

REFUGEE STATUS APPEALS AUTHORITY
NEW ZEALAND

REFUGEE APPEAL NO. 74628

REFUGEE APPEAL NO. 74629

REFUGEE APPEAL NO. 74630

AT AUCKLAND

<u>Before:</u>	V J Shaw (Chairperson) A Schaaf (Member)
<u>Counsel for Appellant:</u>	D Mansouri-Rad
<u>Appearing for NZIS:</u>	No Appearance
<u>Date of Hearing:</u>	11 September, 17 October & 28 November 2003
<u>Date of Decision:</u>	11 February 2004

DECISION

[1] These are appeals against the decisions of a refugee status officer of the Refugee Status Branch (RSB) of the New Zealand Immigration Service (NZIS) declining the grant of refugee status to the appellants, citizens of South Africa.

INTRODUCTION

[2] The appellants are a 39 year-old woman (henceforth to be referred to as “the appellant”) and her two daughters aged four and seven years. They arrived in New Zealand on 16 April 2002 and were all granted visitors’ permits. Refugee claims

were filed on 21 May 2002. The appellant was interviewed by the refugee status officer on 11 November 2002 and her and her children's refugee claims declined in decisions dated 3 April 2003.

[3] The appellant was born in Goma in the Democratic Republic of Congo (DRC) (formerly Zaire) of Congolese parents. Her refugee claim as set out in her application form and accompanying written statement was that she and her two youngest daughters had fled the DRC after her husband, a Congolese evangelist, had been attacked and later kidnapped, along with the couple's two eldest children, by a group of unidentified Congolese men because of the husband's Rwandan Hutu ancestry. The appellant and her two youngest children had departed the DRC on 1 January 2002 and travelled by truck to South Africa from where they eventually made their way to New Zealand a few months later travelling on false South African passports.

[4] The appellant maintained this account before the refugee status officer. However, the officer held that the appellant's account was not credible on the basis that information received from the South African authorities suggested that the appellant had in fact been granted permanent residence in South Africa in March 1996 and in July 2000 had become a naturalised South African citizen. A passport in the name of KK had been issued to her on 30 November 2001.

[5] During the first day of the appeal hearing the appellant stuck to her original claims denying that she was the KK identified by the South African authorities. Additionally, she mentioned for the first time her experiences of being raped on two separate occasions by her husband's assailants in the DRC and claimed that she still had had no news of the fate of her husband and eldest children.

[6] The Authority made further enquiries with the South African authorities and on 2 October 2003 received a complete copy of the 1995 permanent residence application. This revealed that the appellant had entered South Africa during December 1993 under the maiden name KS and had married a South African citizen, RK, in November 1994. Her residence application had been based on this marriage. The Authority was also able to obtain the South African birth certificate for the older child, AFH, which showed she had been born in South Africa on 12 July 1996 to the appellant and a South African citizen, RH.

[7] When the hearing resumed on 17 October 2003, this additional information was put to the appellant. In response she admitted that she was indeed the KK referred to in the South African documentation and that her claims concerning the alleged persecution of herself and her family in the DRC were not true. She was apologetic and tearful.

[8] The Authority adjourned for a short period to allow counsel to take instructions. He subsequently advised that the appellant had instructed that she had left South Africa with her two daughters so as to escape the violence of her estranged husband. The appellant confirmed to the Authority that this was the reason she had left South Africa. However, as she was in too distressed a state to be interviewed, the Authority adjourned the hearing.

[9] Prior to reconvening on 28 November 2003 the Authority received a handwritten statement written by the appellant setting out an account of her life in South Africa. It is this statement, along with her oral evidence to the Authority on 28 November 2003, which forms the basis of the narrative set out below.

[10] Additionally, the Authority has received from counsel submissions and a range of country material concerning the issue of the appellant's nationality and domestic violence in South Africa which have been duly considered.

THE APPELLANT'S CASE

[11] The appellant is from a family of six children. After her mother's death around 1981, her father remarried. He and his second wife and four of the appellant's siblings continue to reside in Goma. A married sister lives with her family in Lubumbashi. Subsequent to his retirement from the Zairian army where he held the rank of an ordinary soldier, the appellant's father worked as a carpenter/furniture maker. He is now elderly and in poor health. The appellant described her family as poor, their economic situation having been made even more precarious by the conflict in eastern DRC and the destructive effects of a recent volcanic eruption which destroyed the family home.

[12] Around 1983 the appellant commenced studies at the University of Lubumbashi, eventually graduating with a Master's degree in English. While still a

student she had two children; a daughter born on 10 August 1983 and a son born on 4 April 1985. Their father, whom she never legally married, was also from Goma. The daughter was raised by a paternal aunt living in Goma and the son by the appellant's sister in Lubumbashi with whom the appellant also lived after completing her degree.

[13] Although she trained as a teacher the appellant was unable to find a teaching position or any other employment. She therefore made the decision in 1993 to go to South Africa in the hope of finding a job and creating a better future.

[14] The appellant entered South Africa in December 1993 travelling on a Zairian passport current to 27 July 1997. She stayed initially with a Congolese woman friend in Johannesburg. After a few months she formed a relationship with a South African citizen, RK, whom she married in November 1994. Her husband worked as a door-to-door commission salesman and initially impressed her as a gentle man who would take care of her. However, within a short time he took to drinking heavily which caused him to become a totally different person and "uncontrollable". He would regularly beat and abuse her, including forcing her to have sex. A particular trigger for his abuse was especially if she questioned him or asked for anything. Despite their living in a small one-bedroom apartment he would bring women home indifferent to the appellant's feelings. On occasions he would lock her in the apartment for the day while he was out and would sometimes leave her without food for up to two days. Despite the beatings and abuse, the appellant felt too vulnerable to leave her husband because of her immigration status.

[15] On one occasion a few months after the marriage her husband attempted to strangle her. After he left the apartment – she thinks around mid-morning – she telephoned the police. In the late afternoon when her husband had returned home, two male police officers came to the apartment. They talked to the husband in their own tribal language – which the appellant did not understand – then informed her that according to her husband there had just been a disagreement between him and herself. When she protested that her husband regularly beat her they asked if she was her husband's wife and when she confirmed this stated that it was a family problem and that she and her husband should resolve it themselves. After the police officers departed her husband threatened "to correct her properly" if she dared to call the police again.

[16] The appellant believes that the police refused her protection because of her status as a woman and wife and because of her being a foreigner. There were, she suggested, high levels of xenophobia in South Africa, especially against foreign blacks. The police targeted such persons on the street and she had even experienced being stopped and asked for her identity papers, only to have them torn up. Once, around December 1994, she was robbed in the street at knifepoint. When she complained to the police they soon identified her as a *makwere* or foreigner and claimed there was nothing they could do. When robbed a second time she did not consider it worthwhile to even lay a complaint with the police.

[17] After leaving RK in November 1995, she found sanctuary in the home of a woman friend where she remained for some months. She supported herself by selling items door-to-door as well as at flea markets. Through her friend she met another South African citizen, RH, with whom she fell in love. She soon became pregnant. RH was not keen on her having a child but she refused to have an abortion. She rented a room in a boarding house where she lived alone. RH continued to live in Soweto, visiting mainly in the weekends. He provided some financial assistance. Because of her experiences with her husband she was happy with this arrangement.

[18] The appellant did not see her husband again until mid-1999. She was pregnant at the time with her youngest daughter. She is uncertain how he managed to locate her. He arrived accompanied by another man. On finding RH also present he beat him, warning RH that the appellant was his wife and that he would kill him if he did not stop seeing her. The husband did not beat the appellant although he warned her that if she did not leave RH he would punish her.

[19] As a result of this incident, RH became fearful and as a consequence reduced the frequency of his visits to the appellant. He was also approached by several men in the street and warned that if he did not leave the appellant he would "pay the price".

[20] The appellant's husband made several further visits to the appellant. On these occasions she was alone. He did not assault her but would tell her that she should watch out and remind her of everything he had done for her. He did not suggest that the appellant should return to live with him.

[21] One morning around March 2000, about four to five months after the birth of her youngest child, the husband again arrived at the appellant's home, this time accompanied by two men unknown to the appellant.

[22] The appellant was alone with her two daughters. On seeing the new baby in her arms RK began to shout, accusing her of not learning her lesson and that he would teach her an "unforgettable one". He grabbed the baby and threw her into her cot. He slapped the appellant, knocking her to the ground, then proceeded to rape her in front of the older child. When he had finished the other two men also raped her at RK's invitation. Before leaving RK pointed a gun at the appellant and threatened her that if she told the police she "would be a dead person" and that he knew how to find her. In consequence she did not lay a complaint with the police.

[23] That evening RH visited and the appellant informed him of what had happened. Already fearful for his own safety this latest incident prompted RH to end his relationship with the appellant. He informed her that he did not want to lose his life and was not in a position to protect her from RK.

[24] The appellant did not see RH again for some weeks although during this time he sent a friend with money. He then appeared accompanied by a friend and informed her that he had been stabbed in the back when in the street. He and his friend blamed the appellant and warned her that if anything was to happen to RH she would pay the price. The meeting was relatively brief. RH again told the appellant that he did not want to die because of her and departed telling her that she should regard the children as "a gift" but forget about him. The appellant has had no further contact with, or financial support from, RH.

[25] The appellant received several more visits from RK. On these occasions he would verbally abuse and threaten her, demanding to know if she was still with her boyfriend. He did not physically or sexually assault her. Particularly distressing for the appellant though was the threat he made that one day he "would have to punish" her "bastard babies". The appellant did not regard this as an idle threat. She was aware from media reports that there was a high incidence of child rape in South Africa. This and RK's treatment of herself made her terrified that RK might well rape her daughters.

[26] The appellant arranged for her and her children to stay with a woman she knew living in the same district. She supported herself by hawking goods including Congolese crafts sent to her by her sister.

[27] The appellant described feeling in a desperate state over this period. She was constantly afraid for her and her children's safety. She wanted to go somewhere where she could not be found by RK. If she were to shift elsewhere in South Africa away from Johannesburg she was not confident that RK would not eventually track her down. She considered returning to the Congo but decided against it because of the insecurity in that country and fears that, as in the past, she would never be able to find employment so as to support herself and her children. Her family had all been badly affected by the war and had little to offer her.

[28] When discussing her plight with Congolese friends she learned it was possible to travel on her South African passport to some countries without a visa. Desiring to be as far away from RK as possible the appellant therefore made the decision to come to New Zealand. Over the following months she raised the money to pay for her travel by selling crafts and other goods including all of her possessions. She also received US\$400 from her sister in Lubumbashi and another US\$1,600 from members of the local expatriate Congolese community in Johannesburg who were concerned for her welfare.

[29] The appellant and her daughters departed South Africa on 15 April 2002 travelling on their own South African passports. On arrival in Auckland the following day they were granted visitors' permits. The appellant knew no-one in this country. She sought advice about accommodation from a taxi driver at the airport and he took her and the children to a refugee hostel in Henderson. From there she was put in contact with members of the Auckland Congolese community who provided her with initial accommodation and advice about filing a refugee claim.

[30] The appellant explained that she had fabricated her original story because she wanted to hide herself away. In particular she did not want information about her true identity or past history in South Africa to circulate in case it eventually got back to RK in South Africa.

[31] Because of the absence of a reliable mail service in the DRC the appellant has had only intermittent contact with her family in that country. On one occasion

she was able to speak to her sister in Lubumbashi on the telephone. She submitted a fax received during August 2003 from one of her brothers in Goma. This essentially recounts the family's desperate economic circumstances – including being unable to pay for medicine for their very sick father – and asks the appellant for her help.

[32] The appellant is afraid to return to South Africa because she fears for the safety of her and her children at the hands of RK. She does not believe that state protection would be available to them. She did not seek help from the police after being raped because she knew from her past experience of seeking police protection from RK that they could not be relied on to protect women victims of domestic violence and that her safety could even be compromised by their involvement. The fact that she was Congolese, she believed, made it even more unlikely that she would receive police protection.

[33] As regards her ability to return to the DRC, the appellant told the Authority that she could not recall if she had her Zairian passport renewed when in South Africa but, if so, it would only have been for a period of two years and that the passport, which she left with a friend in South Africa, had now expired. It was her understanding that Congolese citizenship was “unique” in that once she took South African citizenship it was no longer possible for her to retain her Congolese citizenship.

THE ISSUES

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

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

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

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

ASSESSMENT OF THE APPELLANT'S CASE

[36] The Authority must first determine whether or not the appellant's latest account about her experiences in South Africa is credible.

CREDIBILITY

[37] The Authority is mindful that the appellant has admitted that her claim, as originally advanced, was a fabrication. We have carefully considered her explanation for this. We have also taken note of her general demeanour throughout the hearing. She presented as fragile and deeply troubled. Her remorse and apologies for her deceit appeared sincere and her revelation that her true fear was of her estranged South African husband was spontaneous and cathartic.

[38] With respect to her critical evidence of being raped by her estranged husband and two of his associates, it should be noted that the appellant's first revelation of being raped was made to Dr Wansborough during a consultation on 9 September 2003. Dr Wansborough alerted the Authority to this matter in a medical report of the same date noting that the appellant claimed to have felt too ashamed to talk of it to the immigration officer or her lawyer.

[39] Particularly revealing was the appellant's description of being raped during the first day of the hearing when recounting her false narrative of her and her family being persecuted in the DRC. The Authority knew, on the basis of the South African documentation, that her claims to be in the Congo up until the beginning of 2001 could not be true and therefore she could not have been raped in that country in the circumstances described. However, her anguish when describing being raped (including by three men in front of her children) was such that the Authority suspected that she had in all probability been raped – presumably in South Africa – and that she was merely concealing the true circumstances.

[40] The appellant told the Authority that she was still not recovered from her experience of being raped which has left her feeling deeply shameful and useless. Her generally poor mental state was described in the two reports received from Dr Wansborough. Medical evidence also established that the appellant is suffering from high blood pressure, something she believes to be stress related.

[41] Taking all of these matters into account the Authority accepts that the appellant's account of her family background and life in South Africa, as set out above, is credible.

NATIONALITY

[42] Before turning to the framed issues it is necessary to first consider the issue of the appellant's nationality.

[43] The appellant was born in the DRC. Her latest Zairian (DRC) passport was issued in 1994 and appears to have been valid until 22 July 1997. It may have been renewed for a further two years. There is no doubt that, at least up until she became a naturalised South African citizen in 2001, the appellant was a national of the DRC.

[44] The South African authorities have confirmed the appellant's immigration history in South Africa. She became a South African citizen by naturalisation on 20 July 2001. A South African identity document and South African passport in her married name were both issued during November 2001.

[45] It was the appellant's evidence that it was her understanding that DRC citizenship was "unique" in that DRC law did not recognise dual citizenship. She therefore thought that by taking South African citizenship her DRC citizenship may well have been extinguished although she did not know the legal technicalities and acknowledged not ever having formally renounced her DRC citizenship.

[46] Counsel has submitted information concerning the DRC citizenship law sourced from the US Office of Personnel Management, *Citizenship Laws of the World* (March 2001). This records that in accordance with the Congolese Civil Code and Special Law on Congolese Nationality dual citizenship is not recognised and that involuntary loss of Congolese citizenship occurs when a person voluntarily acquires a foreign citizenship.

[47] This is also stated to be the case by the UK Home Office *Country Report: DRC* (October 2003) para. 5.39.

[48] Similarly a report from the Research Directorate of the Canadian Immigration and Refugee Board (IRB), RDC 41254.E (16 May 2003) citing *Citizenship Laws of the World* also states that dual citizenship is not recognised by the DRC and that the UNHCR office in Kinshasa had also confirmed that this remains the case under Article 14 of the New Transitional Constitution promulgated on 4 April 2003. The IRB sought an opinion from two experienced Congolese jurists in respect of a Congolese who obtained Central African citizenship in 1992. Both were of the opinion that by acquiring such citizenship the individual in question lost his Congolese citizenship automatically. It could only be recovered if the person renounced his new nationality and addressed a request to the Minister of Justice in the DRC.

[49] The Authority concludes from the above that the appellant, by acquiring South African citizenship in July 2001, *automatically* forfeited her Congolese citizenship. While it may be possible for her to regain it the legal opinions given to the Canadian IRB suggest that this is a two-fold procedure requiring the appellant to renounce her South African citizenship and make an application to the DRC Justice Minister. This suggests that the process is discretionary rather than a strict legal entitlement.

[50] On the available evidence, the appellant's ability to resume her Congolese citizenship cannot be said to be a mere formality as contemplated by *Refugee Appeal No. 72635/01* (6 September 2002) para 138 - 141 and *Refugee Appeal Nos 72558/01 & 72559/01* (19 November 2002) para 83 citing *Tatiana Bouianova v Minister of Employment and Immigration* [1993] FCJ No 576; (1993) 67 FTR 74 (FC:TD). The Authority therefore concludes that the appellant's claim for refugee status falls to be determined in relationship to South Africa, her sole country of nationality. Similarly, the claims of the two children – both are South African citizens by virtue of their birth in South Africa to a South African citizen father and South African permanent resident mother (South African Citizenship Act 1995, US Office of Personnel Management *Citizenship Laws of the World*). Both hold South African passports. Further their mother's involuntary loss of her Congolese citizenship effectively precludes their having any claim to Congolese citizenship by descent.

[51] The Authority now turns to consider whether the appellant and/or her two children face a real chance of being persecuted in South Africa.

WELL FOUNDED FEAR

[52] The appellant has clearly suffered past serious harm at the hands of her estranged husband, RK. Throughout 1995, during the course of her short-lived marriage, she sustained regular beatings as well as sexual and psychological abuse. Some three and a half years after their separation, RK tracked down the appellant. Threats and intimidation were followed by an ugly episode in which the appellant, in the presence of her older daughter, then aged four and a half years, was raped, not only by RK but by two associates urged on by RK.

[53] Past persecution, while not determinative, is often highly relevant to the assessment of the prospective risk of harm required by the Refugee Convention. The nature of RK's serious mistreatment of the appellant during their marriage and his more recent serious abuse and intimidation of the appellant which caused her to flee South Africa, clearly indicates that RK is a man of jealous and violent disposition.

[54] The issue for the Authority is whether or not RK retains sufficient interest in the appellant that he would again seek her out with a view to intimidating and harming her. After the rapes around March 2000 RK made several more visits over the following months. He was menacing but did not physically harm the appellant. Once she moved to stay with a woman friend the appellant was not troubled by RK again up until she departed South Africa in April 2002. This was despite living in the same district in Johannesburg as her previous accommodation.

[55] The Authority has considered whether the period of no contact from mid 2000 onwards (which, taking into account the time spent in New Zealand, has now extended to some three and a half years) indicates that the appellant would remain safe from RK in the event of her returning to South Africa.

[56] Of particular relevance is the past matter of contact with RH. On fleeing the marriage around November 1995 the appellant had no contact with RK up until mid 1999, that is, some three and a half years later. During this period she was living in Johannesburg. She has no knowledge of RK's circumstances during these three

and a half years including if he was even living in Johannesburg; when she last saw him in November 1995, he had been about to leave for Transkei from where he originated. The appellant does not know if RK was looking for her during this period or, if not, what triggered his interest or how he managed to locate her. It is not known if RK learned of her whereabouts by chance – perhaps through friends or acquaintances of the appellant – or by deliberately searching for her, possibly exploiting contacts in the Congolese community.

[57] The Authority takes into account the evidence of RK's jealous and controlling personality, his propensity for using serious violence against the appellant, the timing and nature of his contacts with her subsequent to their separation and the dearth of information about his current circumstances and intentions towards the appellant and her daughters. Cumulatively these factors require that the Authority extends to the appellant the benefit of any doubts it has as to the degree of interest RK retains in her and the corresponding risk of future harm he represents. The Authority therefore finds that were the appellant to return to Johannesburg - the only place she had ever lived in South Africa – there is a real chance that RK, as happened in the past, would come to know of her whereabouts and that he would again subject her to intimidation and serious violence.

[58] Persecution, as defined in our jurisprudence, requires not only a real chance of serious harm but the failure of state protection (refer *Refugee Appeal No.71427/99* [2000] NZAR545 para 43-70). The Authority must therefore consider the ability and willingness of the state of South Africa to respond effectively to the risk posed to the appellant by RK.

[59] Regrettably, violence against women and girls is extremely prevalent in South Africa. Human Rights Watch and Amnesty International, in their joint submission to the South African parliament on the draft Criminal Law (Sexual Offences) Amendment Bill, 2003 [AI Index :AFR53/006/2003] (<http://hrw.org/press/2003/09/sa-drafcrimelaw.htm>) (accessed 9 December 2003), described the level of sexual violence as “a problem of epidemic proportions” and noted that the trauma of rape has been further exacerbated by the life-threatening possibility of transmission of HIV through sexual assault.

[60] The United States Department of State *Country Reports on Human Rights Practices 2002: South Africa* (31 March 2003) identified entrenched patriarchal

attitudes towards women as a significant factor in the high rate of domestic violence and its under-reporting, while the reasons for the extremely high incidence of rape included “a poor general security climate and societal attitudes condoning sexual violence against women. In the large majority of rape cases, the perpetrator went unpunished”.

[61] Amnesty International locates sexual violence against women within a broader context of widespread economic, social and legal discrimination of women in southern African countries. Survivors of rape confronted serious problems accessing justice and necessary health care. These included “discriminatory attitudes, practices and laws, poor standards of police investigation, as well as low standards of medical care and procedures for the forensic examination of rape survivors”.

[62] For a detailed analysis of the traditional failure of the South African criminal justice system to provide an effective remedy for women subject to violence, see Human Rights Watch *Violence Against Women in the Medico-Legal System*, Vol. 9 No. 4(A), 1 August 1997.

[63] The South African government has, in recent years, responded positively to the challenge to eliminate discrimination and violence against women. Initiatives adopted have included law and criminal justice reforms such as the Domestic Violence Act 1998 which makes provision for protection orders, and the draft Sexual Offences Bill, as well as the establishment of specialised sexual offences courts and improvements to police training and forensic medical procedures. Policies have also been implemented to improve standards of medical and psychological care and treatment of rape victims. As Amnesty International acknowledges, these reforms will, over time, increase women’s access to effective remedies in cases of rape, sexual abuse and domestic violence. However, Amnesty International cautions that “These initiatives are still at a preliminary stage and in some cases are still being resisted by some government officials” (Amnesty International press release *Southern Africa: Women and girls still facing discrimination and violence*, 5 December 2002 (Amnesty International Index:AFR 03/012/2002 Public)).

[64] The Authority has also consulted two reports by the Consortium on Violence Against Women at the Institute of Criminology, University of Cape Town *Monitoring the First Research Report 2000-2001(2001) and Magistrates and the Domestic*

Violence Act: Issues of Interpretation (2003). Additionally it has perused the report of the South African Parliament's Joint Monitoring Committee on the Improvement of Quality of Life and Status of Women *Report on Violence Against Women* (May 2002). All three reports confirm the enormous task entailed if a reduction in South Africa's record level of violence against women is to be achieved.

[65] The Consortium on Violence Against Women in its 2001 report concluded that although the Domestic Violence Act 1998 was heralded as groundbreaking legislation there remain numerous barriers to its effective implementation. Many of these stem from no additional resources having been made available to courts and the police to implement the legislation. Commenting on the barrier to effective protection to be found in the attitudes of law enforcement agents the report notes at p83:

"Perhaps the most important, and least acknowledged ingredient of social change to end domestic violence, lies in the shifting of attitudes. Progressive legislation enforced by those with unprogressive attitudes can create hostility and resentment on the part of law enforcement agents towards complaints. The reality is that many of those responsible for implementing the legislation do not understand the dynamics of domestic violence, and may themselves have many unresolved issues about the problem. Evidence shows too that there are high levels of domestic violence within the police service, and it hardly bears mentioning that even the most far-reaching legislation will be rendered toothless if it is enforced by those who themselves do not believe in its necessity."

[66] The United States Department of State (*ibid.*) also notes that the implementation of domestic violence legislation is hampered by societal attitudes and lack of infrastructure, resources and training for law enforcement officials. While many police and other judicial system officials were committed to complying with the law, it was not implemented adequately. The number of shelters for abused women was also inadequate.

[67] Fears have also been expressed that implementation of the proposed new sexual offences legislation will be hampered by inadequate funding, as has happened with the Domestic Violence Act, so for instance the provision requiring rape victims to be provided with post-exposure prophylaxis to reduce the chances of contracting HIV were dropped from the Bill because of funding problems (*Africa News 'Gender Violence Veeds Hefer Probe'*, November 25, 2003).

[68] Although the reforms are aimed at increasing victims' confidence in the police and willingness to report violence and sexual offences, as yet the US Department of State notes in its latest report that the number of victims willing to file complaints are

believed to represent “only a fraction of those who suffered abuse”. Conviction rates in rape cases are also low at around 8.9%.

[69] During 1995, the appellant complained to the police after RK attempted to strangle her. The police failed to take her complaint seriously, no doubt reflecting the unsympathetic sexist attitudes highlighted in the country material. Mindful of this experience and fearful of RK’s threats to kill her, the appellant refrained from filing a complaint after being raped in 2000.

[70] The initiatives by the South African authorities noted above would suggest that by July 2001, had the appellant chosen to file a complaint, there was a far better chance that the police would have responded more positively. However, whether their response would have been sufficiently sympathetic, pro-active and professional to result in RK and his associates being arrested and prosecuted, and whether the police would have had the resources to protect the appellant from intimidation and possible reprisals, is uncertain. Despite the reforms currently being implemented, the United States Department of State reports that in 2002, it remains “difficult for abused women’s cases to be prosecuted effectively, and abused women often were treated poorly by doctors, police officers, and judges”.

[71] The magnitude of the problem of violence against women in South Africa, the entrenched patriarchal attitudes, including amongst police and other officials and the scarce resources available to implement new legislative proposals, lift professional standards within the police and criminal justice systems and support victims of violence, suggest that state protection, for a significant number, if not the majority, of victims of domestic violence and rape, will be at best deficient and at worst non-existent.

[72] The Authority must also consider the appellant’s contention that her Congolese origin also places her at a disadvantage when seeking police protection. Again, she points to her past experiences when she complained to the police after being robbed in the street. On realising she could not converse in Zulu, the police were dismissive, referring to her by the derogatory term for foreigner, *makwere*.

[73] Country material supports the appellant’s claims that migrants, especially from other African countries, experience significant intolerance (see, for instance, *Immigration, Xenophobia and Human Rights in South Africa*, Southern African

Migration Project by South African Human Rights Commission, 2001). The United States Department of State in its 2002 report (ibid) also notes that violent attacks on foreigners due to xenophobia continue to occur

[74] In light of the widespread anti-foreigner sentiment in South Africa, including relevantly amongst police officers, the Authority finds that the appellant's Congolese origin has the potential to further reduce her capacity to access state protection.

[75] Overall, the appellant is entitled to the benefit of any doubts the Authority may have for the reasons outlined above as to the ability and willingness of the state of South Africa to respond effectively to protect her from the violence of her estranged husband. That being the case, the Authority concludes that her fears of being persecuted in the event of her returning to South Africa are well-founded.

CONVENTION GROUND

[76] In order to establish a nexus between the persecution feared by the appellant and one of the five Convention grounds, it is not necessary that the Convention ground be the sole or even dominant cause of the risk of being persecuted. It need only be a contributing factor to the risk (*Refugee Appeal No.72635/01* (6 September 2002) at [176]). Further, the Authority has previously held that because persecution is a construct of two distinct elements, namely, risk of serious harm and failure of state protection, the nexus between the Convention reason and the persecution can be provided by either limb of the definition (*Refugee Appeal No.71427/99* (16 August 2000), [112]).

[77] As discussed above, South Africa's shocking level of violence against women and girls and inadequate level of state protection for victims of domestic violence and/or rape, reflects entrenched patriarchal values, gender inequality and societal attitudes which condone sexual violence against women. Women have been, and continue to be, denied adequate protection and support at every level of the police and criminal justice system because of their status as women. The failure of the state to protect the appellant is, therefore, for the Convention reason of a particular social group, namely women.

[78] The Authority also finds that race namely, the appellant's Congolese origins, is a further contributing factor to the absence of state protection available to her.

INTERNAL PROTECTION

[79] Finally the Authority must consider whether an internal protection alternative is available to the appellant, that is could she reduce the risk of serious harm from RK to below that of a real chance by moving to some other area of South Africa well away from Johannesburg?

[80] If the appellant and her daughter were to move well away from Johannesburg, RK would undeniably face far greater difficulty locating them there if they were living in Johannesburg. Whether he would do so depends on a number of factors, the most critical being the nature of this ongoing interest in the appellant and the strength of his desire to find her and/or her daughters. These matters are not known. Bearing in mind the past history, the Authority must extend the benefit of the doubt that RK maintains a live interest in the appellant. It is not unreasonable to assume that he could locate her and her children within South Africa if he was intent on doing so. Her Congolese ethnicity, inability to speak local tribal languages and likely resort to hawking goods at flea markets and Congolese crafts to tourists in order to support herself and her children would not assist her concealment.

[81] Additionally, the appellant's minimal economic resources and lack of family support also have the potential to force her to fall back on the assistance of friends in the Johannesburg area as she had to do in the past, thereby increasing the risk of her coming once again to the attention of RK.

[82] Taking all of these matters into consideration and extending the benefit of any doubts, the Authority finds that an internal protection alternative is not available to the appellant.

THE CHILDREN

[83] RK threatened that he would have to "punish" the appellant's "bastard children". The appellant does not dismiss this as hyperbole or an idle threat. RK's threat to teach her a lesson preceded her multiple rape. She particularly fears that he might have it in mind to subject her young daughters to a similar ordeal.

[84] The appellant's fears for her daughters are well-founded, particularly in light of the statistics for child rape in South Africa – more than 2,000 reported cases in 2001

– while rapes of infants and very young children have been widely reported in the media (Human Rights Watch *World Report 2003: South Africa*).

[85] The Authority concludes that if the two young daughters were returned to South Africa there is a real chance that they would suffer serious harm at the hands of RK.

[86] The Authority's findings in respect of the inadequacies of state protection, Convention grounds and the absence of internal protection apply equally to the two children. Both are entitled to the protection of the Refugee Convention.

CONCLUSION

[87] For the above reasons, the Authority finds that the appellant and her two daughters are all refugees within the meaning of Article 1A(2) of the Refugee Convention. Refugee status is granted. The appeals are allowed.

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V J Shaw
Chairperson