

REFUGEE STATUS APPEALS AUTHORITY
NEW ZEALAND

REFUGEE APPEAL NO 76550

AT AUCKLAND

Before: B A Dingle (Member)

Representative for the Appellant: The appellant represented himself

Appearing for the Department of Labour: No Appearance

Date of Hearing: 9 September 2010

Date of Decision: 25 November 2010

DECISION

[1] This is an appeal against the decision of a refugee status officer of the Refugee Status Branch (RSB) of the Department of Labour (DOL) declining the grant of refugee status to the appellant, a national of Zimbabwe.

INTRODUCTION

[2] The appellant is a married man of mixed ethnicity who travelled to New Zealand in 2000 and was joined shortly thereafter by his wife and children (also Zimbabwean citizens). He (along with his family) gained residence in New Zealand in October 2004.

[3] In 2007 the appellant was convicted of various offences and served a sentence of 23 months' imprisonment. Because the offences were committed within five years of the grant of his residence permit, an application for the appellant's deportation was made by Immigration New Zealand (INZ) and, on 12 May 2009, the Minister of Immigration, the Hon Jonathan Coleman, made an order for his deportation from New Zealand under s91(1)(b) of the Immigration Act 1987. The appellant appealed that deportation order to the Deportation Review Tribunal

(DRT) but his appeal was lodged out of time and therefore the DRT had no jurisdiction to accept and consider the appeal. The letter notifying the appellant that his appeal to the DRT was not to be accepted was dated 16 June 2009.

[4] The appellant lodged his Confirmation of Claim to Refugee Status in New Zealand with the RSB on 26 January 2010. He was interviewed by the RSB on 26 April 2010. The RSB declined to recognise the appellant as a refugee in a decision dated 15 June 2010 and it is from that decision that the appellant now appeals.

[5] The appellant claims that he is at risk of being persecuted on return to Zimbabwe because he made comments critical of President Mugabe in an Internet forum in 2006 and 2007. Further, the appellant claims to be at risk of being persecuted on account of his ethnicity as a mixed-race or "coloured" Zimbabwean.

[6] The issues to be determined in this case are whether or not the appellant's account is credible and whether his ethnicity leads to a finding that he has a well-founded fear of being persecuted on return to Zimbabwe.

Representation

[7] For clarity it is useful to record changes in the appellant's legal representation through the course of the appeal. At the time the appellant lodged his notice to appeal, received by the Authority on 16 June 2010, he was represented by Ms Curtis of Marshall Bird & Curtis. However, by way of letter received on 19 August 2010 Ms Curtis advised that she was no longer representing him. Given the proximity to the scheduled hearing date, the Authority adjourned the appeal hearing so that he could instruct other counsel.

[8] By way of letter received on 23 August 2010, the appellant advised the Authority that he had instructed Dr Michael Kidd as counsel. However, despite repeated requests by the Authority to Dr Kidd and the appellant, no Authority to Act for Dr Kidd was ever received by the Authority. The Authority was advised that Dr Kidd was unable to obtain instructions because the appellant did not attend scheduled appointments.

[9] On the day of the appeal hearing the appellant was unrepresented and he confirmed that he was prepared to continue with the hearing without the assistance of counsel.

[10] On 18 October 2010, the Authority received a further letter (dated 15

October 2010) from Ms Curtis advising that the appellant had re-appointed her as counsel and an Authority to Act was attached. On 8 November 2010 Ms Curtis wrote to the Authority asking whether she could provide submissions on behalf of the appellant. On 10 November the Authority replied by letter and granted leave until 17 November 2010 for submissions to be lodged. On 18 November Ms Curtis advised by letter that the appellant had not attended a number of scheduled appointments. She requested a further extension of time for lodgement of submissions.

[11] Given the procedural history of the appeal and the repeated failure of the appellant to attend appointments and properly instruct his counsel, the Authority determined that no further extension should be granted. No post-hearing submissions have therefore been received from Ms Curtis.

THE APPELLANT'S CASE

[12] What follows is a summary of the evidence provided by the appellant in support of his appeal. An assessment of this evidence will follow later in the decision.

[13] The appellant is of Indian and Zimbabwean ethnicity and therefore is known colloquially as a "coloured" in Zimbabwe. He was born in east Zimbabwe and is one of six children born between 1967 and 1984.

[14] At some stage before the appellant started school, the family relocated to live in Bulawayo. Within Bulawayo, the family lived in a suburb which was populated largely by other coloured people.

[15] Between 1973 and 1984, the appellant attended school. During this time, he suffered some discrimination by way of verbal harassment from black students who asked why he was not attending a school for white people - a taunt intended to bring attention to the fact that the appellant was coloured and not black. The appellant was also involved in physical fights with other students at the school, some of which were related to the racial taunts.

[16] The appellant also found it difficult to secure a trade apprenticeship when he left school. He believes was because of his ethnicity. He eventually obtained one with the help of his uncle. Between 1984 and 1997 the appellant worked for various employers, first as an apprentice and then as a qualified tradesperson.

[17] In 1989 the appellant met his wife and they subsequently had two sons. In 1993, after the birth of the children, they married.

[18] In 1997 the appellant established his own business. At times he employed up to six other workers in the business. He used to talk with them informally about the political party the Movement for Democratic Change (“MDC”) and encouraged them to vote for that party rather than President Mugabe’s ruling party The Zimbabwe African National Union – Patriotic Front (ZANU-PF).

[19] In early 1999 the appellant obtained a Zimbabwean passport.

[20] Shortly after the February 2000 Zimbabwean constitutional referendum, in which President Mugabe suffered a shock failure of his proposed constitutional amendments, a Shona-speaking man visited the appellant at his workplace and asked him for a lift to the police station. The appellant acquiesced and once at the station the man invited the appellant inside to “have a chat”. Once inside, the appellant was questioned by a series of Central Intelligence Organisation (“CIO”) officers who asked him how long he had been running a business, what he did with the business profits and his (the appellant’s) views on the current political situation. The appellant denied having any involvement with the MDC and told the CIO officers that he “did not think much of them”. The appellant was afraid of the consequences should he admit he supported MDC policies.

[21] The appellant believed the questions were an attempt to ascertain whether or not he was aligned with the MDC or was giving them money, in which case he would probably be arrested or harassed. He was aware that many people had been questioned about their possible involvement with or financial contributions to the MDC after the shock result of the referendum.

[22] In the June 2000 Parliamentary elections the appellant voted for the MDC candidate in his area. However, President Mugabe’s party were declared to have won a landslide victory.

[23] The appellant departed from Zimbabwe in October 2000 and arrived in New Zealand at Auckland international Airport on 28 October 2000. Initially he was issued with a three month work permit and a series of subsequent work permits were granted to him between 2001 and 2004. On 4 October 2004 the appellant was issued with a two year residence permit and on 21 May 2007 he was granted a Residence Permit for an indefinite period.

[24] From approximately 2006 to 2007 the appellant participated in an internet-based forum hosted on Goffal.com. "Goffal" is the colloquial term used in Zimbabwe to describe persons of mixed ethnicity. The forum was established as an online space where Zimbabweans of mixed ethnicity could discuss issues and share news of common interest. The appellant made comments on the forum under both his own name (first name and first letter of last name) and under a pseudonym. In summary, he criticised President Mugabe and the ZANU-PF party (at one point suggesting that President Mugabe was not the biological father of his son) and criticized Morgan Tsvangirai because he (the appellant) believed the MDC should have used violence to overthrow the ruling party. During some periods, the appellant commented on the forum frequently – up to one or two times a week.

[25] In December 2007, the appellant's mother ("the mother") was visited at home in Zimbabwe by two black men who the appellant and his family assume to have been CIO officers. They asked the mother where her sons were and then warned her to tell her son in New Zealand to watch what he said and watch his back. The mother was very fearful after the visit and as a result, she and the father arranged to move to South Africa permanently.

[26] In May or June of 2008 the appellant heard about the visit to his mother from his Zimbabwean friend in New Zealand, AA, who visited him (the appellant) in detention. The appellant's sister had told AA who passed the information to the appellant.

[27] In November 2009, the appellant's friend, AA, visited Zimbabwe to assess business opportunities. On arrival in Zimbabwe AA was harassed and robbed by the police because he was of mix-raced ethnicity. AA returned to New Zealand after one day in Zimbabwe because of the difficulties he encountered.

[28] On 26 January 2010, the RSB received the appellant's Confirmation of Claim form. It was signed and dated by the appellant on 7 September 2009. The appellant was interviewed by the RSB on 26 April 2010 and a decision declining his claim to refugee status was delivered on 15 June 2010. It is from that decision that the appellant now appeals.

[29] The appellant claims that if he returned to Zimbabwe he would be at risk of serious harm because he will be blacklisted at all of the border entry points for having criticized President Mugabe and the ZANU-PF on the online forum and because of his mixed-race ethnicity.

Documents

[30] The Authority and the appellant have been provided with the files of the RSB, including copies of all documents submitted by the appellant at first instance.

[31] In addition to the correspondence received in relation to the appellant's representation (detailed above in paragraph [7]-[11]), the Authority received a short statement from the appellant on 13 September 2010 in which he reiterated that he feared returning to Zimbabwe and explained the lack of corroborative evidence from friends and family as being due to "my financial situation and I suppose the disgrace I have brought on my friends and family, I think this is why they are reluctant to help me now". Also attached were three emails relating to communication with the administrator of the Goffal.com site – the details of which are discussed below at [45]-[46].

THE ISSUES

[32] The Inclusion Clause in Article 1A(2) of the Refugee Convention provides that a refugee is a person who:

... owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

[33] In terms of *Refugee Appeal No 70074/96* (17 September 1996), the principal issues are:

- (a) Objectively, on the facts as found, is there a real chance of the appellant being persecuted if returned to the country of nationality?
- (b) If the answer is yes, is there a Convention reason for that persecution?

ASSESSMENT OF THE APPELLANT'S CASE

Credibility

[34] Prior to determining the framed issues, it is necessary to make an assessment of the appellant's credibility.

[35] The Authority rejects the appellant's account to have come to the attention of the CIO or other security and enforcement authorities in Zimbabwe because of anti-ZANU-PF activity before leaving Zimbabwe or for postings on an online forum since he has lived in New Zealand. The specific reasons and findings follow.

Basis of claim

[36] It will be recalled from above that the appellant claims that his mother was visited at her home in Zimbabwe in December 2007 and warned about the appellant's anti-regime comments. The mother was so concerned about the visit that as a direct consequence she and the father left Zimbabwe soon after to live in South Africa.

[37] The Authority has several concerns about this part of the account for the following reasons.

[38] Surprisingly, although the mother was deeply concerned for her own safety and that of the appellant as a result of the December 2007 CIO visit, she did not tell the appellant about it when they spoke on the telephone in late December 2007, just weeks after the visit. Asked to explain his mother's silence on the matter, the appellant could not. He said that she told him she was moving to South Africa but did not explain why. In the absence of a compelling explanation, the Authority finds it implausible that the mother would not have told the appellant of this CIO visit - both out of concern for him and because it was the reason she and the father were moving to South Africa. The appellant alleges that his brother and other family members were told of the visit. If true, that would highlight that there was no sensible reason why the appellant would not have been told, particularly because he was the one individual who had it in his power to stop making the problematic online postings.

[39] Moreover, when the appellant filed his (unsuccessful) application to appeal to the DRT, he set out the reasons (listed as (a) to (m)) why he should not be deported. He also provided the Tribunal with a separate two page hand-written letter. In the list of reasons he included that he should not be deported on human rights grounds (unspecified) and because he had no family left in Zimbabwe "because of the economic devastation and political unrest". He did not make any reference to being personally at risk in Zimbabwe or to his family having left because of specific CIO harassment.

[40] Asked by the Authority to explain this surprising omission, the appellant said

that he was not focused on his refugee claim (which was not extant at that time) and he was reasoning with the DRT about the political situation in Zimbabwe, his personal problems and the explanation for his New Zealand offending. The Authority rejects that explanation because his alleged profile with the CIO is very much a personal problem and relates to the political situation in Zimbabwe. The RSB file reveals that the appellant has frequently written detailed letters explaining his views and advocating for New Zealand authorities to take certain action. The Authority is in no doubt that had the appellant received a warning via his mother from the CIO, and feared return to Zimbabwe for that reason, he would have specifically included that information in his application and letter to the DRT. The fact that he did not mention the CIO incident, while mentioning other reasons why he should not be deported to Zimbabwe, indicates that it is not a genuine event.

[41] The Authority also notes that the appellant's brother's statement (dated April 2010), written at the appellant's request in support of his refugee claim, and detailing the experiences of the family in Zimbabwe, also fails to mention the CIO visit and the warning relating to the appellant. In the context of a statement written specifically to detail the harassment of suspected MDC supporters and the appellant's family's difficulties in Zimbabwe, this omission is striking. Asked by the Authority to explain, the appellant said that when the brother wrote the statement, it was thought that the mother would also write a statement in which she would detail the CIO visit. The appellant was unable to sensibly explain why the mother did not write a statement.

[42] Given the claimed significance of the CIO visit to the family's decision to leave Zimbabwe, as well as its relevance to the appellant's refugee claim, the brother's failure to mention the incident in his written statement supports the Authority's finding that it did not occur.

The Goffal.com site

[43] The Authority also notes its concerns about the appellant's claim that the Zimbabwean authorities know of his participation in the Goffal.com forum. There is no external evidence to corroborate the appellant's assertions that he posted inflammatory political comments on the site.

[44] The RSB identified that internet archives of information posted on the Goffal.com site are available for the period 2004 to 2007 but that it (the RSB) could find no information that could be linked to the appellant, either using his real

name or the pseudonym under which he sometimes wrote. The appellant has not produced any information which displaces the RSB conclusion. Neither has the Authority been able to locate any archived material relating to the appellant.

[45] The appellant has provided the Authority with email communication between himself and the administrator of the Goffal.com site. In summary, the appellant found the administrator's current email address from Facebook and requested him to verify that the appellant had posted political messages in mid-2007 on the site, and that the site had been subject to unlawful online interference (hacking), probably by the CIO. The administrator has not replied to the request for information.

[46] Given the findings above that the appellant's account of a CIO visit to his mother in late 2007 is false, and in the absence of any corroborative evidence of the claimed postings in the archive material available, the Authority does not accept the appellant's account that he posted anti-regime political comments online.

Conclusion on credibility

[47] For the reasons given above, the Authority rejects the appellant's claim to have posted anti-ZANU-PF comments on Goffal.com and the claim that his mother was visited and warned by a CIO in late 2007, causing her to depart Zimbabwe permanently. There is no other credible evidence before the Authority to establish that the appellant has an adverse profile with the Zimbabwean authorities for any reason.

[48] The Authority accepts that the appellant is a Zimbabwean national of mixed race (coloured) ethnicity. It is on that factual basis that the Authority now turns to assess whether the appellant has a well-founded fear of being persecuted should he now return to Zimbabwe.

Objectively, on the facts as found, is there a real chance of the appellant being persecuted if returned to Zimbabwe?

Country information

[49] Reports dealing with the general social, economic and political situation in Zimbabwe disclose that there are myriad serious issues which face various groups within the population. Some issues (such as infrastructural development and food

security) are faced by almost all citizens. As regards the political situation (which underpins all of the significant issues of personal liberty and security faced by citizens), the most recent United States Department of State's *Country Reports on Human Rights Practices: Zimbabwe* (March 2010) (the DOS report) notes that:

Zimbabwe, with a population of approximately nine million, is constitutionally a republic, but the government, dominated by President Robert Mugabe and his Zimbabwe African National Union-Patriotic Front (ZANU-PF) since independence, was not freely elected and was authoritarian. The last four national elections--the presidential election in 2002, parliamentary elections in 2005, harmonized presidential and parliamentary elections in March 2008, and the presidential run-off in June 2008--were not free and fair. In the March 2008 elections, two factions of the opposition Movement for Democratic Change (MDC), known as MDC-T to denote Morgan Tsvangirai's faction and MDC-M for the group aligned with Arthur Mutambara, gained a parliamentary majority. Mugabe was declared the winner of the June 2008 run-off election after opposing candidate Tsvangirai withdrew due to ZANU-PF-directed violence that made a free and fair election impossible. Negotiations subsequently took place between ZANU-PF and the two MDC factions on a power-sharing government. In September 2008 the three parties signed the Global Political Agreement (GPA), a power-sharing agreement under which Mugabe would retain the presidency and Tsvangirai would become prime minister-elect. On February 11, Tsvangirai was sworn in as prime minister. On February 13, new cabinet ministers and deputy ministers from MDC-T, MDC-M, and ZANU-PF were sworn in. Although the constitution allows for multiple parties, ZANU-PF, through the use of government and paramilitary forces, continued to intimidate and commit abuses against opposition party members and supporters and obstructed their activities. The Joint Operation Command, a group of senior security and civilian authorities, maintained control of the security forces and often used them to repress opposition to ZANU-PF.

[50] The same country information also establishes that for those people who are identified as politically opposed to the Mugabe regime and the ZANU-PF party there is a greatly increased risk of the pervasive and systematic abuse of human rights including through trumped-up charges and arbitrary arrest, intimidation, and corruption.

[51] As to the mixed race population, they are reported to constitute less than one percent of the total population. See Central Intelligence Agency *World Fact Book 2010: Zimbabwe* (www.cia.gov). Country information indicates that they may be subject to varying levels of discrimination. Research published by the Canadian Immigration and Refugee Board of Canada in 2006 records that:

In a January 2005 report on political injustice in Zimbabwe published by the South Africa-based Institute for Justice and Reconciliation (IJR), mixed race individuals were described as "invisible minorities" who have "suffered differing levels of discrimination," especially with regard to unequal access to government-controlled programs such as that for land ownership reform (24 Jan. 2005, 11). According to Edmund Monteiro, executive director of the National Association for the Advancement of Mixed-Race Coloureds (NAAC), an organization mandated to promote mixed race rights (Kubatana 22 Jan. 2004), in addition to being ignored during the land reform process, mixed race persons have had limited access to employment, education, and health services (*The Standard* 23 Nov. 2003; see also NAAC 29 Oct. 2003).

In July 2005, *The Zimbabwean* reported that the historical exclusion of the mixed race community from "national political, social and economic participation and development," has yet to be addressed by media and non-governmental organizations (22 July 2005).

See Immigration and Refugee Board of Canada, *Zimbabwe: Racism, discrimination against "mixed race (coloured)" and the availability of state protection (2004-2006)*(7 February 2006) ZWE100933.E

[52] For the purposes of refugee determination, "being persecuted" has been described as the sustained or systemic violation of basic or core human rights such as to be demonstrative of a failure of state protection; see *Refugee Appeal No 2039/93* (12 February 1996) and *Refugee Appeal No 74665/03* [2005] NZAR 60; [2005] INLR 68 at [36] to [125]. Put another way, it has been expressed as comprising serious harm plus the failure of state protection; *Refugee Appeal No 71427* (17 August 2000).

[53] The Authority has consistently adopted the approach in the decision of *Chan v Minister of Immigration and Ethnic Affairs* (1989) 169 CLR 379 (HCA), which held that a fear of being persecuted will be well-founded when there is a real, as opposed to a remote or speculative, chance of such persecution occurring. This entails an objective assessment as to whether there is a real or substantial basis for the anticipation of being persecuted. Mere speculation will not suffice.

Assessment of the appellant's predicament

[54] Despite the reported discrimination towards the mix-raced population in Zimbabwe, it is not established that the appellant is at risk of a sustained or systemic denial of basic or core human rights in Zimbabwe on that basis. In making this finding, the Authority observes that prior to his departure from Zimbabwe the appellant owned and operated a successful business, employing up to six others. He completed his secondary schooling and owned a house, as did his parents and other family members. He gave evidence that he had been discriminated against in school (by way of verbal harassment and sometimes physical assault from other school boys) and in his attempts to find an apprenticeship. However, he conceded that he was able to find employment and was continuously employed for many years before he established his own business. He also confirmed he had been able to access medical treatment when required.

[55] There is no other credible evidence before the Authority which would support a finding that the appellant faces a sustained or systemic denial of basic or

core human rights in Zimbabwe to the real chance threshold. The Authority does not accept (for the detailed reasons given above) that the appellant has any profile with Zimbabwean authorities as being politically active or as being anti-Mugabe or anti-ZANU-PF. There is no realistic prospect that he would develop such a profile were he now to return to Zimbabwe. It is not established that his particular circumstances in Zimbabwe would place him at a real, rather than a remote, risk of being subjected to arbitrary arrest, detention or other forms of serious harm.

[56] For all the reasons given above, the first issue framed for consideration is answered in the negative. It is therefore unnecessary to consider the second issue of Convention ground.

CONCLUSION

[57] The Authority finds that the appellant is not a refugee within the meaning of Article 1A(2) of the Refugee Convention. Refugee status is declined. The appeal is dismissed.

“B A Dingle”
B A Dingle
Member