1501978 (Refugee) [2015] AATA 3672 (8 November 2015)

DECISION RECORD

DIVISION:	Migration & Refugee Division
CASE NUMBER:	1501978
COUNTRY OF REFERENCE:	Zimbabwe
MEMBER:	Giles Short
DATE:	8 November 2015
PLACE OF DECISION:	Sydney
DECISION:	The Tribunal remits the matter for reconsideration with the direction that the applicant satisfies paragraph 36(2)(a) of the Migration Act.

Statement made on 08 November 2015 at 6:17pm

Any references appearing in square brackets indicate that information has been omitted from this decision pursuant to section 431 of the *Migration Act 1958* and replaced with generic information which does not allow the identification of an applicant, or their relative or other dependant.

STATEMENT OF DECISION AND REASONS

INTRODUCTION

1. [The applicant] is a citizen of Zimbabwe. She has said that before she last left Zimbabwe in December 2001 she was involved in activities in support of the opposition Movement for Democratic Change (MDC) along with her [relative], with whom she was living in Harare at the time, and that in July 2000 youths from the ruling ZANU-PF (Zimbabwe African National Union - Patriotic Front) beat her [relative] so severely that he could not walk and broke into the house and sexually assaulted her. She has said that her [relative] has since died and that she has no close family members living in Zimbabwe. [The applicant] initially came to Australia as a student in July 2002 and she has remained here working in [a certain] sector. She applied for a protection visa [in] April 2013. Her representative has submitted that she faces a real chance of persecution for reasons of her perceived support for the MDC and her status as a young, single woman without close family or a support network in Zimbabwe.

2. [The applicant]'s application for a protection visa was refused by a delegate of the Minister for Immigration and she has applied to this Tribunal for review of that decision. On 15 October 2014 the Tribunal, differently constituted (the first Tribunal), affirmed the decision under review. [In] January 2015 the Federal Circuit Court of Australia ordered, by consent, that a writ of certiorari issue to quash the decision of the first Tribunal and that a writ of mandamus issue to compel the Tribunal to reconsider the matter the subject of the decision according to law. The Court noted that the Minister conceded that the decision of the first Tribunal was affected by jurisdictional error as the Tribunal failed to perform its statutory task by not considering relevant country information. The Court did not identify the relevant country information which the Tribunal had supposedly failed to consider.

3. The matter is now back before the Tribunal pursuant to the orders made by the Federal Circuit Court. A summary of the relevant law is set out at Attachment A. I have taken the policy guidelines prepared by the Department of Immigration and the country information assessments prepared by the Department of Foreign Affairs and Trade into account to the extent that they are relevant. The issues in this review are whether [the applicant] has a well-founded fear of being persecuted for one or more of the five reasons set out in the Refugees Convention in Zimbabwe and, if not, whether there are substantial grounds for believing that, as a necessary and foreseeable consequence of [the applicant] being removed from Australia to Zimbabwe, there is a real risk that she will suffer significant harm.

CONSIDERATION OF CLAIMS AND EVIDENCE

Does [the applicant] have a well-founded fear of being persecuted for one or more of the five reasons set out in the Refugees Convention in Zimbabwe?

[The applicant]'s claims

4. [The applicant] is aged in her early [age]. She has said that she belongs to the Shona tribe. She has said that her parents separated when she was [age] or [age] years old and that her father moved to [another country]. She has said that she and her mother moved around Zimbabwe for the purpose of her mother's work but that the home of her [relative] in Harare became the family home. She has said that she attended a boarding school in Bulawayo from January [year] until October or November [year] when she successfully completed her Advanced level examinations (Year 12). [The applicant]'s mother (who is a citizen of [Country 1] but who was living in Australia on a [temporary] visa at the time [the applicant] made her application for a protection visa) told the primary decision-maker in November 2013 that she had been living and working in [Country 2] from April 1999 until about March 2001 when she had gone to [Country 1] and that during school holidays [the applicant] had

mostly stayed with family friends in Bulawayo. She said that during this period she had often returned to Zimbabwe to spend time with [the applicant] and that [the applicant] had also spent time with her in [Country 2].[1]

5. [The applicant]'s recollection is somewhat different. She said at the hearing before me that while she had been at boarding school in Bulawayo she had returned to her [relative]'s house in [a suburb] in Harare for the school holidays and on some 'fixture free' weekends when she would go back there after lunch on Friday and return to the school by lunchtime on the Monday. She said that it took about four hours to travel from Bulawayo to Harare. She confirmed that during some school holidays in this period she had gone to [Country 2] when her mother had been living and working there but she said that during others she had gone to Harare and that she did not think that she had spent any of the school holidays in Bulawayo. She said that after she had finished her Advanced level examinations in October or November [year] she and her [relative] had visited her mother in [Country 2] before returning to Harare where she has said she had a Christmas holiday job for around three months at [a] department store. [The applicant] has said that she continued living with her [relative] in Harare until she left Zimbabwe in December 2001 to visit her mother in [Country 1] before coming to Australia as a student at the beginning of July 2002.

6. In a statutory declaration made on 3 September 2014 [the applicant] said that her [relative] had been [occupation] of a [church] and [another occupation]. She said that he had been in exile in [another country] as a member of ZAPU (the Zimbabwean African People's Union led by Joshua Nkomo) and that, after ZANU and ZAPU had merged, the Shona people who had supported ZAPU had been left in the lurch. She said that her [relative] had been a very public figure who had bravely supported the MDC and had often spoken out against the ZANU-PF. She has said that he held meetings of MDC supporters in his home and that he also went to 'growth points' (which she has explained are like suburban shopping centres) to give speeches about the MDC and to hand out flyers, T-shirts and sometimes food as well. She has said that when she was in Harare she would assist her [relative] in holding meetings at his home and she would go with him to the 'growth points'.

7. [The applicant] has referred to the fact that the MDC was only formed in 1999 and she has said that because of her [relative]'s support for the MDC his home in Harare was targeted by youths from the ZANU-PF. She has said that they shouted threats such as 'traitors' and 'dogs' through the gates, they painted slogans on the walls and they threw rocks at the house. She has said that in July 2000 (following the parliamentary elections held on 24 and 25 June 2000) her [relative] was attacked at the gate to his home by ZANU-PF youth militia and beaten so severely that he was unable to walk. She has said that the youths broke into the house and two of them sexually assaulted her. [The applicant] has said that she and her [relative] did not report this incident to the police as they would do nothing against ZANU-PF supporters.[2] She has said that she was traumatised by this incident and that she has found it hard to trust or to have a proper relationship as a result. She has said that after this incident neither she nor her [relative] went to the 'growth points' as they had previously but that the meetings in her [relative]'s home resumed in 2001, although there were fewer such meetings than before. She has said that she was not able to leave Zimbabwe sooner after this incident because her [relative] had needed her help due to his injuries and her family had had financial problems.

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[1] See the file note at folio 162 of the Department's file [number].

[2] In a statutory declaration prepared for her by her representative and signed on 20 May 2015 it was stated that some church people had reported this incident to the [police] but [the applicant] confirmed at the hearing before me that, as she had said in her statutory declaration made on 3 September 2014, it was an earlier incident which occurred when her [relative] was dropping off worshippers after a mid-week prayer meeting which was reported to the [police].

8. As referred to above, [the applicant] came to Australia as a student in July 2002. She has said that she completed a [tertiary course] in Australia in [year] and that she was issued a [certain] visa while she was visiting [Country 1] in December 2007. She has said that in January 2013 she applied unsuccessfully for [another] visa. She has said that since 2010 she has worked in [a certain] sector in [section] and the provision of [service]. She has said that she has not been back to Zimbabwe since she left in December 2001 and that, following her [relative]'s death in 2005, she has no close family there. At the hearing before the first Tribunal on 26 September 2014 she said that one of her [relatives] who was [occupation] still lived in Zimbabwe but she had not spoken to him in many years. She said that she also had a few cousins but she had not spoken to them in a long time. She said that [a relative] was involved in politics and that his wife had actually been granted asylum in [another country]. At the time she made her application [the applicant] had a multiple entry visa permitting her to visit her family in [Country 1] but this expired [in] November 2014.

9. [The applicant] has said that while she has been in Australia she has talked with friends about what is happening in Zimbabwe. At the hearing before me she said that she had spoken to a few friends at social gatherings and there had been a few fund-raising events. She said that she had not attended any political meetings besides the fund-raising events. She said that these events had been raising funds for the MDC and for orphanages and the like. She said that she had donated money to the MDC when she could. She said that she had mainly attended these fund-raising events when she had been living in [city] (up until May 2013). She said that she had not really known anyone in [city] and she had not attended similar fund-raising events in [city].

10. When she was interviewed by the primary decision-maker [in] November 2013 [the applicant] said that she feared returning to Zimbabwe because of the political situation. She said that the recent elections had been rigged, there was no democracy and there was lawlessness. She said that she feared that when she arrived she would be detained and questioned because she had been away for so long. She said that she feared for her life because of the help she had provided to her [relative] when she had still been in Zimbabwe. She referred to giving out flyers. She said that people with whom she had been at school were now in positions of political power so they were likely to remember her. She said that they would know about her previous involvement in the MDC with her [relative] and they would target her. She said that this was what she was hearing from friends in Zimbabwe. She said that she would possibly be kidnapped or bashed by the ZANU-PF youth militia, the police and the CIO (the Central Intelligence Organisation, responsible for internal and external security). She said that they would want to harm her because of the work she used to do and because she had been out of the country for around 12 years. She said that they would think that she was trying to bring in western ideologies and that she was sourcing funds to help the MDC. With regard to her delay in applying for a protection visa she said that she had considered applying for a protection visa as a last resort and she had explored every other avenue to remain in Australia.

11. At the hearing before the first Tribunal on 26 September 2014 [the applicant] said that she believed that people were still being detained and questioned, especially when they came back from western countries. She said that there were reports, and she had heard, that people were still being beaten up and people were still disappearing. She said that there had obviously been no freedom to be able to vote in the elections which had occurred in 2013 and there was no law in Zimbabwe. She said that even though she had left Zimbabwe 13 years previously she was still fearful of returning because of the sexual assault she had experienced. She said that the people who had assaulted her and who had attacked her [relative] were still there and could be in positions of power. She said that once she returned they would know because Zimbabwe was a small country. She said that there was a high risk of her being attacked or detained or kidnapped or bashed because these people would

want to protect themselves in case she lodged a complaint or spoke out about what had happened to her.

12. In a statutory declaration made on 20 May 2015 [the applicant] said that MDC supporters were still being attacked in Zimbabwe. She said that she had a real fear of being persecuted in Zimbabwe as a young, single female with no family in Zimbabwe and with a memory and history of having supported the opposition. She said that as such she would have no protection from the authorities. She said that the risk of persecution of past MDC supporters increased the longer they stayed out of the country. She said that her attackers might well identify her upon return and they might be in higher positions in the Mugabe regime. She said that she feared that she would suffer serious harm, including beatings, detention and possible death on account of her actual and imputed political opinion in support of the MDC and in opposition to the ZANU-PF.

13. In a covering submission [the applicant]'s representative referred to her claims. He submitted that she feared that she might be subjected to harm as a returnee who had lived in a western country for a significant period of time. He submitted that her political opinion in support of the MDC and in opposition to the ZANU-PF together with her western affiliation would make her a noticeable target. He submitted that country information indicated that [the applicant]'s fears of persecution were well-founded, referring to Section 2.3 of the UK Home Office Country Information and Guidance on *Zimbabwe: Political Opposition to ZANU-PF* (October 2014) which deals with the treatment of actual or perceived political opponents. Although that document refers to the July 2013 elections [the applicant]'s representative referred to the power-sharing agreement between the ZANU-PF and the MDC following the elections in 2008. He submitted that the Zimbabwe security services believed that returning asylum-seekers were British spies, that a Zimbabwean could be a 'marked man' on return and that Zimbabweans deported home were regarded as traitors but he cited no source for this information.

Discussion of [the applicant]'s claims

14. At the hearing before me I asked [the applicant] what she thought she would do for a living if she went back to Zimbabwe. She said that she had no idea because they had a high unemployment rate at the moment. I asked her if she thought she would be able to obtain employment in the same sort of work she was doing here, in [industry]. She said that as far as she knew there were no businesses that ran in the same way as in Australia so she did not think so. She said that she had talked to friends who had tried to go back. She said that one of these friend had returned to [another country] and one of them had come here. She said that her friend in [the other country] had wanted to start a [business] in a rural area ([name]) as part of her [tertiary] qualification but she had almost been assaulted because (although she was from a Shona-speaking background) she had not really been able to speak Shona as a result of having been away for a long time and had consequently been viewed as a traitor. She said that her other friends had said that when they had gone back they had had a lot of issues because the ZANU-PF had been in charge of the businesses and they had been viewed as traitors because they had been away for so long. She said that they had told her that when they were driving around there were a lot of road-blocks and the ZANU-PF would ask you to chant the slogans and they would also ask for bribes. She said that this was in Harare.

15. I referred to the fact that [the applicant] had said at the previous hearing that she believed that people were still being detained and questioned, especially when they came back from western countries, and I asked her if this had happened to any of her friends. [The applicant] said that she had based this on what she had read and had heard. She said that this had not happened to someone whom she knew personally but it had happened to someone whom other friends knew. She said that her friend who had told her that the

ZANU-PF had been in charge of the businesses had gone back with her husband but this friend had told her that it would have been much more difficult if she had been alone. She said that this friend had told her that she had seen other young women who had gone back alone and it had been difficult for them because if you went to particular areas they asked you to chant slogans and if you did not know the slogans you would be at risk of being detained or assaulted.

16. I put to [the applicant] that it appeared that her political activity had only been at a fairly low level. [The applicant] said that in Zimbabwe they did not view anything as low-level or high-level. She said that if you were seen to be an MDC member or you were seen to have any sort of influence you were a threat. I explained to [the applicant] that the first thing I had to do was to make a finding about what she was likely to do if she went back to Zimbabwe. I noted that her only involvement had been in helping her [relative], attending some of the meetings which he had held at his home and going with him to the 'growth-points'. I noted that she did not appear to have been particularly politically active in Australia: she had said that she had attended some fund-raising events. [The applicant] said that if she went back to Zimbabwe she would not speak out against the regime because she would be frightened. She said that her [relative] had been there when the MDC had started and they would always remember.

17. I put to [the applicant] that she had not done anything in Australia to speak out against the regime in Zimbabwe: she had just attended fund-raising events. [The applicant] said that when she had applied for a protection visa she could have started doing this to support her application but she had not because she had been doing the honest thing. I noted that she had been in Australia for a very long time before she had applied for protection so if she was the sort of person who was very committed to taking action against the regime she could have been doing this. [The applicant] said that this was true but it was not correct to say that she was not politically committed: she had never seen herself as a leader. She said that in the first couple of years after she had come to Australia she had still been processing everything that had happened to her. She said that to be honest she had not wanted to become politically active because she had still been quite traumatised. She agreed that she had been here for ten years before she had applied for protection and that during this time her only political involvement had been talking about things with friends and attending some fund-raising events.

18. I referred to the fact that when [the applicant] had been interviewed by the primary decision-maker she had said that people with whom she had been at school were now in positions of political power so they were likely to remember her. [The applicant] said that the parents of some of the people with whom she had been at school had been affiliated with the ZANU-PF. She said that some of them had been ZANU-PF Ministers. She said that once she returned they might tell the CIO or the police and she would be detained or questioned. She said that because Zimbabwe was a small country word got around pretty quickly if someone came back. She said that she feared that this would cause her problems with the CIO and the police because they knew of her previous affiliation with the MDC. I noted that she had remained in Zimbabwe for a further 18 months after the incident in July 2000 and she had had no troubles with the police or the CIO and I asked her why she thought she would have problems with the police or the CIO if she went back now. [The applicant] said that now she had been away for 14 years, especially in Australia, they would think that she was going to fund the MDC or to motivate people. She said that it was because she had been in Australia for 14 years, she had been affiliated with the MDC and her [relative] had been as well.

19. I explained to [the applicant] that the Tribunal was required to take into account assessments prepared by the Australian Department of Foreign Affairs and Trade for protection status determination purposes and that on 25 February 2014 the Department had issued a Country Report in relation to Zimbabwe. I put to her that the Department had said that it assessed

that politically-motivated violence had been decreasing in frequency in the preceding three years and that incidents of politically-motivated harassment and violence were concentrated in rural areas. It had said that in recent years the ZANU-PF had moved from outright violence to the administrative and systemic repression of dissent among opposition groups and civil society. It had said that at the time of writing its report politically-motivated violence was more likely to be targeted at specific high profile individuals. It had said that mere membership of the MDC did not mean that an individual would attract adverse attention from the Government or would face community prejudice but that, the more prominent and outspoken a member was, the more likely they would be to attract adverse attention or harassment from the authorities.

20. I put to [the applicant] that the Department had said that low-profile MDC members, defined as members without a high public or party profile, were at low risk of attracting politically-motivated violence from police or government officials although it had said that this risk could spike during election cycles and at times of political uncertainty. It had said that it assessed that family or associates of MDC members, including high-profile members, were at low risk of violence on the basis of association with a member of an opposition party. It had said that some instances of harassment and intimidation occurred, such as obvious surveillance and administrative hurdles.[3] I put to her that the Department's assessment suggested that, contrary to what she had said earlier, there was a distinction between high-profile and low-profile people or people who were associated with a high-profile person.

21. [The applicant] said that she thought that Zimbabwe was still trying to save face so a lot of people would tell the Australian Department of Foreign Affairs and Trade a lot of different things and that a lot of this would be lies because from what she was hearing things were different. She said that according to the Zimbabwe Human Rights Forum politically-motivated violence was still there, whether or not you were a low-level or high-level member. She referred to the fact around two months before the hearing Itai Dzamara had been kidnapped in broad daylight by 20 people and he had not been found up until now. She also referred to the fact that three pastors who had had seven Canadians with them had been detained. She said that they had tried to make them say that they had been doing MDC activities with the Canadians. She said that they had been detained for hours with no food and they had later been released with no charge. She said that there was plenty of other country information that differed from the assessment of the Australian Department of Foreign Affairs and Trade.

22. I stressed that [the applicant] was welcome to produce any evidence she wanted to the Tribunal. I suggested to her, however, that Itai Dzamara, for example, could be described as a high-profile person. [The applicant] said that she knew that he had spoken out at a rally but that she would not describe him as a high-profile MDC person. I noted that I had focused on the MDC because this was her claim but the Department in its report also went on to talk about civil society and obviously people who were speaking out against the government through other organisations were at risk as well. I noted that the pastors might fall into this category, for example. I noted that [the applicant]'s representative had referred to the UK Home Office Country Information and Guidance on *Zimbabwe: Political Opposition to ZANU-PF* (October 2014) but it said that the UK Foreign and Commonwealth Office had reported that the July 2013 elections had been largely peaceful and that levels of overt violence had been lower than in previous election periods.[4] I noted that it talked about risks to suspected and known MDC members and supporters but, as we had discussed, it appeared that her own political involvement had been at a low level and this sort of information might not suggest that there was a real chance or a real risk that she would be

[3] *DFAT Country Report - Zimbabwe*, 25 February 2014, paragraphs 2.21-2.22, 3.27-3.28, 3.47-3.48.
[4] UK Home Office Country Information and Guidance - *Zimbabwe: Political Opposition to ZANU-PF* (October 2014), paragraph 2.3.1.

harmed because of her own low-level involvement or her association with her [relative] (who she had said had been a high-profile and outspoken person) if she went back to Zimbabwe now.

23. [The applicant] said that what she had been hearing on the ground was different and she thought that she would be subjected to torture as a young woman with an association with the MDC. I indicated that I accepted that violence against women had been part of the politically-motivated violence in Zimbabwe but the real question was whether there was a real chance or a real risk that she would be a victim of such politically-motivated violence. [The applicant] said that if she were to go back she would not know where to go as a young woman with an MDC history. She said that if she had family members or a support network there who could tell her where to go or where not to go or what slogans to chant or how she could protect herself then this country information would make sense but because she did not have any of these things she thought that she would be at real risk. I indicated to her that my starting point would be to assess her claims on the basis that she would return to Harare because this was where she had lived and where she had said that her family home had been. [The applicant] repeated that she did not know where to go because she did not have any support network in Zimbabwe. She repeated that if she had family or friends or a support network it might be safe for her to return because they would be able to tell her what to do, where to go, what slogans to chant, where it was politically safe or where other people from the MDC lived but because she did not have anyone like this she would be terrified of returning.

24. I put to [the applicant] that the Australian Department of Foreign Affairs and Trade had also said that it assessed that Zimbabwean citizens who had lived, studied or worked in Australia were not specifically targeted or discriminated against on their return to Zimbabwe. It had said that professionals returning to Zimbabwe were likely to find it difficult to find work as the few positions available in non-government organisations and the private sector were in high demand. It had said that government organisations might view returning Zimbabweans with some suspicion or question their loyalty but it had said that returnees to Zimbabwe were unlikely to attract the attention of the state and would be permitted to return to their place of origin without harassment except in the case of high profile returnees wanted on criminal charges.[5] [The applicant] said that she did not agree.

25. I noted that it did not appear from her evidence that her friends who had returned to Zimbabwe had encountered problems because they were returnees rather than for other reasons. [The applicant] said that her friends who had gone to Bulawayo had been asked to chant slogans because people had known that they had been away for a while. I asked her if they had been singled out because they had been away for a while or if everyone who had encountered these road-blocks had had to chant slogans and she said that she did not know. I noted that her representative had referred to information which came from a research response prepared for the Tribunal in March 2011 which had quoted *BBC News* reports in relation to a decision of the UK Asylum and Immigration Tribunal in 2005 in which it was argued that the Zimbabwean security services believed returning asylum-seekers were British spies. I put to [the applicant], however, that the UK Court of Appeal had remitted the case to the UK Asylum and Immigration Tribunal which had ruled in 2006 that a failed asylum-seeker returned involuntarily to Zimbabwe did not face on return a real risk of being subjected to persecution or serious ill-treatment on that account alone.[6]

26. I put to [the applicant] that in a 2013 country guidance decision the UK Upper Tribunal (Immigration and Asylum Chamber) had said that the evidence did not show that, as a general matter, the return of a failed asylum-seeker from the United Kingdom, having no

[5] *DFAT Country Report - Zimbabwe*, 25 February 2014, paragraphs 3.60, 5.20.
[6] See *AA (Risk for involuntary returnees) Zimbabwe CG* [2006] UKAIT 00061 (1 August 2006).

significant MDC profile, would result in the person facing a real risk of having to demonstrate loyalty to the ZANU-PF. I put to her that the Tribunal had said specifically that a returnee to Harare without ZANU-PF connections would not face significant problems there (including a 'loyalty test') unless he or she had a significant MDC profile.[7] [The applicant] repeated that her friends who had gone back had been stopped and asked to chant slogans. I noted that the UK Upper Tribunal was not saying that this did not happen but that people were not singled out in this context because they were returning from the UK or because they were known or assumed to be failed asylum-seekers.

27. I noted that the Australian Department of Foreign Affairs and Trade had also said that women remained disadvantaged and discriminated against in Zimbabwean society.[8] I put to [the applicant] that she was well-educated and we had talked about the fact that she had an excellent employment history working in [industry]. I put to her that it might be difficult for me to accept that there was a real chance that she would encounter discrimination as a woman that was so serious, or so detrimental in its effect, as to amount to persecution for the purposes of the Refugees Convention. She was not in the same situation as the women in rural areas, for example, who clearly suffered from all sorts of problems in Zimbabwe: she was an educated professional. I indicated that I accepted that, as the Department had said, professionals might find it difficult to get work in Zimbabwe because the opportunities were limited but I put to her that this was different from saying that any discrimination would be so serious, or so detrimental in its effect, as to amount to persecution. I noted that [the applicant] had referred to country information, for example from the Zimbabwe Human Rights Forum, and I reiterated that she was welcome to produce such information to me. I gave [the applicant]'s representative time after the hearing to make further written submissions.

Post-hearing submission

28. In a submission dated 9 June 2015 [the applicant]'s representative referred to [the applicant]'s claims. He submitted that the authorities were aware of [the applicant]'s association with her [relative] and her past MDC activities and that there was more than a remote chance that, as an actual or perceived MDC supporter, [the applicant] would experience problems such as intimidation, harassment, beatings, sexual assault or worse if she returned to Zimbabwe. He referred in this connection once again to the UK Home Office Country Information and Guidance on *Zimbabwe: Political Opposition to ZANU-PF* (October 2014) which he submitted stated that 'those who are not favourably disposed to ZANU-PF are entitled to international protection'. However this refers to what was said in the country guidance decision made by the UK Upper Tribunal (Immigration and Asylum Chamber), *CM (EM country guidance; disclosure) Zimbabwe CG* [2013] UKUT 59 (IAC) (31 January 2013), to which I referred in the course of the hearing, and the UK Upper Tribunal was referring there specifically to people returning from the UK after a significant absence to a rural area of Zimbabwe (other than Matabeleland North or Matabeleland South).[9] As I put to [the applicant], in relation to persons returning to Harare the UK Upper Tribunal said that 'in general a person without ZANU-PF connections will not face significant problems there (including a "loyalty test"), unless he or she has a significant MDC profile, which might cause him or her to feature on a list of those targeted for harassment, or would otherwise engage in political activities likely to attract the adverse attention of ZANU-PF, or would be reasonably likely to engage in such activities, but for a fear of thereby coming to the adverse attention of ZANU-PF'.[10]

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[7] UK Upper Tribunal (Immigration and Asylum Chamber), *CM (EM country guidance; disclosure) Zimbabwe CG* [2013] UKUT 59 (IAC) (31 January 2013), paragraphs (1) and (5).
[8] *DFAT Country Report - Zimbabwe*, 25 February 2014, paragraph 3.68.
[9] *CM*, cited in footnote 7, paragraph (2).
[10] *CM*, cited in footnote 7, paragraph (5).

29. [The applicant]'s representative referred to the fact that the same report (once again drawing on the same country guidance decision as set out above) said that '[a]s a general matter, it is unlikely that a person with a well-founded fear of persecution in a major urban centre such as Harare will have a viable internal relocation alternative to a rural area in the Eastern provinces'. [The applicant]'s representative noted that the same report said that 'there continue to be reports, albeit declining numbers, of ill-treatment of perceived MDC supporters, their families, political activists, student leaders and perceived government critics, particularly in Mashonaland West, Mashonaland Central, Mashonaland East, Manicaland, Masvingo and Midlands provinces and high density areas of Harare' and that it referred to the fact that the US State Department had said in its *Country Reports on Human Rights Practices for 2013* in relation to Zimbabwe that 'ZANU-PF supporters - often with tacit support from police - continued to assault and torture scores of persons, including suspected and known MDC members, their families, civil society activists, and student leaders, especially in neighborhoods of Harare and nearby towns' and that the police sometimes arrested the victims of the violence rather than the perpetrators.

30. [The applicant]'s representative referred to the fact that [the applicant] had resided in Harare before she had left Zimbabwe in December 2001 and he submitted that based on this information she could not now reside in Harare or relocate to any rural area. He also submitted that as a young, single woman without a support network she was likely to be vulnerable and subject to destitution but he referred to no evidence in support of this submission. He submitted that [the applicant] faced 'a real risk [sic] of persecution, amounting to property [sic], physical and sexual harm based upon her perceived support or membership of the MDC and her status [as] a single women [sic] without a support network'. He submitted subsequently that [the applicant] was a member of a 'defined social group' because she was a perceived supporter of the MDC and she was a single woman without close family or a support network. He referred to two decisions of the Tribunal (differently constituted), 1006859 [2010] RRTA 1023 (18 November 2010) and 1101968 [2012] RRTA 585 (30 May 2012) in which the Tribunal accepted that the applicants faced a real chance of persecution based on their association with family members involved in the MDC.

Conclusions

31. Although, as the primary decision-maker noted in the decision under review, various matters were omitted from [the applicant]'s application for a protection visa and further details have been provided in the course of the processing of her application, I do not agree with the primary decision-maker's assessment that [the applicant] knowingly provided false or misleading information to the Department. It is apparent that many details were omitted through inadvertence and that other matters may be explained by the passage of time since the relevant events. The primary decision-maker expressed the view that [the applicant]'s delay in applying for protection indicated that she did not have a strong fear for her personal safety in Zimbabwe but, while it is well-established that an applicant's delay in applying for a protection visa is relevant in assessing the genuineness, or at least the depth, of their claimed fear of being persecuted,[11] it is a mistake to treat delay in itself, without more, as determinative of an application for refugee status.[12] In the present case [the applicant] has provided a cogent explanation with regard to why she did not apply for a protection visa earlier, namely that she chose to pursue other avenues first, a course which she was perfectly entitled to take. It is relevant in this context that, although [the applicant] has travelled extensively since she first came to Australia in July 2002, she has not returned to Zimbabwe during this time which provides support for her claimed fear of being persecuted if she returns to that country now.

[11] See *Selvadurai v Minister for Immigration and Ethnic Affairs* (1994) 34 ALD 347.
[12] See *SZJYM v Minister for Immigration & Anor* [2008] FMCA 652.

32. Having had the opportunity of observing [the applicant] giving evidence before me I formed a favourable view of her credibility. She gave her evidence in an honest and forthright fashion, she did not seek to evade questions, nor did she exaggerate her claims in an attempt to strengthen her application. I consider it clear on the basis of her evidence about her activities both in Zimbabwe and Australia that she is not someone who could be characterised as a political activist: she is someone who is interested in politics to the extent that it has a direct impact on her and her family and friends. I accept that her [relative] with whom she lived in Harare before she left Zimbabwe in December 2001 was a political activist and that he had a prior history as a member of ZAPU as she said in her statutory declaration made on 3 September 2014. I accept that, as she has said, she spent some school holidays and some 'fixture free' weekends with her [relative] in Harare when she was attending the boarding school in Bulawayo and her mother was living and working in [Country 2]. I accept that when she was in Harare she assisted her [relative] in holding meetings at his home and that she would go with him to the 'growth points'.

33. As I put to [the applicant], it appears from her evidence that her political involvement was at a low level and I note that she did not contest this characterisation, suggesting rather that the likelihood of a person being a victim of politically-motivated violence did not depend on whether they were low-level or high-level people. Having had the opportunity of observing [the applicant] giving evidence before me I accept that she is telling the truth about the attack on her and her [relative] in July 2000. I accept that this was a very traumatic event for her despite the fact that she managed to carry on with her life, taking her Advanced level examinations, obtaining a holiday job and making plans to study in Australia. The first Tribunal placed weight on the fact that [the applicant] had remained in Zimbabwe for 18 months after this event but I accept that, as [the applicant] has said, she remained because her [relative] needed her help and her family had financial problems. Given the low level of [the applicant]'s involvement it is not part of her case that she was at imminent risk of being attacked every time she stepped out of the house. Moreover it is relevant that, as she has said, her [relative] ceased going to the 'growth points' after the attack in July 2000 and that, although he resumed holding meetings in his home in 2001, there were fewer such meetings than before.

34. [The applicant]'s case is that she will face a real chance of being persecuted if she returns to Zimbabwe as a result of a combination of factors, any one of which, taken on its own, might not be sufficient: her own low-level involvement in MDC activity particularly in the lead up to the parliamentary elections in June 2000, her association with her [relative] who had a long history of involvement in politics as a member of ZAPU and who often spoke out against the ZANU-PF, the fact that she was the victim of a sexual assault by ZANU-PF youths in July 2000 and that she is sure that she will be able to identify the youths responsible if she meets them again, even after 15 years, the fact that she has been outside Zimbabwe for 14 years and that, as someone returning from Australia in particular, she may be viewed with suspicion or her loyalty may be questioned, and the fact that, if she returns to Zimbabwe, she will be a young, single woman with no close family or support networks.

35. While, as I put to [the applicant], the Australian Department of Foreign Affairs and Trade has said that low-profile MDC members, defined as members without a high public or party profile, are at low risk of attracting politically-motivated violence from police or government officials,[13] I consider that this combination of factors may elevate the risk to [the applicant]. I accept that, as she said, politically-motivated violence continues to occur in Zimbabwe: although, as the Department noted (and as referred to in the UK Home Office document on which [the applicant]'s representative relied), the July 2013 elections were largely peaceful and levels of overt violence have been lower than in previous election periods. In its *Country Reports on Human Rights Practices for 2014* in relation to Zimbabwe, for example, the US

[13] *DFAT Country Report - Zimbabwe*, 25 February 2014, paragraph 3.47.

State Department repeated that, as it had said in the previous year's report, ZANU-PF supporters - often with tacit support from the police - continued to assault and mistreat scores of persons, including suspected and known MDC members and their families, especially in neighbourhoods of Harare and nearby towns.[14]

36. Likewise, while the Australian Department of Foreign Affairs and Trade said that it assessed that Zimbabwean citizens who had lived, studied or worked in Australia were not specifically targeted or discriminated against on their return to Zimbabwe, it said that government organisations might view returning Zimbabweans with some suspicion or question their loyalty.[15] [The applicant] referred in this context to people being required at road-blocks to chant slogans to demonstrate their loyalty and she said that her friends who had returned to Zimbabwe had encountered this problem. As I put to her, the UK Upper Tribunal said in its 2013 country guidance decision (which is also referred to in the UK Home Office document on which [the applicant]'s representative relied) that the evidence did not show that, as a general matter, the return of a failed asylum-seeker from the United Kingdom, having no significant MDC profile, would result in the person facing a real risk of having to demonstrate loyalty to the ZANU-PF. As I put to her, the Tribunal said specifically that a returnee to Harare without ZANU-PF connections would not face significant problems there (including a 'loyalty test') unless he or she had a significant MDC profile.[16]

37. As I put to [the applicant], while I consider that the independent evidence indicates that people are not singled out to be subjected to these sorts of loyalty tests because they are returning from a country like Australia (or the UK) or because they are known or assumed to be failed asylum-seekers, the UK Upper Tribunal decision confirms the existence of such tests and it refers to 'the prospect of serious harm in the event of failure'.[17] I accept the force of [the applicant]'s argument that she will be particularly vulnerable in this context because she lacks family or friends or a support network in Zimbabwe who would be able to tell her what to do, where to go, what slogans to chant and where it is politically safe. I also accept that it is likewise relevant that, if [the applicant] returns to Zimbabwe, she will be a young, single woman with no close family or support networks which may increase the chance that she will be the victim of serious harm (including sexual assault) if she fails such a 'loyalty test'.

38. Having given careful consideration to all of the evidence I accept that there is a real chance that, if [the applicant] returns to Zimbabwe now or in the reasonably foreseeable future, she will be persecuted by people from the ZANU-PF for reasons of her real or imputed political opinion (in support of the MDC or disloyal to the ZANU-PF). For the reasons given above I accept that [the applicant] will be particularly vulnerable to serious harm if she is required to demonstrate her loyalty to the ZANU-PF because she will be a young, single woman returning to Zimbabwe after an extended absence overseas who lacks family or friends or a support network in Zimbabwe. I consider that it is this combination of factors which means that there is a real chance that she will face persecution involving serious harm in the context of the sort of loyalty tests which the UK Upper Tribunal decision establishes may be encountered in Harare as well as in other parts of Zimbabwe.

39. With regard to the availability of effective protection, the High Court has said that the State is obliged 'to take reasonable measures to protect the lives and safety of its citizens, and those measures would include an appropriate criminal law, and the provision of a reasonably effective and impartial police force and justice system' (per Gleeson CJ, Hayne and Heydon

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[14] US State Department, *Country Reports on Human Rights Practices for 2014* in relation to Zimbabwe, Section 1.c, Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment.
[15] *DFAT Country Report - Zimbabwe*, 25 February 2014, paragraph 3.60.
[16] *CM*, cited in footnote 7, paragraphs (1) and (5).
[17] *CM*, cited in footnote 7, paragraph (2).

JJ in *Minister for Immigration and Multicultural Affairs v Respondents S152/2003* (2004) 222 CLR 1 at [26]). The Australian Department of Foreign Affairs and Trade has said that there is no credible avenue for a victim of official violence to seek reliable redress in Zimbabwe and that the Zimbabwe Republic Police are expected to be loyal to the ZANU-PF and have been complicit in the murder, torture, harassment and detention of MDC members.[18] As referred to above, the US State Department has reported that ZANU-PF supporters often have the tacit support of the police when they assault and mistreat people and that the police sometimes arrest the victims of the violence rather than the perpetrators.[19] I do not accept on the evidence before me that the Government of Zimbabwe meets international standards as referred to in *Respondents S152/2003* at [26] and [27] per Gleeson CJ, Hayne and Heydon JJ with regard to the protection it affords to people who face a real chance of persecution at the hands of the ZANU-PF.

40. While the Australian Department of Foreign Affairs and Trade has said that it is possible for a Zimbabwean to live anywhere in Zimbabwe,[20] the UK Upper Tribunal country guidance decision referred to above suggests that a person without ZANU-PF connections returning from the UK after a significant absence to a rural area of Zimbabwe (other than Matabeleland North or Matabeleland South) may well find it difficult to avoid adverse attention, amounting to serious ill-treatment, from ZANU-PF authority figures and those they control and that relocation to Matabeleland (including Bulawayo) may be negated by discrimination where the returnee is Shona.[21] I accept that [the applicant] is Shona and I therefore consider that there is no part of Zimbabwe to which she could reasonably be expected to relocate where she would be safe from the persecution which she fears.

41. I consider that the harm which [the applicant] fears amounts to persecution involving 'serious harm' as required by paragraph 91R(1)(b) of the *Migration Act 1958* in that it involves significant physical harassment or ill-treatment. I consider that her real or imputed political opinion is the essential and significant reason for the persecution which she fears, as required by paragraph 91R(1)(a), and that the persecution which she fears involves systematic and discriminatory conduct, as required by paragraph 91R(1)(c), in that it is deliberate or intentional and involves her selective harassment for a Convention reason.

CONCLUSIONS

42. I find that [the applicant] is outside her country of nationality, Zimbabwe. For the reasons given above, I find that she has a well-founded fear of being persecuted for reasons of her political opinion if she returns to Zimbabwe now or in the reasonably foreseeable future. I find that she is unwilling, owing to her fear of persecution, to avail herself of the protection of the Government of Zimbabwe. As referred to above, although she had a multiple entry visa permitting her to visit her family in [Country 1] at the time she made her application for a protection visa, this expired [in] November 2014. There is nothing in the evidence before me to suggest that she currently has a 'right to enter and reside in' any country other than her country of nationality, Zimbabwe, of the kind referred to in subsection 36(3) of the Migration Act.[22] It follows that I am satisfied that she is a person in respect of whom Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol. Consequently she satisfies the criterion set out in paragraph 36(2)(a) of the Migration Act for a protection visa. It is therefore unnecessary for me to consider her claims under the complementary protection criterion.

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[18] *DFAT Country Report - Zimbabwe*, 25 February 2014, paragraphs 5.1, 5.3.
[19] US State Department, *Country Reports on Human Rights Practices for 2014* in relation to Zimbabwe, Section 1.c, Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment.
[20] *DFAT Country Report - Zimbabwe*, 25 February 2014, paragraph 5.20.
[21] *CM*, cited in footnote 7, paragraphs (2) and (7).
[22] See *Minister for Immigration, Multicultural Affairs and Citizenship v SZRHU* (2013) 215 FCR 35.

DECISION

43. The Tribunal remits the matter for reconsideration with the direction that the applicant satisfies paragraph 36(2)(a) of the Migration Act.

Giles Short
Senior Member

ATTACHMENT A - RELEVANT LAW

1. In accordance with section 65 of the *Migration Act 1958*, the Minister may only grant a visa if the Minister is satisfied that the criteria prescribed for that visa by the Act and the Migration Regulations 1994 have been satisfied. The criteria for the grant of a Protection (Class XA) visa are set out in section 36 of the Act and Part 866 of Schedule 2 to the Regulations. As applicable to this application subsection 36(2) of the Act provided that:

> '(2) A criterion for a protection visa is that the applicant for the visa is:
>
> (a) a non-citizen in Australia in respect of whom the Minister is satisfied Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol; or
>
> (aa) a non citizen in Australia (other than a non citizen mentioned in paragraph (a)) in respect of whom the Minister is satisfied Australia has protection obligations because the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non citizen being removed from Australia to a receiving country, there is a real risk that the non citizen will suffer significant harm; or
>
> (b) a non-citizen in Australia who is a member of the same family unit as a non-citizen who:
>
> (i) is mentioned in paragraph (a); and
>
> (ii) holds a protection visa of the same class as that applied for by the applicant; or
>
> (c) a non citizen in Australia who is a member of the same family unit as a non citizen who:
>
> (i) is mentioned in paragraph (aa); and
>
> (ii) holds a protection visa of the same class as that applied for by the applicant.'

Refugee criterion

2. Subsection 5(1) of the Act defines the 'Refugees Convention' for the purposes of the Act as 'the Convention relating to the Status of Refugees done at Geneva on 28 July 1951' and the 'Refugees Protocol' as 'the Protocol relating to the Status of Refugees done at New York on 31 January 1967'. Australia is a party to the Convention and the Protocol and therefore generally speaking has protection obligations to persons defined as refugees for the purposes of those international instruments. Article 1A(2) of the Convention as amended by the Protocol relevantly defines a 'refugee' as 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, is unable or, owing to such fear, is unwilling to return to it.'

3. The time at which this definition must be satisfied is the date of the decision on the application: *Minister for Immigration and Ethnic Affairs v Singh* (1997) 72 FCR 288.

4. The definition contains four key elements. First, the applicant must be outside his or her country of nationality. Secondly, the applicant must fear 'persecution'. As applicable to this application subsection 91R(1) of the Act stated that, in order to come within the definition in Article 1A(2), the persecution which a person feared must involve 'serious harm' to the person and 'systematic and discriminatory conduct'. Subsection 91R(2) stated that 'serious harm' included a reference to any of the following:

   (a) a threat to the person's life or liberty;

   (b) significant physical harassment of the person;

   (c) significant physical ill-treatment of the person;

   (d) significant economic hardship that threatens the person's capacity to subsist;

   (e) denial of access to basic services, where the denial threatens the person's capacity to subsist;

   (f) denial of capacity to earn a livelihood of any kind, where the denial threatens the person's capacity to subsist.

5. In requiring that 'persecution' must involve 'systematic and discriminatory conduct' subsection 91R(1) reflected observations made by the Australian courts to the effect that the notion of persecution involves selective harassment of a person as an individual or as a member of a group subjected to such harassment (*Chan Yee Kin v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379 per Mason CJ at 388, McHugh J at 429). Justice McHugh went on to observe in *Chan*, at 430, that it was not a necessary element of the concept of 'persecution' that an individual be the victim of a series of acts:

> 'A single act of oppression may suffice. As long as the person is threatened with harm and that harm can be seen as part of a course of systematic conduct directed for a Convention reason against that person as an individual or as a member of a class, he or she is "being persecuted" for the purposes of the Convention.'

6. 'Systematic conduct' is used in this context not in the sense of methodical or organised conduct but rather in the sense of conduct that is not random but deliberate, premeditated or intentional, such that it can be described as selective harassment which discriminates against the person concerned for a Convention reason: see *Minister for Immigration and Multicultural Affairs v Haji Ibrahim* (2000) 204 CLR 1 at [89] - [100] per McHugh J (dissenting on other grounds). The Australian courts have also observed that, in order to constitute 'persecution' for the purposes of the Convention, the threat of harm to a person:

> 'need not be the product of any policy of the government of the person's country of nationality. It may be enough, depending on the circumstances, that the government has failed or is unable to protect the person in question from persecution' (per McHugh J in *Chan* at 430; see also *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225 per Brennan CJ at 233, McHugh J at 258)

7. Thirdly, the applicant must fear persecution 'for reasons of race, religion, nationality, membership of a particular social group or political opinion'. Subsection 91R(1) of the Act provided that Article 1A(2) did not apply in relation to persecution for one or more of the reasons mentioned in that Article unless 'that reason is the essential and significant reason, or those reasons are the essential and significant reasons, for the persecution'. It should be remembered, however, that, as the Australian courts have observed, persons may be persecuted for attributes they are perceived to have or opinions or beliefs they are perceived to hold, irrespective of whether they actually possess those attributes or hold those opinions or beliefs: see *Chan* per Mason CJ at 390, Gaudron J at 416, McHugh J at 433; *Minister for Immigration and Ethnic Affairs v Guo* (1997) 191 CLR 559 at 570-571 per Brennan CJ, Dawson, Toohey, Gaudron, McHugh and Gummow JJ.

8. Fourthly, the applicant must have a 'well-founded' fear of persecution for one of the Convention reasons. Dawson J said in *Chan* at 396 that this element contains both a subjective and an objective requirement:

> 'There must be a state of mind - fear of being persecuted - and a basis - well-founded - for that fear. Whilst there must be fear of being persecuted, it must not all be in the mind; there must be a sufficient foundation for that fear.'

9. A fear will be 'well-founded' if there is a 'real chance' that the person will be persecuted for one of the Convention reasons if he or she returns to his or her country of nationality: *Chan* per Mason CJ at 389, Dawson J at 398, Toohey J at 407, McHugh J at 429. A fear will be 'well-founded' in this sense even though the possibility of the persecution occurring is well below 50 per cent but:

> 'no fear can be well-founded for the purpose of the Convention unless the evidence indicates a real ground for believing that the applicant for refugee status is at risk of persecution. A fear of persecution is not well-founded if it is merely assumed or if it is mere speculation.' (see *Guo*, referred to above, at 572 per Brennan CJ, Dawson, Toohey, Gaudron, McHugh and Gummow JJ)

Complementary protection criterion

10. An applicant for a protection visa who does not meet the refugee criterion in paragraph 36(2)(a) of the Act may nevertheless meet the complementary protection criterion in paragraph 36(2)(aa) of the Act, set out as relevant to this application above. The Full Court of the Federal Court has held that the 'real risk' test imposes the same standard as the 'real chance' test applicable to the assessment of 'well-founded fear' in the context of the Refugees Convention as referred to above (see *Minister for Immigration and Citizenship v SZQRB* [2013] FCAFC 33 at [246] per Lander and Gordon JJ with whom Besanko and Jagot JJ (at [297]) and Flick J (at [342]) agreed). 'Significant harm' for the purposes of the complementary protection criterion is exhaustively defined in subsection 36(2A) of the Act: see subsection 5(1) of the Act. A person will suffer 'significant harm' if they will be arbitrarily deprived of their life, if the death penalty will be carried out on them or if they will be subjected to 'torture' or to 'cruel or inhuman treatment or punishment' or to 'degrading treatment or punishment'. The expressions 'torture', 'cruel or inhuman treatment or punishment' and 'degrading treatment or punishment' are further defined in subsection 5(1) of the Act.

Ministerial direction

11. In accordance with Ministerial Direction No. 56, made under section 499 of the Act, the Tribunal is required to take account of policy guidelines prepared by the Department of Immigration and Citizenship - 'PAM3: Refugee and humanitarian - Complementary Protection Guidelines' and 'PAM3: Refugee and humanitarian - Refugee Law Guidelines' - and any country information assessment prepared by the Department of Foreign Affairs and Trade expressly for protection status determination purposes, to the extent that they are relevant to the decision under consideration.

Credibility

12. As Beaumont J observed in *Randhawa v Minister for Immigration, Local Government and Ethnic Affairs* (1994) 52 FCR 437 at 451, 'in the proof of refugeehood, a liberal attitude on the part of the decision-maker is called for'. However this should not lead to 'an uncritical acceptance of any and all allegations made by suppliants'. As the Full Court of the Federal Court (von Doussa, Moore and Sackville JJ) observed in *Chand v Minister for Immigration and Ethnic Affairs* (unreported, 7 November 1997):

> 'Where there is conflicting evidence from different sources, questions of credit of witnesses may have to be resolved. The RRT is also entitled to attribute greater weight to one piece of evidence as against another, and to act on its opinion that one version of the facts is more probable than another' (citing *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 281-282)

13. As the Full Court noted in that case, this statement of principle is subject to the qualification explained by the High Court in *Minister for Immigration and Ethnic Affairs v Guo* (1997) 191 CLR 559 at 576 per Brennan CJ, Dawson, Toohey, Gaudron, McHugh and Gummow JJ where they observed that:

> 'in determining whether there is a real chance that an event will occur, or will occur for a particular reason, the degree of probability that similar events have or have not occurred for particular reasons in the past is relevant in determining the chance that the event or the reason will occur in the future.'

14. If, however, the Tribunal has 'no real doubt' that the claimed events did not occur, it will not be necessary for it to consider the possibility that its findings might be wrong: *Minister for Immigration and Multicultural Affairs v Rajalingam* (1999) 93 FCR 220 per Sackville J (with whom North J agreed) at 241. Furthermore, as the Full Court of the Federal Court (O'Connor, Branson and Marshall JJ) observed in *Kopalapillai v Minister for Immigration and Multicultural Affairs* (1998) 86 FCR 547 at 558-9, there is no rule that a decision-maker concerned to evaluate the testimony of a person who claims to be a refugee in Australia may not reject an applicant's testimony on credibility grounds unless there are no possible explanations for any delay in the making of claims or for any evidentiary inconsistencies. Nor is there a rule that a decision-maker must hold a 'positive state of disbelief' before making an adverse credibility assessment in a refugee case.