lasted less than a week. In October 2002 she had returned a third time to lodge a further asylum request.

171. The Government recalled that in March 2003 the Supreme Administrative Court had found that no family life within the meaning of Article 8 had existed between the applicant and E. Any interference with such family life on account of the applicant's expulsion order and the enforcement thereof was, and would be, grounded on the Aliens Act and further a legitimate aim within the meaning of Article 8 § 2.

172. While maintaining that the family could settle in the DRC as the applicant's expulsion to that country would not be in breach of Article 3, the Government submitted, in the alternative, that the family could settle in E.'s country of origin Russia or in any other country that were to grant them a residence permit. The Government concluded therefore that the decision to expel the applicant was not disproportionate to the legitimate aim pursued. Consequently, the enforcement of that expulsion order would not be in violation of Article 8.

B. The Court's assessment

173. The Court has concluded above that the applicant's expulsion to the DRC would violate Article 3. In view of this conclusion the Court finds that no separate issue arises under Article 8 (*Hilal v. the United Kingdom*, no. 45276/99, § 71, ECHR 2001-II).

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

174. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

175. The applicant claimed EUR 20,000 in compensation for the suffering caused by his planned expulsion which was stayed following the Court's indication under Rule 39.

176. The Government considered that should a violation be found this would constitute sufficient just satisfaction for any non-pecuniary damage.

177. Having regard to all the elements before it, the Court considers that the finding that the applicant's expulsion to the Democratic Republic of Congo at this moment in time would amount to a violation of Article 3,

constitutes in itself sufficient just satisfaction in respect of any non-pecuniary damage suffered by the applicant.

B. Costs and expenses

178. The applicant, who had the benefit of legal aid from the Council of Europe, claimed no reimbursement for costs and expenses.

FOR THESE REASONS, THE COURT

1. *Holds* by six votes to one that the applicant's expulsion to the Democratic Republic of Congo would amount to a violation of Article 3 of the Convention;

2. *Holds* unanimously that no separate issue arises under Article 8 of the Convention;

3. *Holds* unanimously that the finding that the applicant's expulsion to the Democratic Republic of Congo at this moment in time would amount to a violation of Article 3 constitutes in itself sufficient just satisfaction for any non-pecuniary damage sustained by the applicant**.**

Done in English, and notified in writing on 26 July 2005, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Michael O'BOYLE
Registrar

Nicolas BRATZA
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the dissenting opinion of Mr Maruste is annexed to this judgment.

N.B.
M.O'B.

PARTLY DISSENTING OPINION OF JUDGE MARUSTE

I did not find a violation of Article 3 of the Convention in this case, because I did not find the account put forward by the applicant very credible. Moreover, I did not share the assessment of the possible risk the applicant would run, if returned to his country of origin. In essence this is a case of assessment of credibility and risk and I believe that in such situations the domestic authorities are much better placed than international judges. There is no need therefore to go through all arguments put forward by the applicant. As an example of my suspicions, however, suffice it to note his different identities (four altogether), the lack of any documentary evidence about his position and activities in the DRC and the uncertainty about his knowledge of local languages.

I have confidence in Mr. Heinonen's assessment of the situation in the DRC as he has visited the country to ascertain the facts on the ground. In light of his findings (see § 104 of the judgment) as well as those of UNCHR I consider that the current DRC authorities' interest in the applicant for the purpose of detaining and possibly ill-treating him due to his past activities in the country must be assumed to have diminished with the passage of time, including a further coup d'état in 2001. This finding is supported by the most recent assessments of the human rights situation in the DRC and of the groups of asylum seekers deemed to be of particular interest to the current regime, if returned to the country (see, in particular, § 122 of the judgment).

It has to be noted furthermore that according to his own account the applicant had never been in direct contact with President Mobutu and had not attained any senior military rank when forced to leave the country. It is true that the UNHCR and other reports indicate, in respect of former FAZ members, that factors other than rank – such as the soldier's ethnicity or connections to influential persons – may also be of importance when considering the risk he or she might be facing if returned to the DRC. Of course the country is still unpredictable and there is always a certain risk, but according to my understanding and the information available, the risk of possible ill-treatment is not imminent and real.

Even if decisive regard were to be had to the applicant's specific activities as an infiltrator and informant reporting directly to very senior-ranking officers close to Mobutu, he would not to my mind, on account of such activities, remain at any substantial risk of treatment contrary to Article 3 if expelled to the DRC today, that is to say over eight years after Mobutu's regime was toppled. I would also note the reports to the effect that a number of Mobutu supporters have been returning voluntarily to the DRC in the recent years (see § 122 of the judgment). Moreover, even assuming that relatives of dissidents during Mobutu's regime might, to this day, wish to seek revenge on former Mobutu collaborators, any risk of

treatment contrary to Article 3 emanating from such individuals must be considered insignificant for the purposes of this provision.

In these circumstances, and having assessed all the material before the Court, I have reached conclusion that sufficient evidence has not been adduced to establish substantial grounds for believing that the applicant would be exposed to a real risk of treatment contrary to Article 3, if expelled to the DRC. Accordingly, the enforcement of the order issued to that effect would not violate that provision.