

**REFUGEE STATUS APPEALS AUTHORITY**  
**NEW ZEALAND**

**REFUGEE APPEAL NO 76246**

**AT AUCKLAND**

**Before:** B L Burson (Member)

**Counsel for the Appellant:** C Curtis

**Appearing for the Department of Labour:** No Appearance

**Dates of Hearing:** 29 & 30 September and  
2 December 2008

**Date of Decision:** 15 January 2009

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**DECISION**

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

**INTRODUCTION**

[2] The appellant claims to have a well-founded fear of being persecuted in Kenya by reason of his exposure of the embezzlement of public finances by a prominent and powerful politician and by reason of his familial connection to his father who has been active in [...] in Kenyan politics and public affairs for a number of decades.

[3] What follows is a summary of the appellant's evidence in support of his claim. An assessment follows thereafter.

This is an abridged version of the decision. Some particulars have been removed from or summarised in the decision pursuant to s129T of the Immigration Act 1987. Where this has occurred, it is indicated by square brackets.

## **THE APPELLANT'S CASE**

[4] The appellant was born in the 1970s in X town. He is from the [...] ethnic group. He has one older brother and two sisters.

[5] [...] As long as the appellant can remember his father has been involved in public affairs in Kenya. There were always a large number of political magazines at their home. He can recall even from a young age his father talking to him about serious issues such as public integrity and issues relating to infrastructure.

[6] [...]

[7] Like everybody else at the time, his father was a member of the Kenyan African National Union (KANU) [and at one time] was a candidate in the parliamentary election for a ward in their locality. Although Kenya was effectively governed by a one party system dominated by KANU, there were various factions within KANU. His father was at that time associated with a “rebel” faction [...].

[8] His father had to give up his position [...] when he decided to run for office. His father did not get elected into parliament on this occasion. He was barred from returning to his former position because he was perceived to have opposed the official “party line”. Nevertheless his father remained active in [public] affairs [...].

[9] [...]

[10] As a result of his inability to return to his former job, the appellant's father worked in a number of roles before starting his own business.

[11] During the 1980s, splits emerged within KANU over calls to move to a multi-party political system. His father was part of the faction that supported the opening up of the political process. This caused his father to be arrested on two occasions in the late 1980s. The first occasion was in approximately 1986 for approximately one or two weeks. He recalls his older brother going to visit him in prison. The appellant and his mother and siblings were all arrested and taken to the CID headquarters in X where they were questioned about their father's activities. They were questioned about what documents and papers he was bringing home, who he had been talking to, and visiting, and who was visiting him at the home.

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[12] However, the information that the appellant and his siblings could give was limited because, from the early 1980s, the appellant's parents had begun to live separate lives. Although not wholly separated, his father had prioritised his civic and political activities over his family which meant that he was only at the family home on an irregular basis, typically amounting to one night per week.

[13] The appellant's father's second arrest came in 1988. The appellant and his mother and siblings were not arrested on this occasion. He has no idea for how long his father was detained.

[14] At around this time, his father experienced further difficulties as a result of his business dealings. He had secured a substantial contract to act [for an overseas] company. In order to facilitate this contract, he entered into a business agreement with a close relative of the then President Moi who could facilitate the granting of the necessary licences and visas. In due course, the appellant's father learnt that moneys being paid on the contract were being misappropriated by this person and his father raised the issue with him. This led to a falling out and the President's relative stopped facilitating the necessary licences and visas. Eventually, the [overseas] company cancelled the contract. The President's cousin then arranged for the remainder of the business to be picked up by the President's son. [...]

[15] In 1991, multi-party democracy was restored to Kenya and a number of political parties sprang up. At this time, the appellant became a formal member of KANU but, like many other Kenyans including his father, he also began attending the political rallies of other parties [...].

[16] In the next parliamentary elections the appellant became an election observer and did not actually vote. His father stood as a candidate for [election] but did not gain a parliamentary seat. Thereafter, his father became disillusioned with opposition political parties realising that the manifestos were not very different from KANU. By the time of the next election had returned to KANU Party. The appellant also underwent a similar political transition and abandoned his involvement with opposition political parties and came back to support KANU. The appellant had become disillusioned with the fractious nature of multi-party politics in Kenya which, as a culturally diverse nation, tended to be organised along tribal alliances.

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[17] By the mid-1990s, the appellant's contact with his father became even more infrequent as between 1994 and 1997 undertook tertiary studies in another city and only returned home during the school holidays. His father also stood unsuccessfully in local council elections and also in a by-election. His father did not generally discuss what he was doing with the appellant on the occasions they did meet but the appellant became aware from the newspapers that his father was involved in the political scene [...].

[18] After the appellant finished his tertiary studies in 1997, he secured a job with the X Municipal Council for a few months. He then went and worked with his father in his business. He also helped his brother who was looking after the family business. He helped his father for approximately three years. By the late 1990s, however, the appellant's parents had finally separated and this further decreased the frequency with which the appellant saw his father.

[19] In approximately 2001, the appellant took over the family business when his brother left to travel to the United Kingdom. He decided to develop it [further]. He applied for permission from the council and this was granted and it began operating.

[20] Also after leaving [his studies], the appellant and a friend called AA came up with the idea that they should pool their financial resources for their mutual economic betterment. They then discussed this amongst their family and friends and it was agreed to set up a co-operative in which each member would contribute 20-40 Kenyan shillings per month to a mutual fund. This fund could then be drawn upon by the members in order to assist them with their various business ventures. As this idea was being formalised, AA approached various members of the group talking about problems a nephew of his was experiencing in his private life. He had been expelled from school and sent to live with AA. The group started discussions about something needing to be done to support the youth in Kenya and they conceived the idea of incorporating within their co-operative an element of community development. The co-operative was called CCC and was registered with the relevant Kenyan authorities in 2000. [...] AA and the appellant both became co-convenors.

[21] In mid-2002, CCC was invited to participate in an organising committee for [a particular event]. The appellant, AA and another CCC representative attended

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a number of meetings of the [event's] organising committee. They three then attended the celebrations. The appellant and AA became concerned that the amount of food and drink provided was only a fraction of what had been budgeted for and agreed in the meetings of the organising committee. They raised their concerns with the treasurer of the organising committee who was present on the day and who more or less admitted to the fact that he had taken the sum of money. When questioned further by the appellant and AA he simply remarked that he had only taken a small amount (amounting to 10,000 Kenyan shillings) and that everyone was doing it. He told them to stop making a fuss about it because this was being done all the way from the top down.

[22] The appellant raised this issue with the chairman and other members of CCC on an informal basis after [the event]. The next scheduled meeting of CCC was to be held in approximately 10 days' time and it was decided to put this issue on the agenda. The appellant and AA decided that, in the meantime, they would visit the treasurer once more to try and obtain more information from him. In particular, they wanted to know why he had done this and to see whether he expressed any remorse for doing so and was prepared to pay the money back. This information would then, in turn, be reported back to the CCC meeting.

[23] Approximately three or four days after [the event], the appellant and AA saw the treasurer. Far from expressing any remorse or guilt, the treasurer repeated what he had said and warned them that there would be trouble if they decided to take the matter any further.

[24] At the next meeting of CCC the issue was discussed. The appellant and AA saw it as CCC's duty to investigate this matter and take it further. Other members of CCC were less sure about this course of action. They were concerned about their own safety if they did so and also were afraid of what could be done to CCC as an organisation. The senior politician with ultimate responsibility for this was Mr BB who had recently managed to avoid being convicted on corruption charges. He was very powerful and likely to be sensitive to any further allegations of this nature. The CCC members were sufficiently concerned that they decided not to do anything.

[25] Both the appellant and AA told the remaining group that they were not satisfied with this and that they were determined to take it further. The other CCC

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members told them that in no way should they associate any further activity with CCC.

[26] A few days after this meeting the appellant and AA approached the treasurer again. They told him that they were determined to take this matter to the press and that unless he wanted to be publicly exposed he should give to them any documents he had in his possession relating to the embezzlement of funds meant for [other] activities. After some persuasion the treasurer agreed and gave them detailed accounts showing the disbursement of funds from donor agencies ostensibly for the purposes of [...] which bore the signature of Mr BB. The appellant and AA then set about trying to obtain further documents. They eventually obtained two further invoices from a distant relative of the appellant who worked at the local municipality which showed that donors' money for [...] campaigns was being used to pay for the private business and personal affairs of Mr BB.

[27] Armed with this information the appellant and AA sent copies to the editor of *The Nation* and *Standard* newspapers. They also sent copies of a document to a supporter of CCC resident in the United States. To their dismay, neither *The Nation* nor *Standard* published the information although their United States contact did publish the material on Internet sites which prompted debate in Internet chat rooms devoted to the Kenyan community abroad.

[28] The appellant and AA told the CCC group what they had done. Shortly thereafter, AA decided that he wanted no further involvement in this because he was concerned about his safety. The appellant himself had decided that he would not take the matter any further because their efforts to date had come to nothing.

[29] However, shortly thereafter the appellant began experiencing harassment from the Kenyan authorities. First, in approximately September 2002, the local council failed to renew a licence necessary for the operation of an important aspect of the family business, citing reasons that had not been problems in the past. Second, approximately a month later, the appellant was detained by the Central Intelligence Department (CID) and taken to the headquarters in X. He was detained for three hours where he was questioned about his involvement in a warehouse break-in.

[30] Finally, in October 2002, the police raided his business. The appellant was

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out of town at the time but his mother was detained on the false basis that she had been operating without a licence. These were all instances of harassment which the appellant attributes to his attempt to make public the embezzlement of funds by Mr BB.

[31] The appellant realised that this harassment was not going to stop and decided that he would go to the family's ancestral lands situated in Z village, some 300 kilometres from X. The appellant stayed there for approximately four months engaging in subsistence farming. Shortly after he arrived in late 2007 the local village policeman was replaced by another policeman from another tribe which was most unusual. The appellant attributes this to a desire by Mr BB to monitor him. In discussion with his mother the appellant decided that it would be better for him to leave the country. He had lost his livelihood in X and was having to make do with a subsistence farming living. He believed that if he went elsewhere in Kenya he would continue to be monitored and that it was better for him to commence a new life somewhere else.

[32] His mother therefore arranged for a Kenyan passport to be issued in his name and through her an agent was instructed who facilitated his obtaining a student visa to study at an educational institute in New Zealand. The appellant entered New Zealand in February 2003 and commenced studying at the educational institute.

[33] The appellant had only paid for tuition for the first semester. His visa expired in August 2003. At the end of that semester the appellant realised that he did not have sufficient funds to continue studying. He therefore did not renew his visa and instead obtained labouring work on a casual basis. He also had a part-time job with a New Zealand employer which he continued.

[34] In 2005, concerned about his immigration status the appellant approached an immigration lawyer. The lawyer advised him that it was best for him if he voluntarily left the country on his Kenyan passport which was current and sought to re-enter New Zealand from Kenya. The appellant decided that he would follow this advice. He was now in full-time employment with the New Zealand employer and he discussed with them the possibility of returning to Kenya for an extended period of time. The employer said that they were happy for him to accumulate his annual leave and would give him a period of unpaid leave so he could return to

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Kenya for an extended visit. The appellant's employment contract was such that it would take him some time to accumulate the leave and he had scheduled to return to Kenya in approximately June 2007.

[35] However, as at June 2007, the political and security situation in Kenya was deteriorating in the run-up to presidential elections. The appellant became concerned that his father's political activities might create problems for him upon arrival. He had remained in contact with his father on an occasional basis while in New Zealand, speaking once every fortnight. He understood from these conversations that his father had remained active in politics since he had left for New Zealand.

[36] He had by this time found out from his sister that she had been unfairly fired from her job with a partly privatised Kenyan entity and she attributed this to their father's political activities. The appellant's concerns were further compounded when he received an email from his other sister who also remained in Kenya to the effect that she too had been fired from her job. Again, this was attributed to the father's political activities. The appellant decided that it would be too risky to return to Kenya.

[37] In late 2007, the appellant was served with a removal order and remanded in custody where he remained until March 2008. Officials from INZ made contact with the Kenyan embassy in Canberra as to his obtaining a new passport, his previous one having now expired. While in detention, the appellant arranged for a New Zealand friend to telephone his family and find out what was going on because he was aware from the media of the outbreak of the political violence in the wake of the disputed elections.

[38] After his release from detention he received a text from his brother saying that his mother was due to come to stay with him in England. Approximately two weeks later the appellant received a telephone call from his mother in the United Kingdom. She informed him that in early May 2008 her property in Y had been raided by [...] people. Although it is possible that this was linked to the outbreak of political violence following the election, the appellant remains concerned that there was something more to it. This is because his mother also informed him that in June 2008 there was a visit by the police to the family home in X town where the appellant had been residing prior to his departure for Z. The officers told his

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mother that they had received information that the appellant had returned to Kenya and they were looking for him.

[39] The appellant is very concerned at the prospect of returning to Kenya. He believes that he would definitely be questioned upon arrival. While to some extent he agrees this is standard practice for anybody being returned to Kenya from overseas he believes that there is a real chance that he would be detained and imprisoned to place pressure on his father.

[40] The appellant told the Authority that he was aware that his father had [become involved in a significant matter relating to one of the parties currently in the coalition government (“the significant political matter”)]. The appellant stated that this would be seen as a “spanner in the works” by two powerful forces and may be used to place pressure on his father. Also, the appellant believes that he will be subjected to ongoing monitoring and surveillance by the authorities about his activities upon return.

*The hearing on 2 December 2008*

[41] At the conclusion of the hearing on 30 September 2008 the Authority directed that Ms Curtis obtain the following:

- (a) A statement from the appellant’s father in affidavit form detailing his political activities and other activities since the appellant had been in New Zealand and in particular relating to [the significant political matter]. The appellant’s father was to detail any problems he had encountered while the appellant was in New Zealand as a result of his political activities.
- (b) Information relating to the appellant’s involvement in CCC.
- (c) Information relating to Ngugi Wadiongo. The appellant cited Mr Wadiongo as an example of what could happen to people who were perceived to be political opponents. This man is a well known exile and on return to Kenya just after the multi-party election his house was raided, his wife and family killed and his wife raped.

[42] In response, on 14 November 2008, the Authority received from Ms Curtis further documents comprising replies to the appellant’s email of 29 September

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2008 from AA and CC dated 29 September 2008 and 30 September 2008 respectively together with a further e-mail in reply of the appellant dated 1 October 2008. No information was filed in relation to the appellant's father or Ngugi Wadiongo, nor was there any explanation in Ms Curtis' brief letter of 14 November 2008 as to the steps taken by the appellant in relation to these items of information. All that was indicated is that the attached e-mails were "the only information that our client has been able to obtain."

[43] The Authority re-listed the matter for hearing on 2 December 2008 in order that it could hear from the appellant further.

[44] At the re-convened hearing, the appellant explained that soon after the hearing on 30 September 2008, he had telephoned his father and asked him to provide the information requested. He told his father why he was requesting the information and that he was concerned about returning to Kenya. In response, his father told him that he would not provide any help. Instead, his father told him that he should return to Kenya to be by his side and that he should "stop running away and stand up like a man". His father also spoke of his concern that that neither of his sons were in Kenya and there is no one to carry on the family name.

[45] The appellant further explained that, since the last hearing, he had contacted his elder brother in the UK. His brother told him that, some time previously, he had also been contacted by their father and the pair had argued. His brother told him that their father had also asked him to return to Kenya to carry on the family name. Their father blamed the appellant's brother for encouraging their mother to travel to the UK. The appellant has also spoken to his two sisters since the last hearing. One is staying at the family home in X town and looking after their mother's business while she is in the UK. The other sister was herself trying to secure an entry visa for the UK and hoping to secure employment which might assist her in that regard. This sister implored the appellant not to do anything which might jeopardise her application.

[46] The appellant explained that he had also tried to contact AA who had promised to send to him CCC's original registration which would show his involvement. This had not however been received and there had been no reply to his phone calls. He explained that one of his sisters had managed to speak to AA directly but, again, nothing has been forthcoming.

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[47] The appellant explained that he was concerned that Kenyan officials had been alerted to his removal from New Zealand because this would mean that he would be detained upon arrival for questioning. He is anxious that, given his father's ongoing activities, this detention could transcend the routine. If so, this would then become another issue for his father to rally against which would further embroil him in his father's activities. Furthermore, he believes he would come under pressure from his father to become involved in his various activities. He also is worried that Mr BB is still powerful enough to cause him harm.

### **Documents and submissions received**

#### *Statement of Lidia Buxeda*

[48] On the RSB file is a letter from Lidia Buxeda, the friend the appellant requested contact his mother while he was detained. Ms Buxeda reports speaking with the appellant's brother who told her that, as of March 2008, the appellant's mother and sister [...] had to flee their home and were hiding in another part of the area and they were concerned and frightened for their safety. Ms Buxeda reports that the appellant's brother indicated the family was concerned for the appellant's safety should he return.

[49] Ms Buxeda was not called as a witness.

### **Other documents**

[50] On 9 September 2008, the Authority received a memorandum from Ms Curtis outlining her submissions.

[51] In response to questioning from the Authority regarding CCC, on the morning of 30 September 2008 the appellant produced an email he had written to AA and other members of CCC requesting confirmation of his involvement in CCC's activities as this was not reflected in the documentation available on CCC's website.

## **THE ISSUES**

[52] The Inclusion Clause in Article 1A(2) of the Refugee Convention provides

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that a refugee is a person who:

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

[53] 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?

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## **ASSESSMENT OF THE APPELLANT'S CASE**

### **Credibility**

[54] There can be no doubt that the appellant's claims regarding his father's involvement in political activity in Kenya is true. Various country information both submitted by counsel and sourced independently by the Authority, points to the appellant's father's involvement for many years in political life in Kenya [...]. Documents have been submitted showing that the appellant's father has been engaged in an ongoing dispute with the [overseas] company since at least the early 1990s. [...]

[55] Importantly, [country information also confirms the appellant's father's principal role in the significant political matter]. There is no report to suggest that it has been abandoned.

[56] [...]

[57] In short, the appellant's claim that his father has been active in the Kenyan political scene over a number of years and to have a level of involvement in significant political issues is amply corroborated by the available documentary evidence.

[58] As to the appellant's evidence relating to CCC, he was vague about some basic matters. Moreover, the appellant's claim to have been involved in CCC is not reflected in the documents obtained from CCC's website. However, the Authority notes that there is some indication in the e-mails that have been produced that the appellant was involved. Also, the appellant's account was generally consistent with what he had said previously to the RSB. He has made no attempt to embellish his claim in any way and was quite candid with the Authority regarding all matters. He answered question openly. In the end, the Authority is left in some doubt in this issue and, in accordance with usual principles in this jurisdiction, extends to the appellant's the benefit of the doubt in relation to CCC.

[59] As a result, the appellant's evidence is accepted in its entirety. It is now necessary to examine these twin aspects of the appellant's claim to have well-founded fear of being persecuted although, as will be seen, it is only necessary to

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traverse the first of them in any detail.

**A well-founded fear of being persecuted by reason of his familial association with his father**

[60] There can be little doubt that the appellant's father is [...] only too willing to take on the Kenyan political establishment over perceived irregularities in public financial management and/or the democratic electoral process. While the Authority does not have any up-to-date information as to the status of the [significant political matter], given the appellant's father's established record [...], it appears unlikely to be something he would have abandoned. More likely in the Authority's view, is that the [outcome] has been delayed pending the report of the official inquiry into the 2007 post-election violence.

[61] The assessment of the well-foundedness of the appellant's fear in this regard depends on an examination of the post-electoral violence in Kenya in late 2007 and 2008 and the response to it.

The electoral violence in Kenya in late 2007

[62] The latest bout of political violence which erupted in Kenya in late 2007 followed the announcement by the Electoral Commission of Kenya (ECK) on 30 December 2007 that the incumbent, Mwai Kabaki, had won the presidential election. The immediate genesis of this violence lies in the collapse of the National Rainbow Coalition (NARC), a coalition of opposition parties, following its historic election victory in 2002 over KANU. Following that election victory, now President Kabaki, as head of NARC, failed to implement the memorandum of understanding and in particular, share cabinet posts equally between its signatories and carry out the necessary constitutional reforms to create the position of prime minister for Rila Odinga who had been his rival for the post of presidency. The resulting fragmentation resulted in two separate coalition blocks namely the Party of National Unity (PNU) under Kabaki and the Orange Democratic Movement (ODM) under Odinga. The spark for the violence was the widespread belief that electoral irregularities and fraud had deprived the ODM of a certain victory given that all polls prior to the election pointed towards an overwhelming ODM victory - see International Crisis Group Report: *Kenya in Crisis* (21 February 2008) at pp2-4; Human Rights Watch Report: *Ballots to Bullets: Organised Political Violence and*

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*Kenya's Crisis of Governance* (March 2008) at p21-23.

[63] In the aftermath of the violence a Commission to Investigate Post-Election Violence headed by Waki J, a judge of the Kenyan Court of Appeal, was established. The Commission was mandated, *inter alia*, to investigate the facts and circumstances relating to the post-election violence; the actions or omission of the state security agencies during the course of the violence; to make recommendations concerning measures to prevent control or eradicate similar violence in the future; to bring to justice those responsible for the criminal acts; and to eradicate impunity and improve the functioning of the state security agencies. The commission began its substantive work in June 2008 and carried out various public hearings in Nairobi and other places affected by the violence. It consulted with civil society organisations and members of relevant government agencies including the Kenya Police service and the National Security Intelligence, both of whose intelligence briefings it had access to. It amounts to a comprehensive review of the post-election violence.

[64] On 17 October 2007, the Commission presented its report to the Kenyan parliament ("the Waki Commission report"). The Waki Commission report notes that, while the disputed 2007 elections were the immediate cause behind the violence, the roots of the violence in Kenya extend deep into the Kenyan social and political structure. The Waki Commission report identifies four factors which, in its view, "explain the causes of the violence and why it escalated as it did." At pages 22-23 of the report, they are set out and are worth repeating in full to properly contextualise the appellant's claim. The Commission noted:

"The first is the growing politicization and proliferation of violence in Kenya over the years, specifically the institutionalization of violence following the legalization of multi-party democracy in 1991. Over time, this deliberate use of violence by politicians to obtain power since the early 1990s, plus the decision not to punish perpetrators has led to a culture of impunity and a constant escalation of violence. This, in turn, has caused a further diffusion of violence in the country, which now is largely outside of the control of the State and its security agencies. Thus, violence has become a factor not just of elections but in everyday life. What this means in practice is that violence is widespread and can be tapped for a variety of reasons, including but not exclusively to win elections.

Second is the growing power and personalization of power around the Presidency. This has had a twofold impact. First, it has given rise to the view among politicians and the general public that it is essential for the ethnic group from which they come to win the Presidency in order to ensure access to state resources and goods. Second it also has led to a deliberate denudation of the authority and legitimacy of other oversight institutions that could check abuses of power and corruption and provide some accountability, and at the same time be seen by the public as neutral

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arbiters with respect to contentious issues, such as disputed elections results. As a result, in many respects the state agencies are not seen as legitimate.

Third, is a feeling among certain ethnic groups of historical marginalization, arising from perceived inequities concerning the allocation of land and other national resources as well as access to public goods and services. This feeling has been tapped by politicians to articulate grievances about historical injustices which resonate with certain sections of the public. This has created an underlying climate of tension and hate, and the potential for violence, waiting to be ignited and to explode.

Fourth is the increasing problem of a growing population of poor, unemployed and youth, educated and uneducated, who agree to join militias and organized gangs. These gangs have been alleged to intersect with parts of the Government and the security forces. These groups now have become “shadow governments” in the slums and even in other parts of the country and have been used by politicians to attack their opponents; to secure their own security, and to gain power. Furthermore, these proliferating militias also are said sometimes to dovetail with the State and its security apparatus thereby not only reducing the State’s capacity to control the violence but also increasingly threatening the integrity of the State and the nation. This underlying endemic situation has created a climate where violence is increasingly likely to be used and where its use is increasingly unlikely to be checked.

[65] The Human Rights Watch Report: *Ballots to Bullets: Organised Political Violence and Kenya’s Crisis of Governance* (March 2008) at p17, comments further on the political manipulation of ethnicity within Kenyan politics:

“The political manipulation of ethnicity is almost a tradition in Kenyan politics, along with impunity for those implicated in fomenting political violence. Among the most explosive periods in Kenya’s post-independence history was between 1991 and 1993 when President Moi tried to stir up sentiment against the Kikuyu in the Rift Valley. The purpose was to consolidate Moi’s vote in the Rift Valley (the area with the most parliamentary seats) among the Kalenjin by driving out those unlikely to vote for him, in particular the Kikuyu. The clashes in the Rift Valley and on the coast left up to 1,500 people dead and 300,000 displaced. The clashes were provoked and often inflamed by politicians in both the ruling and opposition parties, but ruling party members were rarely if ever chastised, much less prosecuted, for their role in inciting violence.”

[66] In relation to the extent of the violence the Waki Commission report notes at p345:

“A total of 1,133 people died as a consequence of the post-election violence. The geographical distribution of the deaths was unequal, with most of the post-election violence related deaths concentrated in the provinces of Rift Valley (744), Nyanza (134) and Nairobi (125). The districts of Uasin Gishu (230), X (213) and Trans Nzoia (104) in the Rift Valley Province registered the highest number of deaths related to post-election violence.

A total of 3,561 people suffered injuries inflicted by or resulting from sharp pointed objects – 1229, blunt objects – 604, Soft tissue injury – 360, Gunshot – 557, Arrow shots – 267, Burns – 164, Assault – 196, etc.

A total of 117,216 private properties (including residential houses, commercial premises, vehicles, farm produce) were destroyed, while 491 Government owned

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properties (offices, vehicles, health centres, schools and trees) were destroyed.”

[67] The scale of the violence which took place is further evidenced by substantial levels of internal displacement. According to data gathered by the Waki Commission, as a result of the 2007 post electoral violence, approximately 350,000 persons were displaced from their normal places of residence and/or business and a further 1,916 Kenyans sought refuge in Uganda” (at p351). The Waki Commission report observes that, although internal displacement has been a prominent feature of Kenya’s history since colonial times, the internal displacements which followed the widespread violence after the announcement of the 2007 presidential elections was “unprecedented in terms of the number of victims and the widespread nature of the phenomenon.” Its states at pp271-273:

While previous conflicts led to internal displacements concentrated in the multi-ethnic regions of Western, Rift Valley and Coast the 2007 [post-electoral violence] resulted in massive countrywide forced displacements, which are urban as well as rural in contrast to the past” - see Waki.

[68] The picture that emerges is of a recent round of ethno-political bloodletting which has brought to a head a number of dynamics within Kenyan society and which, if not entirely unprecedented, has resulted in a substantial number of unlawful killings and other forms of serious harm. As will be seen, the Commission has, in accordance with its mandate, made a number of recommendations in relation to his violence which have proven highly controversial. Before turning to those, a brief snapshot of the violence which took place in the area from where the appellant originates is required.

*X town*

[69] The appellant lived and worked in X town before fleeing to the family farm. [...] In relation to the 2007 violence the report notes [...] that there were in fact two waves of violence. The first wave started on 30 December 2007 following the announcement of the results of the presidential election. This violence was triggered by spontaneous election-related incidents. The second wave began on 24 January 2008 and took the form of a planned and systematic campaign of violence “pitting well organised ethnic based criminal gangs against each other”. In the first wave of violence, Kalenjins began burning houses belonging to ethnic Kikuyus and Kisiis chasing away members of the two communities. These groups were seen as being largely sympathetic to the PNU in contrast to the Kalenjins

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who were mostly supporters of the ODN.

[70] Following sporadic reprisals by Kikuyu in the X town there was a certain level of calm that prevailed until the end of January 2008 when the second worst wave of violence erupted. This violence pitted Kikuyu militias supported by members of the Mungiki sect against organised gangs of Kalenjins. Significantly, the Waki Commission report notes intelligence reports of the time indicating that a former X member of parliament was organising Mungiki members to attack non-Kikuyu people residing within X town and equally on the Kalenjin side intelligence reports indicated several Kalenjin youths were receiving combat training on the farm of a politician for the purpose of being deployed to attack Kikuyu and Kisiis in a neighbouring district.

#### *Y District*

[71] Y District, where the appellant's mother had a farm property, is described in the Waki Commission report as having been previously a theatre of ethnic-based conflict [...]. The district has two distinct constituencies namely Kurasoi and Y. Kurasoi has a Kalenjin majority with a sizeable Kikuyu and Kisii minority. Y has a largely Kikuyu majority with Kalenjin and Kisii minorities. The Waki report noted that even prior to the elections both constituencies were experiencing violence between Kalenjin on one side and Kikuyu and Kisii on another [...]. However, a new wave of violence erupted on 3 December 2007 when Kalenjin raiders began attacking and burning Kikuyu homes. This led to reprisals from Kikuyu and Kisii groups. This led Kalenjin politicians and wealthy Kalenjin businessmen to provide transport to bring in attackers from outside the district to buttress the local minority Kalenjin population. The violence continued through January. The Waki report observes that a total of 150 people were killed in the district, another 170 injured, 1,564 houses burnt and 66,000 people displaced by the violence after the election [...].

[72] The post-election violence in the district is reported to have continued in the district until around 15 February 2008 [...].

#### *Impunity and the recommendations of the Waki Commission*

[73] As noted above, the Human Rights Watch Report observes that impunity for

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those implicated in fomenting political violence has long been a feature of Kenyan politics. The Waki Commission report is significant in that it seeks to end this culture of impunity. It has recommended the establishment of a Special Tribunal for Kenya to be set up as a court for the purpose of seeking “accountability against persons bearing the greatest responsibility for crimes, particularly crimes against humanity, relating to the 2007 general elections in Kenya” – see p472. The Waki Commission report recommended that an agreement for establishment of the Special Tribunal shall be signed by representatives of the parties to the Agreement on National Accord and Conciliation within 60 days of the date of the reports presentation on 17 October 2008. The Waki Commission further recommended that any failure to implement its recommendations on the establishment of the Special Tribunal or that if the Special Tribunal fails to commence functioning as contemplated a list containing the names of and relevant information on those suspected to bear the greatest responsibility should be forwarded to the office of the Special Prosecutor of the International Criminal Court for further investigation – see p473.

[74] On 17 October 2008, Waki J, also handed to Kofi Annan, former United Nations Secretary-General and the chief mediator, a sealed envelope containing a list of suspects whom the Commission believes should be tried before the Special Tribunal. The list is reported to include senior political figures – see “Waki Commission Breaks New Ground but Will It Be Implemented” *The Daily Nation* (17 October 2008); “Hand Over Waki List To Police Says Marende” *The Daily Nation* (16 November 2008).

[75] There are reports that the Waki report has created dissent within the ranks of the ODM with senior ODM officials reportedly rejecting the recommendations of the Waki report – see “Election Violence Divides ODM” *New Vision* (15 November 2008). As to the split, reports indicate the coalition cabinet has been divided over implementation of the Waki report along party lines with the PNU members by in large in support with the ODM rejecting it – see “Waki Report Splits Coalition Government” *The Standard* (18 November 2008). Nevertheless, an agreement to establish the Special Tribunal was signed by Kibaki and Odinga just hours before the deadline was due to expire on 17 December 2008 – see David Mugonyi “Secret List: Now Kibaki and Raila sign Pact” *Sunday Nation* (19 December 2008); “Kenya agrees to election tribunal” *BBC News* <http://news.bbc.co.uk/go/pr/fr/-/2/hi/africa/7788190.stm>. accessed 22 December

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2008.

[76] Having done so, under the terms of the recommendation of the Waki Commission report, a statute is required to be enacted setting out all the Tribunal's rules within a further 45 days after the signing the agreement. The Government has a further 30 days thereafter to make the Special Tribunal operational. Odinga and Kibaki are to co-chair the Cabinet committee charged with drafting the bill for enactment by the end of January 2009. The Special Tribunal must be operational by 1 March 2009. According to the agreement, any person holding public office who is charged with a criminal offence relating to the post-election violence will be suspended from duty while the matter proceeds. Those convicted will be liable for life imprisonment where appropriate and be barred from ever holding public office again – see “Kenya: Poll Violence Planners to face Special Tribunal” *Catholic Information Service for Africa* (19 December 2008) <http://allafrica.com/stories/printable/200812190816.html> accessed 6 January 2009.

#### **Application to appellant's case**

[77] It is fair to say that the Waki Commission report has caused considerable political turmoil. Into this mix must be considered the [significant political matter undertaken] by the appellant's father. [...] It is difficult to underestimate the constitutional seriousness of the issue the appellant's father's [activity in relation to the significant political matter] raises.

[78] The potential for political violence to resurface along ethnic and political lines over the Waki Commission report seems all too real. The appellant's father's [activity in relation to the significant political matter], which it appears he continues to prosecute, must be considered to be an aggravating factor in an already highly-charged political scene.

[79] The Authority notes that the epicentre of the post-electoral violence occurred in the very place from where the appellant originates. In this regard the Authority also notes that the attack on his mother's property in Y took place after the post-election violence had largely subsided in that district suggesting that some other factor might have been motivating this attack. There has also been a visit to the family home by the police trying to establish the appellant's whereabouts in mid-June 2008 which, given his presence in New Zealand at the time, can only be unconnected with the 2007 post-election violence.

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[80] The Authority is concerned that it has no information from the appellant's father about the extent to which his current [activity] has caused him problems. However it accepts that there has been a deliberate decision by him not to cooperate with the appellant in his endeavour to remain outside Kenya as a refugee. Furthermore, the appellant's father has embarked what will no doubt be a lengthy and controversial process [in relation to the current political arrangements]. Given the history of ethno-political violence in Kenya, the idea that the appellant might at points during this [...] process be seriously assaulted or subjected to other harm by disgruntled [...] supporters in retaliation against this [...] activity by his father, or as part of an attempt to put pressure on the appellant's father to [cease his activity in relation to the significant political matter] altogether, seems to the Authority to be one which cannot be dismissed as remote, speculative or far-fetched. This is so notwithstanding the fact that the appellant has to some extent, been estranged from his father for some time. The nature of any such non-state violence directed towards the appellant is something the state will simply be unable to protect him from.

[81] After careful reflection and weighing everything in the round, the Authority has decided, albeit by a narrow margin, that it accepts that, should the appellant be returned to Kenya in these circumstances, there is a real chance that he will suffer serious harm amounting to his being persecuted. The first principal issue is answered in the affirmative.

### **Convention Ground and Nexus**

[82] In such circumstances the appellant's predicament is being contributed to by a combination of a negative political opinion being imputed to him and by reason of his membership of a particular social group in Kenya – his family. The second principal issue is also answered in the affirmative

### **CONCLUSION**

[83] For the aforementioned reasons, the Authority finds that the appellant is a refugee within the meaning of Article 1A(2) of the Refugee Convention. The appeal is allowed. Refugee status is granted.

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"B L Burson"  
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Member

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