IMMIGRATION AND PROTECTION TRIBUNAL NEW ZEALAND **[2011] NZIPT 800050-53**

AT AUCKLAND

Appellants:	**AI (South Africa)**
Before:	C M Treadwell (Member)
Counsel for the Appellant:	M Meyrick
Counsel for the Respondent:	No Appearance
Date of Hearing:	24 September 2010
Date of Decision:	16 November 2011

DECISION

INTRODUCTION

[1] These are appeals against decisions of a refugee status officer of the Refugee Status Branch of the Department of Labour, declining to grant refugee status and/or protected person status to the appellants, citizens of South Africa.

[2] The appellants are a husband and wife and their two children aged 15 and 12 years, for whom the parents are the responsible adults for these appeals. The evidence of each of the four appellants is to be considered in respect of all four appeals.

[3] The appellants claim to be at risk of serious crime in South Africa (notably violence, including assault, murder and rape) and of being marginalised in terms of employment because they are of European ethnicity. The issues which arise are whether the risk of being a victim of crime is more than merely speculative and whether any difficulty in accessing employment amounts to serious harm for the or cruel, inhuman or degrading treatment.

[4] The delivery of this decision has been delayed by circumstance. The appellants initially sought recognition as refugees under the Immigration Act 1987.

Before the appeals on those claims were determined, the 1987 Act was repealed and was replaced by the Immigration Act 2009 on 29 November 2009.

[5] The 2009 Act permits claimants to seek protected person status under the 1984 Convention Against Torture (section 130) and the 1966 International Covenant on Civil and Political Rights (section 131). After the commencement of the 2009 Act, the appellants signalled an intention to bring protection claims and so decisions on the refugee appeals were deferred to allow them time to have the protection claims considered by the Refugee Status Branch. Those claims were declined on 31 May 2011, leading to appeals against the decline of protected person status, which are now consolidated with the refugee appeals.

[6] Since then, there has been further delay while the Tribunal sought confirmation from the appellants that no further evidence (other than that produced at the hearing in September 2010) was to be tendered in respect of the protection appeals. After an exchange of correspondence, the Secretariat of the Tribunal wrote to counsel by fax on 4 October 2011, advising that, if a further hearing was sought, the appellants needed to confirm that they wished to present further evidence beyond that already presented at the hearing in September 2010. If they did, further statements to that effect needed to be submitted. The evidence would need to sensibly require that the hearing be reconvened. They were given until 14 October 2011 to respond. No response has been received.

[7] All three limbs of appeal are addressed herein. Given that the same claim is relied upon in respect of all limbs of the appeals, it is appropriate to record it first.

THE APPELLANTS' CASE

[8] The account which follows is that given by the husband and wife at the appeal hearing. It is assessed later.

[9] The appellants come from Cape Town, where the husband worked in the accounts departments of various firms, most recently as a credit manager. The wife worked for a bank. Their sons are of school age.

[10] The appellants suffered a number of instances of criminal offending in South Africa between 1997 and 2008, as follows:

(a) In mid-1997, in Cape Town, the husband was attacked by a man with a knife as he was strapping their son into his car seat. The purpose of the attack was to steal the car. The husband wrestled with the man, who ran off. The husband reported the incident to the police but, in the absence of any evidence, the police told him that there was nothing they could do.

(b) The family moved to Johannesburg in 2001. There, in 2005, the wife had her mobile telephone stolen from her handbag while shopping. The theft was reported to the police, without result.

(c) In April 2005, the family was shopping at a supermarket in a shopping centre when it was robbed at gunpoint. The family fled through a storeroom at the back. Several people, including a policeman, were shot and killed during the robbery. All the family were traumatised by the incident but the elder son particularly so, being unable to return to the shopping complex thereafter.

(d) In 2006, the husband's sister-in-law was subjected to an attempted car-jacking. It was averted only because the man in the car behind shot at the attackers and they ran off. The police investigated but no arrests were made.

(e) In October 2006, the wife's car was stolen from in front of the family's house. The thieves poisoned the family's dogs to facilitate the theft. The police were called but took some hours to arrive. The car was never recovered.

(f) In May 2007, the husband was visiting a friend in a rural area when thieves stole quad bikes and other items from the property. The thefts were reported to the police, without result.

(g) In October 2007, a neighbour's gardener stole the husband's wheelbarrow, which he loaded with tools belonging to both the husband and the neighbour. The neighbour reported the matter to the police, without result.

[11] On 21 March 2008, the appellants arrived in New Zealand. Since then, they have heard of further incidents of crime affecting relatives and friends in South Africa, including:

(a) In 2009, a nephew of the wife was twice accosted in Cape Town. On one occasion, two men tried to take his bicycle but ran off when cars approached. On another occasion, two men threatened him with a screwdriver and took his mobile telephone and money. The incidents were both reported to the police but the culprits were never found.

(b) Also in 2009, neighbours of the husband's sister were attacked in their home.

(c) In mid-2009, friends of the appellants were attacked by burglars when they arrived home. The burglars took appliances and alcohol and stole the couple's car.

(d) In September 2009, other friends were attacked in their car as they returned to their rural home. One of the couple was dragged from the car and was beaten with a metal pipe, causing injuries from which he died. His wife was also assaulted but the attackers decamped when other people arrived. No-one was ever caught.

[12] Since their arrival in New Zealand, the children have received counselling at the Whirinaki Child and Adolescent Mental Health Unit for the mental trauma they suffered as a result of their exposure to crime in South Africa.

[13] The appellants say that they live in constant fear of violent crime in South Africa, such that their enjoyment of life is significantly restricted. Their accommodation has had extensive security features, including high walls, razor wire, locked grills over doors and internal gates locking off the bedrooms from the rest of the house. The wife, in particular, fears rape being used as a weapon of retribution and points to the high incidence of HIV infection in South Africa as an aggravating factor in that fear.

[14] The appellants also say that they are at risk from the "Affirmative Action" and "Black Employment Empowerment" policies of the government, which discriminate against people of European origin. Both the husband and the wife would, they say, find it difficult to find employment again in South Africa.

Material and Submissions Received

[15] The appellants provided a substantial quantity of country information, mostly in the form of newspaper reports, when they lodged their refugee claims.

That information is included in the Refugee Status Branch file which has been provided to both the Tribunal and the appellants.

[16] On appeal, the appellants also provide:

(a) ABC News article, dated 3 September 2009, “Canada Grants White South African Refugee Status”;

(b) Decision of the Canadian Federal Court in *Minister of Citizenship and Immigration v Huntley* [2010] FC 207.

[17] Counsel made oral submissions at the hearing and has provided written submissions (undated but received on 20 April 2011) on the question of the protection jurisdictions.

[18] At the hearing, the Tribunal provided the appellants with an extract from the United Kingdom Home Office *Country of Origin Information Report: South Africa* (9 July 2010) and the United States Department of State *Country Reports on Human Rights Practices: South Africa* (11 March 2010).

ASSESSMENT

[19] Under section 198 of the Immigration Act 2009, on an appeal under section 194(1)(c) the Tribunal must determine (in this order) whether to recognise the appellant as:

(a) a refugee under the 1951 Convention Relating to the Status of Refugees (“the Refugee Convention”) (section 129); and

(b) a protected person under the 1984 Convention Against Torture (section 130); and

(c) a protected person under the 1966 International Covenant on Civil and Political Rights (“the ICCPR”) (section 131).

[20] In determining whether the appellant is a refugee or a protected person, it is necessary first to identify the facts against which the assessment is to be made. That requires consideration of the credibility of the appellant’s account.

Credibility

[21] The appellants' account of their subjective fears is accepted.

The Refugee Convention

[22] Section 129(1) of the Act provides that:

> "A person must be recognised as a refugee in accordance with this Act if he or she is a refugee within the meaning of the Refugee Convention."

[23] Article 1A(2) of the Refugee Convention provides that a refugee is a person who:

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

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

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

(b) If the answer is yes, is there a Convention reason for that persecution?

Assessment of the Claims to Refugee Status

Objectively, on the facts as found, is there a real chance of any of the appellants being persecuted if returned to South Africa?

[25] For the purposes of refugee determination, "being persecuted" has been defined as the sustained or systemic violation of core human rights, demonstrative of a failure of state protection – see *Refugee Appeal No 2039/93* (12 February 1996). Put another way, persecution can be seen as the infliction of serious harm, coupled with the absence of state protection – see *Refugee Appeal No 71427* (16 August 2000) at [67].

[26] In determining what is meant by "well-founded" in Article 1A(2) , the Tribunal adopts the approach in *Chan v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379 (HCA), where it was held that a fear of being persecuted is established as well-founded when there is a real, as opposed to a remote or

speculative, chance of it occurring. The standard is entirely objective.

[27] There is no doubt that there is a high rate of crime, including violent crime, in South Africa. As the United Kingdom Home Office noted, at 9.02 of its 9 July 2010 report:

> "The BBC reported on 17 May 2010 that:
>
> > 'Each day an average of nearly 50 people are murdered [in South Africa]. In addition to these 18,000 murders each year, there are another 18,000 attempted murders.'"

[28] The United States Department of State's *Country Reports on Human Rights Practices: South Africa* (11 March 2010) also records a bleak picture, stating that the South African police struggled to cope with a violent crime rate which ranked highest in the world. Since the Department of State report issued on 11 March 2010, its further annual report has been issued on 11 April 2011. This latest report continues to record the same picture of high crime rates and inadequate policing resources.

[29] As to the high incidence of violence generally, it must be seen in context. As the Home Office noted, in discussing the BBC report quoted at [26] above:

> "However, the BBC article went on to report the views of Johan Burger '… a senior researcher in the crime and justice programme at South Africa's Institute for Security Studies …' who noted the complicated [picture] regarding the spread of crime across the country. Mr Burger noted that 'The first thing is that the South African murder rate is going down and not up. Contrary to what many people think, the murder rate, while still extremely high, is down by about 44% since 1995. That's a huge decrease.'
>
> 'What is important to understand about our high crime rate is that we know from research that approximately 80% of our murders happen within a very specific social context, mostly between people that know one another. There is something wrong within some of our communities in terms of the social interaction and the social conditions. In blunt terms, areas with problems have murder levels that can be wildly above the national average'."

[30] The risk of serious harm is never amenable to bright-line thresholds, and care must always be taken not to permit generalised statistical information to blind the decision-maker to the actual predicament of the individual in question. Nevertheless, reported statistics on the incidence of harm can provide a degree of insight when attempting to assess claims which are based on nothing more than a claim of a generalised risk.

[31] As to home invasions, the Overseas Security Advisory Council's 26 February 2010 report "South Africa 2010 Crime and Safety Report" noted that there were 8,122 home invasions reported in Gauteng province in 2009. Statistics South Africa recorded, in 2007, a population of 10,450,000 people in Gauteng and

the University of South Africa's Bureau of Market Research 23 May 2007 report, "Population and Household Projections for South Africa by Province and Population Group, 2001 – 2021" noted the average household to be 3.69 persons in 2005. This suggests some 2.8 million houses in Gauteng, indicating that the chance of being in one which suffers a home invasion in any given year in Gauteng province is approximately three per cent. To put it in context, there is a 97 per cent chance of not suffering a home invasion in Gauteng province in any given year.

[32] As to aggravated robbery, the 3 December 2009 *Business Day* article "Murder Rate Falling but Grim View of Crime Rate Persists", provided by the appellants, noted that there were 121,392 reported cases of aggravated robbery in South Africa in the 2008-2009 year. With a population of over 50 million people, there is thus less than 0.25 of a per cent chance of being involved in such an incident in any given year. Again, it translates into a 99.75 per cent chance of *not* being involved in such an incident in any given year.

[33] As to murder, the article "Race, Class and Violent Crime", by Gavin Silber and Nathan Geffen, published in *SA Crime Quarterly*, December 2009 (also provided by the appellants), examined the country's high murder rate. The authors found that, while there is a murder rate of over 50 persons per day, this too must be seen in context. It translates to a rate per annum of some 37 persons per 100,000 (a 0.04 per cent chance of being murdered in any given year, or a 99.96 per cent chance of *not* being murdered). The article states that even at this remote level of risk:

> "... the evidence we have examined indicates that the victims are disproportionately African and coloured working class people."

[34] Silber and Geffen found that, of all male deaths by assault in the four years from 1997-2001 (when the rate was significantly higher than it is now), only four per cent of such deaths were those of white people. Given that the white population at that time comprised 10.9 per cent of the total population, the disproportionately high incidence of deaths by assault suffered by *non*-whites is obvious. Even if one takes the figures for 'unspecified unnatural deaths' which includes all murders (but also manslaughter and other causes of death), whites comprise only 9.69 per cent of the total unspecified unnatural deaths. Thus, at the highest, the murder of white South African citizens in the 1997-2001 period (when it was significantly higher than now), might comprise 9.6 per cent of a degree of risk already calculated at being only 0.03 per cent in any given year – a figure

approaching 0.003 of a per cent. At this level, the degree of risk is no more than remote and speculative.

[35] Sexual offending remains a pervasive and problematic form of crime in South Africa. While the totality of reported cases resulted in a conviction rate of only 4.1 per cent, many cases were presumably not proceeded with because of a lack of evidence. Specialist courts for sexual offences reported a 66.7 per cent conviction rate for cases taken to trial, while conviction rates in other regional courts for sexual offence cases averaged less than 50 per cent.

[36] The 11 March 2010 Department of State report also noted:

> "A poor security climate and societal attitudes condoning sexual violence against women contributed to the problem. A 2005 study by the Medical Research Council estimated that only one in nine rapes was reported to SAPS, as in the most cases the attackers were friends and family members of the victims, who were therefore afraid or reluctant to press charges. This estimate implied that over the year well over half a million women suffered sexual violence. The NGO Treatment Action campaign reported that one in three South African women would be raped in her lifetime."

[37] This last claim is difficult to establish. No statistical basis for the assertion was given. Rather, the 11 March 2009 Department of State report records that there were 71,500 reported case of sexual offending in the 2009 year. At that rate, with a female population of some 25 million, the chance of being sexually assaulted in any given year is approximately 0.3 of a percent (a 99.7 per cent chance of *not* being the victim of sexual offending). The claim that one in three South African women would be raped in her lifetime is not consistent with any known statistics and is unsupported by the evidence.

[38] The high incidence of rape must also be seen in the context of the above extract of the Medical Council Research study, quoted by the Department of State, which explains that, in most cases, the attackers were friends or family members of the victims. In short, much of the sexual violence in South Africa clearly occurs within the domestic context. There is no evidence to suggest that the wife in the present appeals is at risk of being assaulted in such a context. It is not established that her particular circumstances place her at a real, rather than a remote, risk of being subjected to rape or other forms of violence. Nor, for the sake of completeness is there more than a remote or speculative chance of any of the other appellants being subjected to sexual violence.

[39] None of this is intended to downplay the high incidence of violent crime in South Africa generally. Nevertheless, it does provide context to what is meant by

"high" in terms of understanding high rates of crime and in assessing the degree of risk in cases where the claimant asserts nothing more than the risk of being the victim of random acts of crime.

[40] Against this back-drop, it is necessary to assess the appellants' own experiences.

[41] The incidents of violence which have occurred to the appellants (and relatives and acquaintances) in the past are not overlooked, but they need to be seen in context. For the appellants themselves, the relatively small number of past incidents of harm have not resulted in any of them suffering serious physical harm at all (though the stress and trauma such incidents generate is accepted). In the 13 years after the end of apartheid, the appellants suffered five incidents, being the attempted theft of the car, the stealing of the wife's mobile telephone, the theft of the car and the incident at the supermarket, in which they were nearly caught up in an armed robbery. That group of random, unconnected events does not point to anyone singling the appellants out for further harm, or, at a rate of five incidents in 13 years, that the rate of random, unconnected, "in the wrong place at the wrong time" crimes is so great that the risk of further such incidents is anything more than remote and speculative.

[42] As to incidents of harm which friends and relatives have suffered in the past, they help to provide examples of the type of violent crime which occurs in South Africa but they are too few to provide any sensible insight into the degree of risk to the appellants. In short, they are not relevant to the risk of harm which the appellants face in the future.

[43] The evidence does not establish that the risk of any of the appellants suffering serious harm in South Africa rises above the speculative and remote. There is not a real chance of any of the appellants being persecuted in South Africa.

[44] Three further matters must be mentioned.

The Canadian decision in Hartley

[45] At the appeal hearing, Mr Meyrick drew the Tribunal's attention to the granting of refugee status to a white South African in 2009, by the Immigration and Refugee Board of Canada. The decisions of that body are not publicly available but Mr Meyrick produced both the *ABC News* article of 3 September 2009 (*supra*)

and the decision of the Canadian Federal Court in *Minister of Citizenship and Immigration v Huntley* [2010] FC 207.

[46] As to the *ABC News* article, it records that a 31 year old white South African claimed refugee status in Canada on the grounds that he was at risk of serious harm in the form of crime. He claimed to have been mugged and stabbed in seven attempted robberies, during which he was called a "white dog" and a "settler". He did not report any of the incidents to the police.

[47] The article records that there was widespread surprise at the granting of refugee status and quotes Geoffrey Hawker, president of the African Studies Association and head of politics at Macquarie University, as saying:

> "Most refugees tend to be those who are markedly in trouble, underprivileged, on the run. I don't think we've had the case of a white South African coming into this situation before....
>
> Most violence is actually black on black, that's the overwhelming reality. I'm not saying this case couldn't happen but it's not typical of what's happening in the country as a whole.
>
> Of course there are many rich whites, that's absolutely true, and of course they are the focus of robbery and other crimes - that's really not because they're white, that's because they're rich.
>
> And there are plenty of rich blacks now also in South Africa and they get targeted in full measure. The robber's after the money, not really after the person because of the colour of their skin.
>
> Crime reflects the socio-economic condition of the country, rather than its ethnic composition. Unemployment is so high and it tends to be concentrated in the black community and that's where much of the crime is coming from."

[48] Counsel also provided the decision of the Federal Court in *Minister of Citizenship and Immigration v Huntley* (*supra*). That decision, however, is of little assistance. It merely concerned an application to have the Minister's ensuing judicial review proceedings transferred from an application to an action.

[49] What *is* relevant is the recent decision of the Federal Court of Canada on the substantive judicial review – see *Canada (Citizenship and Immigration) v Huntley*, 2010 FC 1175 (2010), which was issued in November 2010. It is unnecessary to traverse in detail what is a long decision. It suffices to record that the Court found that none of the attacks Mr Huntley had suffered could sensibly be seen as having occurred because he was white, that counsel had engineered evidence as to race being the motivation for the attacks by repeatedly asking leading questions, that the evidence of the claimant's sister was not, in fact, "a vivid and detailed account of what is taking place in South Africa today", as the

adjudicator had found. Nor was it based upon "her own personal experience". In fact, the Federal Court found, her personal experience was extremely limited. Finally, the Court held that much of the country information relied upon by the adjudicator was from unreliable sources (including Wikipedia). The decision granting Mr Huntley refugee status was set aside and was the matter remitted back for fresh consideration by a different panel.

[50] It follows that no weight can be accorded to the original decision relied upon by Mr Meyrick.

Attacks on South African farmers

[51] The appellants have included in the country information a number of articles which discuss the high rate of violent attacks on white farmers in South Africa.

[52] There is no doubt that such attacks occur and that they are sometimes accompanied by extreme violence. None of the appellants, however, is a farmer or owns a farm, or has any connection to farming areas other than knowing a number of people (including some relatives) who live in rural areas. There is nothing more than a remote chance of any of the appellants suffering serious harm in terms of attacks on white farmers.

[53] The feelings of insecurity in the farming communities in South Africa is not difficult to understand. Their isolation and concomitant inability to get a quick response from the police makes them an attractive target for criminals. That robbery (rather than race) is the prime motivation for such attacks is evident from the Department of State's 11 March 2010 report, which includes a section headed "National/Race/Ethnic Minorities", which states:

> "The continued killings of mostly white farm owners by black assailants created concern among white farmers that they were being targeted for racial and political reasons, although studies showed perpetrators were generally common criminals motivated by financial gain."

[54] In short, even if there were a risk to the appellants beyond the speculative and remote (which there is not), it cannot be assumed that such attacks are for any Convention reason.

The children

[55] Particular regard is had to the appeals by the two children. The reality is that neither of them has suffered a sustained or systemic violation of core human rights amounting to serious harm.

[56] It is accepted that children are less equipped to deal with stress and that the corrosive effect of an incessant subjective concern about crime and personal safety can have a detrimental effect on a child's mental and emotional well-being. That is consistent with the fact that they have had counselling in New Zealand.

[57] The primary expectation, of course, is that parents will do their best to shield their children from the effects of such fear. The parents on this appeal present as caring and supportive adults and the Tribunal is confident that they understand that it is in their children's best interests not to be exposed to gratuitous and graphic news reporting of crime, or gossip or rumour-mongering about it.

[58] Given that the Tribunal can expect the parents to sufficiently protect the children's mental and emotional well-being in this way, it is satisfied that there is not a real chance of them suffering serious harm in terms of their mental and emotional development.

Is there a Convention reason for the persecution?

[59] Given the finding on the first issue, this does not arise for consideration.

Conclusion on Claim to Refugee Status

[60] Despite the high crime rate and difficulties experienced by the police in effectively combating crime, it is not established that any of the appellants is at risk of a sustained or systemic denial of basic or core human rights in South Africa. In particular, it is not established that any of them faces a real chance of becoming the victim of violent crime.

[61] It is acknowledged that all of the appellants are genuinely fearful of being the victims of crime in South Africa. As already noted, however, the question whether an appellant's fear is well founded is properly determined by objective, rather than subjective, criteria.

[62] For the reasons given, none of the appellants has a well-founded fear of being persecuted.

The Convention Against Torture

[63] Section 130(1) of the Act provides that:

> "A person must be recognised as a protected person in New Zealand under the Convention Against Torture if there are substantial grounds for believing that he or she would be in danger of being subjected to torture if deported from New Zealand."

Assessment of the Claim Under Convention Against Torture

[64] Counsel submits that:

> "Under the Torture Convention Art 3, the only requirement is that the person is able to show that there are substantial grounds for believing he or she will be subjected to torture."

[65] Aside from the point that the appellants need only establish substantial grounds for believing they are *in danger of* being subjected to torture, the assertion is unexceptional. What is overlooked, however, is that the notion of 'torture' itself comprises a number of constituent parts.

[66] Section 130(5) of the Act provides that torture has the same meaning as in the Convention Against Torture. Article 1(1) states that torture is:

> "… any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions."

[67] It can be seen that the duty to protect against torture under the Convention Against Torture is only engaged where the acts complained of:

(a) cause severe pain or suffering;

(b) are inflicted for the purpose of obtaining information or a confession, or to punish or intimidate or coerce or for any reason based on discrimination; and

(c) are inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

[68] It is convenient to address first the requirement at (c) above.

[69] In short, the appellants claim to be at risk of random acts of violent crime by private citizens not violent crime by, or with the consent or acquiescence of, a public official or other person acting in an official capacity.

[70] Counsel submits that "crimes against Afrikaaners ... [are] happening because of the acquiescence of the Police Force". That submission is also rejected. The country information indicates, overwhelmingly, that the inability of the police to prevent violent crime and their difficulties in investigating it and in apprehending offenders, stems from insufficient resourcing and poorly trained personnel. As the Overseas Security Advisory Council noted:

> "The South African Police Service (SAPS) and metropolitan police departments suffer from a lack of equipment, resources, training, and personnel to respond to calls for assistance or other emergencies. In addition, law enforcement agencies in South Africa have lost many experienced officers and personnel to attrition and reorganization of command and administrative structures."

[71] Indeed, *The Economist* reported on 3 October 2009, in an article "Crime in South Africa – It Won't go Away", that crime rates are falling:

> "In fact, despite public grumbles, the government has had some success. If new police statistics are to be believed, the crime rate for the 21 most serious categories has fallen by nearly a fifth in the past 25 years. The murder rate has fallen by half, rape is down by a third, and assault causing grievous bodily harm has dipped by more than a fifth."

[72] As well as the picture of falling crime rates, notwithstanding the under-resourcing of the police, the Department of State's 11 March 2010 report includes a section headed "National/Race/Ethnic Minorities". There, one would expect to find discussion of any pattern of failure by the police to investigate crimes against white people. Instead, virtually the whole section is given over to xenophobia towards black immigrants from other African countries. The only mention of the white population is a concluding paragraph which states:

> "The continued killings of mostly white farm owners by black assailants created concern among white farmers that they were being targeted for racial and political reasons, although studies showed perpetrators were generally common criminals motivated by financial gain. There also were reports that white employers abused and killed black farm laborers and complaints that white employers received preferential treatment from the authorities."

[73] This was repeated in the more recent Department of State report of 11 April 2011, with the addition of a complaint by an Afrikaner that separate statistics were not being kept of crime against farmers and a report of the killing of Eugene Terr'Blanche, for which two black workers have been charged.

[74] The country information does not record any significant failure by the South African police to investigate crimes against whites for reasons of race. Indeed, it suggests that no such discrimination exists.

[75] The Tribunal is satisfied that any severe pain or suffering of which there might be a risk would not be inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

[76] The claim under the Convention Against Torture must fail for this reason alone. For the sake of completeness, however, it is also noted that, the factual background being the same as under the refugee limb of the enquiry, the same remote or speculative degree of risk of serious harm exists under this head of the appeal as did under the Refugee Convention. A remote or speculative risk does not give rise to substantial grounds for believing that a person is in danger of torture (see also the discussion at [81]-[83] hereafter).

Conclusion on Claim under Convention Against Torture

[77] For the foregoing reasons, none of the appellants requires protection under the Convention Against Torture. The appeals under section 130 of the Act must fail.

The International Covenant on Civil and Political Rights (the ICCPR)

[78] Section 131(1) of the Act provides that:

> "A person must be recognised as a protected person in New Zealand under the Covenant on Civil and Political Rights if there are substantial grounds for believing that he or she would be in danger of being subjected to arbitrary deprivation of life or cruel treatment if deported from New Zealand."

[79] Section 131(6) of the Act provides that:

> "In this section, cruel treatment means cruel, inhuman, or degrading treatment or punishment."

Assessment of the Claim under the ICCPR

[80] Again, the factual matrix is the same under this limb of the claim as under the Refugee Convention.

[81] Counsel submits that the threshold of "in danger of" equates to the "real chance" threshold applied in respect of the "well-founded" requirement in refugee law. He cites in support *Removal Appeal No 45259* (28 February 2006), in which the Removal Review Authority considered the point briefly.

[82] The submission risks going too far. Sight must not be lost of the statutory terms, which provide that there must be substantial grounds for believing that the person "is in danger of...". There is a risk, in attempting to further define what is already a definition, that a test wholly distinct from that intended by Parliament becomes established.

[83] The most that can be said is that "in danger of" raises a low threshold. What must be established is less than the balance of probabilities but something more than mere speculation or a random or remote risk. To that extent, the standard can be seen as analogous to the standard applied in refugee law but it goes no further than that.

[84] There is good reason for recognising that "in danger of" raises a low threshold (less than the balance of probabilities but more than mere speculation or a random or remote risk). The same evidentiary hurdles confront claimants bringing a protection claim as confront refugee claimants. As Atle Grahl-Madsen observed in *The Status of Refugees in International Law* (Vol 1) (1966) at pp 145-146 (addressing the issue of proof in refugee claims):

> "In one respect, however, a liberal attitude is called for outright, in order that full effect may be given to the provisions of the Refugee Convention and the purposes for which they are intended: it is a well-known fact that a person who claims to be a refugee may have difficulties in proving his allegations. He may have left his country without any papers, there may be nobody around who may testify to support his story, and other means of corroboration may be unavailable. It would go counter to the principle of good faith if a contracting State should place on a suppliant a burden of proof which he, in the nature of things, could not possibly cope with."

[85] The good faith principle to which Grahl-Madsen refers is that imposed under international law by Article 31(1) of the 1969 Vienna Convention on the Law of Treaties. Just as the Refugee Convention is a treaty to be interpreted in light of the Vienna Convention, so are the ICCPR and the Convention Against Torture.

[86] Returning to the facts of the present case, the Tribunal is satisfied that there are no substantial grounds for believing that any of the appellants is in danger of either arbitrary deprivation of life or cruel, inhuman or degrading treatment in South Africa. The risk of any such harm is speculative or remote only.

Conclusion on Claim under ICCPR

[87] For the foregoing reasons, none of the appellants requires protection under the ICCPR. The appeals under section 131 of the Act must fail.

CONCLUSION

[88] For the foregoing reasons, the Tribunal finds that, in respect of each of the appellants, he or she:

(a) Is not a refugee within the meaning of the Refugee Convention;

(b) Is not a protected person within the meaning of the Convention Against Torture;

(c) Is not a protected person within the meaning of the International Covenant on Civil and Political Rights.

[89] The appeals are dismissed.

"C M Treadwell"
C M Treadwell
Member

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C M Treadwell
Member