REFUGEE STATUS APPEALS AUTHORITY
NEW ZEALAND

REFUGEE APPEAL NO 75338

AT WELLINGTON

Before:	M Hodgen (Chairperson) P Andrews (Member)
Counsel for Appellant:	R Woods
Appearing for NZIS:	No Appearance
Date of Hearing:	15, 16 & 30 November 2004
Date of Decision:	19 April 2005

DECISION

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[1] This is an appeal against a decision of a refugee status officer of the Refugee Status Branch (RSB) of the New Zealand Immigration Service (NZIS) declining the grant of refugee status to the appellant, a national of South Africa.

INTRODUCTION

[2] The appellant is an adult woman, who arrived in New Zealand in October 2003 and applied for refugee status in December 2003. A refugee status officer interviewed her on 17 February 2004. On 25 June 2005 the refugee status officer issued a decision declining refugee status to the appellant. The appellant appeals against that decision.

[3] Counsel has supplied written submissions both before and after the hearing and a faxed letter (by Y) to the Authority and has also made oral submissions, all of which have been considered. The Authority also provided various items of country information to the appellant prior to and at the time of the hearing.

[4] The basis of the appellant's case for refugee status is that she was subject to domestic violence, from a partner, during their relationship, and that after the relationship ended (when she divorced him in 1997) her former partner on occasion threatened her with a gun and assaulted her. She fears he will kill her.

THE APPELLANT'S CASE

[5] This is a summary of the appellant's case to the Authority. Consideration of the appellant's credibility and the claim is dealt with later in this decision.

[6] The appellant is of Zulu ethnicity. She has always lived in the Johannesburg area of South Africa. She attended school in Johannesburg. She and her parental family belonged to a mainstream Christian church.

[7] When the appellant was in high school she met P (who is from a different tribe), a teacher at a college she attended. Their relationship began when she was 14 years old. She left school when she became pregnant by P. The child was born when the appellant was 15.

[8] P at first denied responsibility for the child. Ultimately P admitted responsibility to the appellant and her parents, but on the basis that the relationship not be disclosed to the college or the authorities, because he could be fired from his work or imprisoned because of his relationship with a pupil who was underage. As a result nobody reported P to the college or to the police, but P paid traditional damages to the appellant's parents.

[9] The appellant's and P's relationship resumed after he admitted that he was father of her child. This was despite the appellant's parents' disapproval of P.

[10] In 1984 the appellant was again pregnant by P. A traditional lobola union/marriage was arranged between the appellant's and P's parents in the same year. The appellant was happy to enter into a traditional lobola union/marriage, because she loved P. After the traditional union the appellant moved into P's flat in a suburb, BW, near the centre of Johannesburg, in late 1984, and gave birth early the next year.

[11] The appellant first experienced problems with P in 1985. This began as jealousy by P. The appellant had a male friend, U, who she had known from school. U would visit her. One day P said she and U were together too often and hit her with his open hand on her ear. P said he thought U was her "boyfriend", and not just a friend.

[12] P began drinking and some weeks after he first hit her, he did so again, and thereafter hit her every time he was drunk (which tended to occur on weekends, rather than in weekdays). He would hit her on these occasions with his hands or anything that came to hand. About a month after he first hit her, he beat her all over her body with a "sjambok". The appellant described a sjambok as a whip like instrument, with a handle and a length of flexible rubber. The appellant was "green" all over from the bruising caused by the sjambok blows. The appellant went and told her mother, but told her mother not to tell her father. Her mother gave her ointment for her bruising.

[13] The appellant continued to be subject to various forms of domestic violence from P, until she moved out of P's flat in 1997. This included claps (slaps) and being hit with objects such as a telephone receiver (once), a frying pan (once) and various times with a sjambok. There were periods when P did not assault her, such as for a time after they married by civil ceremony in late 1985.

[14] The appellant's injuries generally consisted of bruising, and she did not consider them serious enough to require medical attention. But one blow had cracked her left eardrum, and she consulted a doctor when her left ear then became septic and was prescribed antibiotics. She did not seek other medical treatment. She also generally did not report the assaults to anyone, partly because she did not want anyone else to know of them and also because she considered such treatment by P as usual in their culture.

[15] In 1990 she reported to the BW police station after being hit with the telephone receiver (as mentioned above) and having sustained a swelling where she was hit on her head. The uniformed policeman, whom she reported to, said he would accompany her back to her home. He drove her back and went to the flat with her. On entering the flat, before the policeman could speak, P accused the appellant of "going out" (ie having a relationship) with the policeman. The policeman denied having a relationship with the appellant. P told the policeman to

leave his home and that he had no right to interfere. The policeman said P and the appellant must talk about their problem and solve it, and then left. Afterwards, P shouted at her, asking if she thought a policeman could do anything to him. P did not assault her for about a month after this.

[16] The appellant reported some of these assaults to her mother, but not to her father, who she did not want to know of the domestic violence. The appellant also once told her superior at her corporate workplace that she had been hit by P, when he had noticed that she had a "blue eye" as a result of a slap. He advised her to report to the police, but she declined and told him that they do nothing. He then assisted her with medication for her eye.

[17] In 1994, after being hit with a sjambok, the appellant reported this to the BW police station. A police sergeant took her complaint and gave her a case number and a date for a hearing. Both the appellant and P received notifications to appear at the BW police station. The appellant went on the day, followed by P, who waited outside the police station. When the appellant asked about the case, the policeman on duty could not find the case and one of the other police members said the case file was missing. The appellant was irritated by this response and as a result left and walked home. She did not think it would have helped to ask for the sergeant who had opened the case, as she suspected they would say he was not on duty.

[18] In 1995, a week after the appellant's eardrum was cracked after being struck a blow on her left ear (as mentioned above), she left and went to stay at her mother's home (her father having died in 1990). She had left the children at the flat. She stayed at her mother's home for about a week. Although P had some assistance with the children from their maid and the appellant's one sister, he could not cope looking after them, and, as the appellant suspected he would, he arrived with the children after a week and apologised, said he loved her and wanted her to come home. P also told her mother that he was sorry he had assaulted the appellant and said he would not do it again. The appellant still loved him and went home with him. Their domestic relations were much better for about two months after she returned home with him but deteriorated after that, because P began socialising with his drinking companions again. The appellant did not like them and they did not like her. She considered that they did nothing constructive and merely helped P waste money on liquor.

[19] One evening in September 1996 P arrived at the university to fetch her and drive her home to their flat. The appellant was shocked to see a silver grey handgun in the hollow between the seats and behind the gear lever. She threatened to leave the car because of the presence of the gun, but P asked her what she was scared of and said it was a friend's gun. They then drove home. When home he put the gun in a drawer. The appellant said he could not keep it at the flat because of the children.

[20] The appellant reported P's possession of the gun to the police at BW the next day. The police came and searched the flat for the gun, including the drawer, but found nothing and then left.

[21] During 1996 and 1997 the appellant spoke to one of her law lecturers about her domestic situation. He advised reporting to the police, but admitted they did not have proper training in handling domestic violence matters. His other advice was that it was open to the appellant to leave P and obtain a divorce. He gave her the name of a presiding officer at the relevant court, to whom she could speak about divorce proceedings. It was ultimately this latter advice that she acted upon.

[22] In 1997 the appellant went to the district/magistrates' court, which the law lecturer had mentioned. She did not speak to the person her lecturer recommended, because she was able to file the divorce proceedings herself, without such assistance. She completed the necessary documentation and filed for divorce.

[23] After filing for divorce and shortly before P was due to receive the summons for the divorce, the appellant left P, moving out of the flat and into her own townhouse in a nearby suburb, with her children. A female friend of hers, Y, had assisted her to find the townhouse. Y lived in the same townhouse complex.

[24] After the appellant moved out, but before the divorce, P arrived one evening in October 1997 to fetch the appellant from university (were she was studying), and give her a lift to her townhouse. P told her he had received a divorce summons, and said he would never give her a divorce, as she was his wife. The appellant said to him that their marriage was over. He then said, "see this (gun), I can use it and nobody will know, and no witnesses". The appellant saw the silver grey handgun again in the hollow between the seats. She was irritated by this and

said “kill me then”. P was then quiet and drove her home to the townhouse. They both went inside, where he talked to his children, and then left.

[25] The appellant reported P to the police at BW, and told them that her husband had again had a gun, and had threatened her. The police replied that they wanted evidence and to know where the appellant was. The appellant told them that he had left her place and had gone. As far as she was aware, nothing was done by the police as a result of this report. The appellant did not expect any real action, she reported as a mere formality, in case anything further happened.

[26] In late 1997 the appellant and P attended the divorce proceedings. P opposed the divorce. The appellant explained her whole history with P to the presiding officer, including that she had been a pupil of P. The presiding officer was critical of P’s actions with a pupil. He granted the divorce and ordered that the appellant have the children, and ordered that P pay maintenance for them. He also told the appellant that she was young enough to make a life for herself without P.

[27] The appellant still experienced both threats with a handgun, and assaults by hand and also with a telephone receiver and a broom after the divorce, at her home. The physical assaults occurred several times a year in 1999, 2000 and 2001. There were some further incidents of threats with a handgun after the divorce, these were on a day in 2000 and in May 2003.

[28] After the divorce P’s friends/ drinking companions would mock and laugh at the appellant, saying things like “look at her”, if they saw her in the park or in the street, or if they came in the car with P, when he visited the children. These friends occasionally came inside, while P was visiting his children, but were quiet inside and merely waited and “looked like fools” until they left with P. P’s friends/drinking companions were members of the same tribe as P and not Zulus.

[29] In 2000 when P came to the appellant’s home, she told him he should pay maintenance. He refused and threatened the appellant with a handgun, and then left her home, but he returned later and again threatened her in the presence of Y. This was the first threat with a handgun that P had made since October 1997. The appellant contacted the police station at BW after this. The police said they would

be coming to see her at her home, but told her they did not have transport at the time. The police never came and nothing further came of this report.

[30] In May 2003, the appellant telephoned P and asked him to come and see her. She wanted to discuss maintenance. P arrived and pointed a gun at her and again threatened that he could kill her. The appellant then reminded him that it was his failure to pay maintenance that had caused her to raise it. After this incident she had her suitcase packed, so that she was ready to leave.

[31] May 2003 was the last time P threatened or caused any problems for the appellant.

[32] The appellant left South Africa and came to New Zealand in October 2003.

[33] Since the appellant left South Africa she has had contact with her family and brother who still live in her townhouse in Johannesburg. Other than her brother observing P once in a street under the influence of liquor, her children and brother have not told her of any contact with or of seeing P since the appellant left South Africa. Her children would have told her if this had occurred. She also had no knowledge of P being aware that she is not in South Africa.

[34] The appellant said she did not consider the police could help with her problems with P, however she did get both support and counselling from her Christian group, which included Y. This was after she left P and when she joined a more charismatic church. Y was also a member of a group called Women Against Abuse (WAA) or more correctly Women Against Women Abuse (WAWA) and had talked about it. However, other than her connection with Y, the appellant was not involved with WAWA and only knew of it from what she heard from Y. Her Christian group counselled women who suffered domestic violence in a Christian way only, and did not assist with the police or the courts. Her Christian group also encouraged members to only come to them, rather than going to non-Christian based (secular) organisations for assistance.

[35] The appellant had not been aware of other organisations that help women who suffer abuse, or of other avenues for assistance, because she did not listen to radio, other than Christian radio, and did not watch television, other than a South African show similar to the (American) Ophrah Winfrey show. She also had not

read newspapers in South Africa, other than business (financial) ones. While she had seen a reference to the organisation “People Opposing Woman Abuse” (POWA) on the internet, she had not been able to open their website, so had not know of its details. But in any event, her Christian (church) group encouraged them to come to it, rather than approaching non-Christian based (secular) organisations (such as WAWA). WAWA’s offices were also a distance from her home.

[36] The appellant’s fear is that P will kill her or have her killed. She has heard of cases in South Africa, when women have been killed by their partners or ex partners, such as a case when a man had his wife killed to obtain life insurance (although in her case, life insurance itself is not an issue).

[37] The appellant did not consider moving to a place such as Cape Town, and away from P, because there are too many gangsters and Muslims in Cape Town. She did not consider moving to KwaZulu/Natal province, and the town where her paternal relatives live, to get away from P, because she did (and does) not wish to live in South Africa anymore, this was (and is) due to the general crime and violence there, and she wanted to move to a new country. Furthermore she did and does not believe there is a good long-term future in South Africa, especially after (ex President) Nelson Mandela dies. She also thought leaving South Africa would be in the best long term interests for her and her children.

THE ISSUES

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

> "...owing to a 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."

[39] 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

[40] The first question for the Authority to now address, prior to considering the principal issues, is whether the appellant's evidence is credible.

[41] The Authority accepts as credible the following evidence of the appellant:

(a) The evidence of her background, including how her relationship with P began, and that difficulties developed between P and her.

(b) She was subjected to domestic violence including physical assaults by P during the time they lived together in BW.

(c) She left P, divorced him, and set up her own household which included her children, and later her brother.

(d) There were still some difficulties with P after their divorce (see below for details).

(e) The appellant wanted to leave and still wants to permanently leave South Africa, over and above any difficulties with P, as she considers it best in the long term for her and her children.

[42] The Authority had credibility concerns relating to the appellant's evidence of physical assaults on her by P after her divorce, the incidents with P and a gun, and her professed limited knowledge of and lack of association with WAWA. The Authority's consideration of these concerns, and conclusions on them are set out below.

Physical assaults after the divorce

[43] The appellant was clear in her evidence that there were no physical assaults on her by P after her divorce, although she had been threatened with a gun. She maintained this throughout her evidence before the Authority, until she was asked about the statement in the faxed letter by Y (which the appellant had arranged with her brother to obtain and send to New Zealand), in which Y said she had been "an eye witness to several beatings" of the appellant by P (and threats of shooting). The appellant then for the first time, late in her evidence, said she was also assaulted "several times a year" by P, after her divorce and the assaults took place in 1999, 2000 and 2001, when P visited her home. These assaults included slaps, and being hit/assaulted with a broomstick and a telephone.

[44] Counsel submitted that the appellant was Zulu speaking and might not have understood the English used and in particular words such as physical assault. The appellant was, as a result, asked about her command of English. She said she had grown up using English. Further, both her school education and her university education had been in English and English was the language she used in her (financial services) employment (ie after 1992, when she began working). She also told counsel she had understood the words ''physical assault", as physically hitting (her). The Authority has no hesitation in finding that she knew the meaning of physical assault. It observes further that her command of English was good, although she did have pronunciation differences from the usual pronunciation used in New Zealand, which required careful listening to make out some words.

[45] The Authority has no hesitation in rejecting the appellant's late change to her evidence, by alleging she was also physically assaulted and hit by P several times a year, after her divorce, in 1999, 2000 and 2001. That evidence is not accepted as credible. The Authority finds that she was not physically assaulted (or hit) by P after her divorce in 1997.

[46] The Authority also finds that Y is not a reliable source of evidence and does not attach any weight to her letter, including the other allegations she makes in it. It may be added that the appellant's (accepted) evidence was that she only told Y of her troubles with P in 1999 or 2000 and that Y had until then not known the nature of her earlier problems with P.

Gun and surrounding circumstances evidence

[47] The Authority's concerns were that there were some differences between what the appellant told the RSB and what she told the Authority and some internal differences in her evidence to the Authority, in respect of the gun incidents with P and what happened in respect of the police thereafter. Internally in her evidence before the Authority these included some vacillation between the two incidents, which occurred on one day, as to whether they occurred in 2002 or 2000. She also initially could not remember any gun incidents occurring after 2002, but later described an incident, which she said occurred in May 2003.

[48] The Authority is prepared to give the appellant the benefit of the doubt and accept her final descriptions to the Authority of the incidents with a gun, and associated evidence of her resultant experiences with the police. It is therefore accepted that there were incidents with P and a gun in 1996, October 1997, 2000 (twice in one day), and May 2003, as set out in the summary (of her descriptions), in "The Appellant's Case" (above). The Authority also accepts in her favour that in May 2003 she reported P to the police (at BW), but they did not take any action.

WAA (WAWA) and possible channels to access protection/assistance

[49] The appellant had told the refugee status officer that she became a member or supporter of Women Against Abuse (WAA) in 1996. In 1997 they counselled her and she joined them. She said it was a very good organisation. She said the group was formed because of abuse in South Africa. Further she said that the group worked with the police. She was asked where the group operated, and said it is in Johannesburg and women could telephone in to report abuse. She said she counselled when she had free time and went there weekly or fortnightly when there was a need. Most of the people (she counselled) had problems with husbands. Neither counsel nor the appellant disputed the summary of this information, which was included in the copy of the interview report that was sent to them for comment.

[50] In contrast, the appellant told the Authority that she had never been a member of WAA (or more correctly WAWA), and her only knowledge of the organisation was through Y who was a member. She and Y were members of the same Christian group and it was in this context that she heard of WAA because at

one of the church group meetings Y spoke about WAA. The appellant said she never attended a WAA meeting nor was she at its premises. She did not counsel for WAA or receive counselling from them. The only counselling she received or gave was in the context of her Christian group, although Y had counselled her in that context. Her only knowledge of WAA was from Y, and she knew little about it.

[51] Counsel submitted that the appellant was possibly misunderstood or misquoted in respect of her evidence to the refugee status officer in connection with WAA and that the refugee status officer's decision did not correctly reflect her case on this aspect. The Authority does not accept this submission, firstly because counsel and the appellant did not dispute the refugee status officer's summary of the interview (which was subsequently incorporated into the decision) and secondly because the responses in the interview were quite clear, and, as indicated above, the appellant has a good command of English.

[52] It may be added that counsel was recorded as present during almost all of the RSB interview, which further limits the chance of errors or misunderstandings during the interview. He was present when the appellant said she became a member or supporter of WAA in 1996 and when she said she joined them in 1997 and received counselling from them, although he was absent for some of the later questions and answers relating to WAA.

[53] The Authority finds that the appellant deliberately downplayed her knowledge of WAA and association with the WAA during the hearing before the Authority. The Authority finds she knew of WAWA and had an association with it, as mentioned to the refugee status officer. The Authority notes that due to denying her full knowledge of and association with WAA (WAWA), the appellant was not able to say why she did not use her association with WAA (WAWA) and its links with the police to access state protection. The Authority however accepts her evidence that her Christian group encouraged Christian counselling in preference to seeking assistance from secular organisations, such as WAWA.

OBJECTIVELY, IS THERE A REAL CHANCE OF THE APPELLANT BEING PERSECUTED IF SHE RETURNS TO HER COUNTRY OF NATIONALITY?

[54] It is helpful to set out some of the country information, before embarking on the assessment of the risk of persecution to the appellant if she now returns to South Africa.

Country information

[55] The submissions for the appellant rely largely on Chapter 8 of the South African Human Rights Yearbook, Vol. 8, published by the Centre for Socio-legal Studies at Natal University in South Africa ("Chapter 8 SAHRY"), which counsel had supplied to the RSB. While this publication has a copyright dated 2000, the contents of Chapter 8 relate to matters and statistics up to 1997 and 1998, and the authors suggest things that need to be done in 1999. The Authority has carefully considered Chapter 8, but it needs to be considered in the context of its timeframe.

[56] It is useful to begin with the United States Department of State *Country Reports on Human Rights Practices 2004: South Africa* (25 February 2004) ("2004 DOS Report"), which was also referred to by counsel.

[57] The 2004 DOS Report refers to South Africa as a democracy with constitutional power shared between the President and parliament. It finds the judiciary is independent, but overburdened. It notes that the civilian authorities maintain effective control over the security services, including the South African Police Service (SAPS or police). It confirms the (South African) government's general respect for human rights of its citizens, but notes problems that exist in South Africa, including violence against women, which remains a serious problem. It confirms efforts by the government to make the SAPS a more accountable community service-orientated police force, but that it is ill equipped, overworked and under trained, with the majority of its resources in former white areas and business districts (ie generally a bias in favour of certain urban rather than rural and tribal areas - as also mentioned in Chapter 8 SAHRY). It notes that police corruption is a problem and that police officers have been regularly prosecuted and convicted of crimes. At various points in the 2004 DOS Report, it refers to actions taken by the ICD (Independent Complaints Directorate), including convictions resulting from several investigations by the ICD.

[58] The 2004 DOS Report notes that there are no legal impediments to women's participation in government or politics, and refers to representation of women in the parliament, in speakers' positions, and who are government ministers or deputy ministers.

[59] The 2004 DOS Report also notes that a number of domestic and international human rights groups operate without government restriction, and government officials generally were co-operative and responsive to their views. It confirms that many organisations participated in government bodies to give public input and fashion policies related to human rights. Further that the government conducted domestic violence awareness campaigns, such as the annual sixteen Days of Activism. President Nelson Mandela spoke at a rally to protest abuse of women and children in 1997 and in 1999 the Deputy President, Jacob Zuma, called for harsher penalties for those convicted of crimes involving violence against women and children (as reported in The Canadian Research Directorate, of the Immigration and Refugee Board report ZAF32993.E, dated 1 November 1999).

[60] On the question of domestic violence, the 2004 DOS Report records that there is a high rate of domestic violence. It also records that the law facilitates the serving of protection orders on abusers, and allows the police to seize firearms and arrest abusers without a warrant. Sentences for violating a protection order are mentioned, which allow various terms of imprisonment, including up to 20 years imprisonment if another criminal charge is involved. But the report nevertheless records that societal attitudes and lack of infrastructure, resources and training hampered implementing the legislation. It was also believed that those who filed complaints were only a fraction of those who suffered abuse. It noted that there were 45 SAPS units which dealt with family violence (and related issues), such units were trained annually in gender sensitivity, as were some of the other SAPS members.

[61] Chapter 8 SAHRY opens by acknowledging significant developments in policing in 1997 and 1998, with actions to change the policing "ethos". But this was obstructed by various factors, including a lack of co-ordination, and a critical dearth of human and financial resources. High levels of domestic assaults and increased media attention to "secondary victimization" of complainants had eroded confidence in the police ability to confront violence against women (in the same timeframe, of 1997 and 1998). It reports that the SAPS in 1996/97 suffered from

poor infrastructure (including transport and administrative support) and lack of capacity and low-level skills amongst station level police (Chapter 8 SAHRY p 183). In 1997/98, despite violence against women being acknowledged as a serious problem in the 1997/1998 Police Plan, women still faced indifference or even sometimes hostility when attempting to report violence, follow up was often slow, and responses included that a charge could not be laid due to lack of evidence. In 1997 and 1998 the SAPS in an effort to educate and train their members issued 500,000 copies of a booklet on human rights issues they were likely to encounter on a daily basis. A training manual and video were produced (including dealing with vulnerable groups such as women) and a project launched to give every operational member of the SAPS human rights training, all new recruits were given it in their initial training.

[62] A barrier to effective service to victims of gender-based violence was the location and number of (police) service points throughout the country, which were biased towards urban and historically white areas (Chapter 8 SAHRY p195).

[63] The Independent Complaints Directorate (ICD) had only officially opened to the public as a government department with its own budget in 1997 (Chapter 8 SAHRY p197), its independence was guaranteed by law (p 200). Various teething problems were experienced in the initial stages of operation, including not being fully staffed and having budgetary restraints: despite the problems and challenges it faced, the authors referred to it being one of the more independent mechanisms in the world for oversight of the police (p204). Chapter 8 SAHRY still referred to the Domestic Violence Act as a bill, its commentary and observations therefore appear to predate that Act. The authors saw the human rights training having the potential to transform the SAPS and recommend strengthening the ICD.

[64] The Domestic Violence Act (DVA) was promulgated in December 1998. Its preamble recognises domestic violence as a serious social evil, and states as its purpose, to afford victims of domestic violence the maximum protection the law can provide, and to introduce measures, which seek to ensure that the relevant organs of the state give full effect to the provisions of the Act. Domestic violence is defined to cover physical, emotional and psychological abuse, intimidation, harassment and various other actions, including threatening violence (DVA s1). Former partners are included as persons in a “domestic relationship” and therefore covered by the Act. A key protection under the DVA is the issue of a protection

order (or interim protection order), which can be applied for by the victim or by various others on her behalf including counsellors and members of the SAPS (DVA s4). The court may issue an interim protection order, even if the respondent has not been given notice of the proceedings, and the interim order must then be served on the respondent, on service on the respondent the victim/complainant is issued a certified copy of the interim protection order and a warrant of arrest for the respondent, which the victim may have enforced if any provision of the interim protection order is breached (DVA ss5 & 8).

[65] Protection orders issued by the court can prohibit a respondent from committing any act of domestic violence or enlisting the help of any others to commit such acts, entering the complainant's place of residence or employment or any other acts specified in the protection order (DVA ss6 & 7). A breach of the terms of an order is punishable with a fine or imprisonment up to five years (DVA s17). The court must order a member of the SAPS to seize any arm in the possession or control of the respondent if the court is satisfied that the respondent threatened or expressed an intention to kill or injure the person in the domestic relationship.

[66] Section 18 of the DVA imposes statutory obligations on prosecutors and the police. The section obliges a member of the SAPS to comply with obligations imposed under the DVA or (police) national instruction (on domestic violence); failure by a SAPS member to comply with such obligations constitutes misconduct under the SAPS Act, any such conduct must be reported to the ICD. The section also requires the National Director of Prosecutions, the National Commissioner of the SAPS and the ICD to make reports to parliament of the steps they have taken under the DVA. In respect of the SAPS this includes details of complaints against SAPS members, details of disciplinary proceedings instituted and the results thereof, and steps taken as a result of ICD recommendations.

[67] The (South African) Firearms Control Act (2000) was, according to its preamble, brought in by the state to protect and promote the rights of persons to security and to be free from all forms of violence. Under this Act it is an offence to point a firearm at any person without good reason, and the penalty for this offence may be imprisonment for up to ten years. The Act also has wide ranging provisions, including ones covering control, search for, seizure and destruction of firearms.

[68] The SAPS National Instruction on Domestic Violence, was published in the (South African) Government Gazette in December 1999, by the National Commissioner of Police. Similarly to the DVA it sets out the wide definition of domestic violence. It requires (police) station commanders to liaise with relevant local institutions, to identify organisations able to provide counselling and support services (para 3). Reports of domestic violence must be responded to and investigated (paras 4 & 5). If there are threats to kill or injure, the member may enter places or search persons without a warrant and seize any arm. If the arm (gun) is not licensed, such a charge should be added to any others (para 6). A member must arrest a person, on receipt of the (DVA) warrant of arrest and the complainant's affidavit (para 11(2)), if he suspects imminent harm is possible from the breach of the protection order, or, if not, give the respondent notice to appear in court. All domestic violence incidents reported have to be reported and recorded. The station commissioner takes (overall) responsibility for this (para 12). A failure to comply with the National Instruction on Domestic Violence constitutes misconduct and disciplinary proceedings must be instituted by the member's commander (para 13). Any exemptions require approval by the ICD (para 13). A record has to be kept of disciplinary proceedings by the station commissioner (para 13). Returns of domestic violence complaints have be sent to Area and on to Provincial Commissioners of police, and consolidated reports are sent on to the ICD and for submission to parliament (para 14).

[69] The ICD website (2004) printout states that it investigates complaints of criminality and misconduct against members of the SAPS: It states that it operates independently of the SAPS "in the effective and efficient investigation of alleged misconduct and criminality by SAPS members". It investigates, *inter alia*, complaints about poor service given by police and failure to assist or protect victims of domestic violence as required by the Domestic Violence Act (DVA). Complaints may be lodged by telephone, letter, fax, email or by going to the ICD offices, which are situated throughout South Africa, including in Pretoria and central Johannesburg (the website gives all the contact details). Complaints may be lodged by victims, witnesses, representatives, or non governmental or community based organisations. A complaint is followed by ICD investigation, obtaining of statements, a report to the Director of Public Prosecutions, with a copy to the SAPS and a report to the client (complainant). Court appearances and departmental actions are reported by the ICD to the client, final results of court hearings or departmental action are then reported by the ICD to the client. Both

the Executive Director and Chief Director of the ICD are women. The ICD reported an increase in the number of offences reported to it, which it attributes to increased public confidence in the ICD and community outreach programmes which the ICD undertakes throughout the year.

[70] The website printouts of two non-government organisations (NGOs) were also canvassed during the hearing. The first being Women Against Women Abuse (WAWA), which was also referred to by the appellant as Women Against Abuse (WAA) and People Opposing Woman Abuse (POWA).

[71] The WAWA (2004) printout reflected that this organisation was established in 1989 by women who saw a need for services for abused women. The organisation leased a shelter for women, provided counselling (and had a qualified psychologist available), assisted with divorce or if legal advice was needed. Further WAWA stated that it had close relationships with the police in order for them to help WAWA with protection (for abused women). The WAWA website also provides a toll free (telephone) helpline, and lists various groups and bodies which can help victims of abuse, and provides their telephone numbers, this list includes the ICD, POWA and various other NGOs and governmental organisations. WAWA is reflected as having its headquarters in Eldorado Park (in the Johannesburg area).

[72] The POWA website (2004) printout shows that its primary base is in the Johannesburg inner city area, with its main focus being there and in Gauteng. It was established in 1979 in response to high levels of violence against women. The organisation is involved with counselling, education, advocacy and lobbying. It runs two shelters for abused women and their children. It offers legal advice and court preparation for abused women. The organisation seeks to enjoy a continued high media profile. Its website provides detailed advice of steps abused women can take, including how to obtain a protection order (under the DVA), and what to do if the protection order is broken.

[73] In an article “Better Safe than Sorry: Magistrates’ views on the Domestic violence Act”, by L Artz (of the Gender, Health and Justice Research Centre, University of Cape Town), published in the Crime Quarterly No 7 of 2004 (March 2004), the magistrates are reported as being of the opinion that the DVA is a progressive and useful piece of legislation. Further: “It was noted that the

performance of the police in domestic violence cases had improved dramatically since the inception of the DVA and that fear of being charged with dereliction of duty was a great incentive to this end." The magistrates all agreed that when respondents were in possession of a firearm or were threatening to use a firearm against an applicant, this would qualify for the urgent issue of a protection order.

The framework for assessment of risk

[74] Persecution has been defined as a sustained or systemic denial of core human rights (see for example *Refugee Appeal No* 2039/93 (12 February 1996)). In determining whether particular facts establish persecution, the test is whether there is both a risk of serious harm and a failure of state protection, at a real chance level (see for example *Refugee Appeal Nos 71427/99* (16 August 2000) at [43]-[67] and *72747-72750/01* (13 September 2001) at [76]). The test is forward looking or prospective, looking to what will happen in the future (*DG v Refugee Status Appeals Authority* (HC Wellington, CP213/00, 5 June 2001, Chisholm J, paras 25 and 26 and *Refugee Appeal No 70366/96 RE C* [1997] 4 HCK 236).

[75] The Authority will now turn to factors pertinent to the appellant's evidence and her case.

[76] The appellant has said she fears P will kill her or have her assassinated. Counsel also submitted that she will not be able to access state protection.

[77] Turning now to the accepted facts in this case, the following emerges.

The indicators relevant to serious harm

[78] Although the assessment of a real chance of persecution is forward looking, it may be instructive to consider past difficulties (see *Refugee Appeal No 70366/96* (above)), and in this case consider what the appellant's difficulties with P were and how they impacted on her life and actions.

[79] Prior to her divorce in 1997 and during the appellant's relationship with P, she experienced domestic violence by P. That violence was while they lived together as a couple. That particular violence ceased after she left him and they divorced and is now historic.

[80] P has not physically assaulted or harmed the appellant since she divorced him in 1997. The only actions of note by P, since then, occurred on a day in 2000 and in May 2003 and involved threats with a gun. They were not accompanied by actual physical violence or the discharge of the gun. The actions by P's friends/drinking companions during this period amounted to occasional verbal comments or harassment, which fall far short of persecution.

[81] The incidents involving P and a (hand) gun which the appellant described after her divorce, were described as being at or near her home, in the context of times when the appellant sought to raise the issue of maintenance, including when she had telephoned him and asked him to come and see her prior to the incident she described in May 2003.

[82] The last incident with P was in May 2003. There were no further incidents after May and there has been no indication of any further interest in the appellant by P ever since. P's lack of interest since May 2003 would suggest that the appellant can avoid him, merely by ignoring him.

[83] In fact the appellant's situation was markedly better after she left P and divorced him. She was living in her own home with her children, brother, and near a supportive neighbour from her church group. Since she left South Africa, her family have not told her of any visits by P to her home and she understands P has not even had any contact with their children. The only report about P was from her brother, who observed P in a street in the city. The appellant said that to her knowledge P did not even know she is not in South Africa.

[84] Apart from what P did, the appellant's own actions or lack of action during the period from 1997 in response to P and his threats included the following. She did not try to move away from Johannesburg to places in South Africa where she would be far from P (and his non Zulu friends), such as to the KwaZulu/Natal province where certain of her relatives live. Nor was her situation such that she actively sought assistance to facilitate state protection from a secular source or sources, such as WAWA or POWA (barring her reports to the BW police station). Even her reports to the police at BW she described as going through the motions and that she did not expect any action. Therefore other than reports to one police station, BW, she made no other efforts to access assistance to obtain state protection, but instead had counselling from her church group, on a religious level

(but excluding actions to access state protection). Therefore other than saying her bags were packed after the incident she described in May 2003, the appellant's actions and inaction in this period from 1997 are indicative of a lack of urgency in her situation with P.

[85] As indicated above, there were therefore isolated threats of serious harm over a period of approximately six years from the divorce in 1997 until the appellant left South Africa, but the reports of these threats to the BW police station did not result in action against P. It is therefore relevant to have particular regard to state protection and whether its prospects would be the same.

State Protection (in the event of the threat of serious harm from P)

[86] The assessment must consider whether state protection would now be available to the appellant on a return to her country of nationality.

[87] As the country information on South Africa indicates, there have been high levels of domestic violence and difficulties in the provision of effective steps to combat domestic violence, due to factors such as poor training and lack of skills amongst the police at police station level. This was particularly so during the 1980s and most of the 1990s, when this appellant experienced domestic violence while living with P.

[88] The efforts by leading politicians, the government, government departments, the parliament and NGOs to rectify the situation are set out above under the Country Information heading. That information shows interlocking legislation and measures to deal with domestic violence, ranging from protection orders, to prison sentences for those responsible for domestic violence, and measures to follow up and deal with dereliction of duty by members of the police. These provide avenues to gain protection in domestic violence situations and to combat dereliction of duty by members of the police.

[89] Counsel submitted that Chapter 8 SAHRY shows that while the actions by the government show good intent and the measures appear good on paper, in reality they do not provide protection for a person such as the appellant (as her evidence shows). The 2004 DOS Report and Chapter 8 SAHRY, he submitted, confirm that there is an ongoing problem with both domestic violence and police

inefficiency, and societal attitudes, and lack of resources and training hamper the effectiveness of the legislation.

[90] Although the relatively recent steps to combat domestic violence (set out above, under "Country Information") postdate the earlier periods of the appellant's case, the assessment of risk of persecution, as mentioned above, is forward looking, and looks to whether the appellant will be able to be access state protection if she now returns to South Africa.

[91] The country information indicates that women subject to domestic violence do not have equal access to the police and agencies providing assistance to obtain state protection. Women who are illiterate and are in rural (or tribal) areas far from the main urban centres have limited police resources available, and very few other agencies easily accessible to them to facilitate state protection. Conversely women who are in urban centres, are literate and have access to modern communications, such as telephones, faxes, computers and the internet, are not only close to agencies that can facilitate state protection but also have a variety of ways of accessing assistance to gain state protection.

[92] Decisions of the Refugee Status Authority referred to by the refugee status officer, such as *Refugee Appeal Nos 74078 and 74145* (17 March 2003) which is distinguished from the present case by counsel and where refugee status was declined, and *Refugee Appeal Nos 74628, 74629, and 74630* (11 February 2004) where refugee status was granted, have been considered. In the latter case, its circumstances differ in several respects from the present case. In that case the main appellant was a woman from the Democratic Republic of the Congo (the other appellants were her two young daughters). She experienced discrimination and lack of assistance from the police during the 1990s due to her Congolese origin and because she could not speak Zulu with the police, she was isolated in South Africa with no familial support, minimal financial resources, and lack of knowledge of tribal languages. She did not know of any other place in South Africa she could move to, to avoid her South African ex partner. Her ex partner had previously sought her out with a view to intimidating and harming her. Her ex partner and two associates had also raped her in front of her children. He had also made threats against her children. That case therefore has significant differences from the present case. These two cases underline that ultimately each case must be decided on its own circumstances and merits.

[93] The appellant is an educated, self-sufficient, Zulu South African, with family support and relatives, whose home is in a major urban area, and close to agencies such as POWA, the ICD, and the courts (where, at one of the courts, she arranged and obtained her contested divorce, without legal assistance) and she can easily contact such agencies by telephone (including WAWA, which is further from her home).

[94] The improvements in dealing with domestic violence in South Africa might not assist all women subjected to it, but in respect of the appellant this would not be the case.

[95] Her problem was that prior to the appeal hearing she had not known of the various agencies and laws, which could assist her to access state protection, and further was in a Christian group which avoided or was disinclined to use secular assistance and help from people who might not be Christian. A choice not to rely on secular organisations and people cannot be a sound basis in this case to find that state protection is not available, both in logic and as indicated in cases such as *Refugee Appeal No 71427* (above) [66]-[68]. The appellant would however apparently be prepared to depart from this stance, as she said that if she was in South Africa, she now knew of the avenues available to her to access assistance, and she would fully utilize the assistance of POWA to obtain a protection order from the magistrates' court and go to the ICD if there was a lack of police diligence. The Authority has no doubt that now armed with her knowledge and with her other personal attributes mentioned above, she would be able to access and gain state protection. The Authority notes that the appellant would be well advised to, in future, request the courts to enforce the maintenance order, rather than personally confronting P.

Conclusion as to state protection and the real chance of persecution

[96] The Authority finds that the appellant can access state protection if she returns to her country of nationality, and that there is no real chance of her being persecuted if she returns to South Africa.

CONCLUSION

[97] Turning to the principal issues as raised by the Refugee Convention, the first is therefore answered in the negative and it is unnecessary to answer the second.

[98] For the reasons mentioned above, 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.

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M Hodgen
Member