IMMIGRATION AND PROTECTION TRIBUNAL NEW ZEALAND **[2011] NZIPT 800019**

AT AUCKLAND

Appellant:	**AB (Rwanda)**
Before:	S A Aitchison (Chair) B Burson (Member)
Counsel for the appellant:	C Curtis
Counsel/representative for the respondent:	No Appearance
Date of hearing:	18 July 2011
Date of decision:	24 August 2011

DECISION

INTRODUCTION

[1] This is an appeal under section 194(1)(c) of the Immigration Act 2009 against a decision of a refugee and protection officer of the Refugee Status Branch (RSB) of the Department of Labour (DOL), declining to grant either refugee status or protection to the appellant, a citizen of Rwanda.

[2] The appellant claims that if she were to return to Rwanda she will be subject to an unfair trial by the gacaca court in Rwanda. It has issued a summons requiring the appellant and members of her family to attend as accused persons. She also fears that she will be killed at the hands of Tutsi extremists in Rwanda because she is perceived as Hutu, and the child of a "genocider". The primary issue in this case is whether the appellant's fear of being persecuted is well-founded.

THE APPELLANT'S CASE

[3] What follows is a summary of the account given by the appellant at the appeal hearing. It is assessed later.

[4] The appellant was born in Kigali, Rwanda. Her father is Hutu, and her mother Tutsi. She is considered in Rwanda to be Hutu. She has six siblings, three brothers and three sisters. As a consequence of the Rwandan genocide in 1994, her father and two eldest brothers are now deceased, and her younger brother is missing.

[5] The appellant's father was a member of the National Republican Movement for Democracy and Development (MRND). He was taken from the family home in 1994 by Rwandan Patriotic Front (RPF) soldiers and never seen again. The appellant's eldest brothers were later taken by the RPF ostensibly to perform military service. However, the appellant later learnt from another man who had been taken by the RPF at the same time but who had managed to escape that this was a ruse, and her brothers had been executed by the RPF.

[6] After the appellant's father was taken, RPF soldiers continued to visit the family home. They detained the appellant's mother on two occasions; on the first occasion for a month, then later for approximately two weeks. They questioned her about her husband and why she had married a Hutu. She was raped in detention.

[7] Soldiers continued to visit the family home after the appellant's mother was released. On several occasions she was questioned and raped. They also beat the appellant and her sisters. During this time the family were also harassed by their neighbours and stones were regularly thrown at the home.

[8] When the appellant was finally able to resume her schooling in 1996, her attendance was interrupted because she was harassed by other school children who called her "interahamwe" (armed youth militia who participated in the genocide), "genocider", and threw stones at her.

[9] The family owned two homes in Kigali. The home they were not living in was occupied by an RPF soldier and his family. The appellant's eldest sister, "AA", was imprisoned when she attempted to regain the home by attending the local commune office. She was released in 2001 after her mother paid a bribe. Her mother then arranged for AA to be placed in hiding until she, along with "BB", could leave the country for South Africa a month later.

[10] In 2002, the appellant, her sister "CC", and their mother, left Kigali for their safety. The family were perceived as Hutu (and, hence, murderers), on account of their father/husband's ethnicity, which was well known to their neighbours. Even persons returning from Burundi or Uganda would find this fact out through word of mouth. Although they moved around Rwanda, their circumstances became known wherever they went.

[11] In 2002, AA was granted refugee status in New Zealand. That same year, the appellant, CC, and their mother entered a refugee camp in Congo. The presence of interahamwe and "genociders" made it unsafe to stay, so they travelled to Uganda after a few weeks. They were not safe in Uganda either because of the presence of RPF soldiers who knew why the family had left Rwanda.

[12] The family travelled to Kenya in late 2004 and were granted refugee status by UNHCR in Nairobi. They were sent to the Kakuma refugee camp, but could not stay there because there were no Tutsi in the camp. They returned to Nairobi where they stayed with a Rwandan family. They also spent time living on the street.

[13] In 2006, the family returned to Rwanda and stayed with a neighbour in Kigali. They did not stay long at this address, however, as the children in this household were harassed by neighbours who were not happy about the appellant and her family staying there. Stones were thrown at the children and they were accused of hiding interahamwe.

[14] The appellant's mother sought and obtained the return of their family home, which had been occupied in their absence. The appellant believes that this was possible only because of the presence of internationals in the country. However, this angered some RPF soldiers who damaged the home and, on several occasions, raped the appellant and her sister. One night they were taken to a forest, raped repeatedly, and left.

[15] The appellant's mother came under pressure to be a witness in the gacaca trials at this time. She was initially asked to accuse Hutu neighbours of killing people. She refused to do so because she had not witnessed anything. She was then told that her husband was a "genocider" and she was blamed because she was his wife.

[16] One day a neighbour came to the home and held a knife to the appellant's mother's neck. He threatened to kill her. The appellant and BB ran for help and, through the assistance of a passer-by, the appellant's mother was released. The same neighbour had previously insulted AA and BB in the street, calling them "interahamwe".

[17] When the appellant's mother informed AA about the difficulties the family were experiencing, AA sent money to help the appellant travel to South Africa in June 2006. She stayed with her sister BB. The appellant had been unable to obtain a passport until her mother paid a bribe. This left insufficient money to send CC to South Africa, so the appellant's mother sent her to live in Cyangugu, on the border of Rwanda and Congo.

[18] By this time the appellant's mother had learned that she was HIV positive. She decided to remain in Kigali. However, the gacaca administration continued to call her and treated her as an accused person. The hatred against her became so strong that she was forced to leave Rwanda. She travelled to South Africa in 2007 through the financial assistance from AA.

[19] After the appellant's mother left Rwanda, CC was taken to the district office in Cyangugu and asked about her mother's whereabouts. CC was told to attend the gacaca court herself. She left Rwanda in 2008 with the assistance of money from AA.

[20] To assist the appellant's refugee claim, her mother obtained a copy of a summons to the gacaca court for the family, issued on 29 June 2010. This was not the first such summons issued. Through word of mouth, CC learnt that the appellant's mother had been sentenced to 30 years imprisonment *in absentia* by the gacaca court. Her mother was also passed on this information.

[21] The appellant obtained refugee status from the UNHCR in South Africa, where she later met and married a French man in November 2006. She departed South Africa for France with her husband in 2007, and upon departure signed a form revoking her refugee status.

[22] The appellant obtained a residence visa in France, valid for one year. She did not obtain permanent residence there, as to do so she would need to renew her residence visa for four years consecutively. She was unhappy in her marriage, as her husband would beat and sexually assault her. She was also

afraid of contracting HIV, having learned subsequent to their marriage that her husband was HIV positive.

[23] The appellant visited AA in New Zealand for a month in October 2008. She returned again to New Zealand on 24 October 2009.

[24] The appellant lodged a claim to refugee status on 15 January 2010 which the RSB declined on 1 October 2010. She appealed this decision to the Refugee Status Appeals Authority (RSAA) on 6 October 2010. She later made a protection claim to the RSB on 16 December 2010, which was declined by RSB on 22 March 2011. She appeals to the Tribunal against these decisions.

Submissions and Documents

[25] The appellant presented several psychological assessment reports, dated 25 February 2010 and 28 April 2010, from a Registered Consultant Clinical Psychologist, who diagnosed the appellant as suffering from chronic Post-Traumatic Stress Disorder and a Major Depressive Episode.

[26] Before the Tribunal, counsel relied upon submissions made to the RSB relating to the appellant's refugee and protected persons appeals. At the hearing, counsel submitted an untranslated summons for the appellant's family to the gacaca court in Cyivugiza, and a "Certificate of Clinical Review of Condition of Patient Subject to Compulsory Treatment Order", recording that the appellant was subject to a compulsory order, from 6 January 2011 until 5 July 2011, under section 30 of the Mental Health (Compulsory Assessment and Treatment) Act 1992.

[27] Subsequent to the hearing, on 19 July 2011, the Tribunal had the abovementioned summons translated from Kinyarwanda into English.

[28] On 29 July 2011, counsel filed further submissions with the Tribunal relating to the appellant's protected person status, including country information. Further, on 18 August 2011, the appellant, through counsel, responded to a question posed by the Tribunal on 18 August 2011.

Credibility

[29] Before turning to consider the principal issues identified above it is necessary to determine whether the appellant's claim is credible.

[30] The appellant is a credible witness. Her evidence in her statement, before the RSB, and Tribunal, was generally consistent. While minor discrepancies appeared in her oral evidence, the Tribunal accepts these are explicable in view of her diagnosis of suffering from Major Depressive Disorder and Post-Traumatic Stress Disorder as outlined in psychologist reports provided to the RSB, and are not symptomatic of an underlying lack of veracity.

[31] Significantly, her evidence of her mother being convicted and sentenced by the gacaca court to 30 years' imprisonment has been confirmed by RSB through a verification check conducted in Rwanda. As to her own position in the gacaca process, the appellant presented a copy of a summons issued on 29 June 2010 that calls the "DD Family" to attend the gacaca court in Cyivugiza as accused persons.

Summary of Factual Findings

[32] The Tribunal accordingly finds that the appellant is a national of Rwanda. In Rwanda, children acquire their father's ethnic identity; see Immigration and Refugee Board of Canada *Rwanda: Treatment reserved for people of mixed origin (Hutu and Tutsi) by authorities, and social attitudes towards people with a Hutu father and a Tutsi mother* (3 June 2008). The appellant is, therefore, considered to be Hutu. Her Hutu father, a member of the MRND, was killed following the genocide in 1994, as were her brothers. Since this time, the appellant has learned that her father is considered to have been a perpetrator of genocide. As a consequence, the appellant, her mother, and her sisters, have all been accused of crimes.

[33] At the time these accusations surfaced, the appellant and her family experienced continued harassment and violation from soldiers and neighbours. Neighbours have called the family "genociders", and one neighbour attempted to kill the appellant's mother. The appellant, just seven years of age during the genocide, was later harassed by other children, calling her "interahamwe" and "genocider" while attempting to attend school. The appellant, her mother and her sisters have been raped repeatedly by RPF soldiers. One of the family's homes in Kigali was also forcibly occupied by soldiers. The efforts of the appellant's oldest sister to retrieve the home lead to her being imprisoned.

[34] Since 2006, the appellant's mother has been accused of committing genocide and summoned to attend the gacaca court. Although aged only eight

years at the time of the genocide, the appellant has been summoned as an accused to attend a gacaca court.

[35] The difficulties the appellant and her family experienced continued until they left Rwanda. The appellant was unable to obtain documentation for a passport application without a bribe, and her sister CC, while living in Cyangugu as the only family member remaining in Rwanda, was summoned to attend the gacaca court.

THE LEGISLATION

[36] This is an appeal under section 195 of the Immigration Act 2009 (the Act). Section 198 of the Act provides that the Tribunal must determine whether to recognise the appellant as:

(a) a refugee under the Refugee Convention (section 129); and/or

(b) protected persons under the Convention Against Torture (section 130); and/or

(c) protected persons under the International Covenant on Civil and Political Rights (the ICCPR) (section 131).

[37] The Tribunal must first deal with the claim for recognition under the Refugee Convention.

THE REFUGEE CONVENTION – THE ISSUES

[38] The Inclusion Clause in 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."

[39] 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 Claim Under the Refugee Convention

Refugee status in Kenya and South Africa does not preclude claim in New Zealand

[40] Article 1(E) of the Refugee Convention provides:

> This Convention shall not apply to a person who is recognized by the competent authorities in the country in which he has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country.

[41] The appellant was granted refugee status by the UNHCR in Kenya in 2004 and by the UNHCR in South Africa in 2006. The Tribunal must, therefore, assess whether the appellant has the rights and obligations attached to possession of a nationality in Kenya and South Africa and whether she needs to avail herself of the surrogate protection of New Zealand.

[42] The practice in Kenya is for the UNHCR to grant "mandate status" which does not accord refugees full status and rights as stipulated in the 1951 Convention, and most are required by the Kenyan authorities to live in designated camps; RSD Watch *Forum: UNHCR refugee status determining: the Kenyan experience* (13 November 2005); Immigration and Refugee Board of Canada, *Kenya: Rights of a person who has obtained refugee status in Kenya, including the right to travel outside Kenya, the validity period of the refugee status and the circumstances in which a person can lose that status (August 2001 – May 2001)* (15 June 2004). In these circumstances, the mandate status afforded the appellant from UNHCR falls well short of the requirements of Article 1E. She does not have the rights and obligations attached to possession of a nationality in Kenya and is, therefore, not precluded from making a claim for refugee status in New Zealand.

[43] When the appellant departed South Africa she signed a document revoking her refugee status there. She does not have the rights and obligations attached to possession of a nationality there. The appellant's claim to fear persecution, therefore, falls to be considered in relation to Rwanda alone.

Background and gacaca system

[44] In April 1994, under the direction of the Hutu-dominated Rwandan government, the Rwandan national army, its armed youth militia (interahamwe) and ordinary civilians, carried out a genocide against civilians of Tutsi ethnicity. In July 1994, the RPF took control of Rwanda, driving the government and its defeated army out of the country.

[45] The RPF formed a government of National Unity which called for national reconciliation and implemented policies and laws to support this aim. It eliminated all references to ethnicity in written and non-written national discourse, as well as ethnic quotas in government employment, training and education. It also banned identity card references to ethnic affiliation. The National Unity and Reconciliation Commission was created in March 1999. In 2001, the government enacted a law "Instituting Punishment for Offences of Discrimination and Sectarianism" forbidding, *inter alia,* discrimination on the basis of ethnicity, region or country of origin, colour of skin, and physical features. The Rwandan Constitution, adopted by referendum on 26 May 2003, also promoted national unity and the eradication of ethnic divisions; see www.nurc.govt.rw; www.grandslcacs.net/doc/4057; United Kingdom Border Agency, *Operational Guidance Note: Rwanda* (9 March 2009); *Hakizimana v Sweden (Application No 37913/05)* ECHR (27 March 2008).

[46] Given the nature and scale of the genocide, the United Nations Security Council established the International Criminal Tribunal for Rwanda to try these crimes in 1994, and the first trial began in 1997. National judicial systems are also utilised to conduct genocide trials, and persons accused of genocide crimes and crimes against humanity are prosecuted in a system of parallel courts according to the category of the crime they have committed. Those persons considered most responsible are tried by the ordinary courts and others judged by the gacaca courts. Trials in the conventional courts began in December 1996 and the gacaca courts in 2005.

[47] The gacaca ("justice on the grass") system is a traditional dispute settlement mechanism. It has evolved over time – from a system engaging smaller lineages and units of society, to an institution associated with state power. In the post-genocide era, gacaca courts operate to prosecute perpetrators of genocide and other crimes against humanity, committed between 1 October 1990 and 31 December 1994; see generally B Ingelaere "The Gacaca courts in Rwanda" *cited in* International Institute for Democracy and Electoral Assistance

Traditional Justice and Reconciliation after Violent Conflict: learning from African Experiences (2008) p 32-44.

[48] While Rwanda had signed and ratified the Convention on the Prevention and Punishment of the Crime of Genocide and the Geneva Conventions in 1975, it had not incorporated these Conventions into its domestic legislation. Two years after the genocide, the government adopted Organic law 8/96 (30 August 1996) on the Organization of the Prosecution of Offences Constituting the Crime of Genocide or Crimes Against Humanity Committed since 1 October 1990, Government of Rwanda, *Official Journal*, No 17, 1 September 1996 (Organic law).

[49] Chapter II of the Organic law contains four categories of offences set out as follows:

> Category 1:
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> a) person whose criminal acts or whose acts of criminal participation place them among the planners, organizers, instigators, supervisors and leaders of the crime of genocide or of a crime against humanity :
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> b) persons who acted in positions of authority at the national, perfectoral, communal, sector or cell level, or in a political party, the or fostered such crimes;
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> c) notorious murderers who by virtue of the zeal or excessive malice with which they committed atrocities, distinguished themselves in their areas of residence or where they passed;
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> d) persons who committed acts sexual torture;
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> Category 2:
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> persons whose criminal acts or whose acts of criminal participation place them among perpetrators, conspirators of accomplices of intentional homicide or of serious assault against the person causing death;
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> Category 3:
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> persons whose criminal acts or whose acts of criminal participation make them guilty of other serious assaults against the person;
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> Category 4:
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> persons who committed offences against property.

[50] Subsequent amendments of the Organic law have assigned most genocide prosecutions to gacaca jurisdictions, and required violations of the penal code to be committed with genocidal intent; see Official Gazette of the Republic of Rwanda: Organic Law No 16/2004, and Organic Law No 10/2007; Human Rights Watch *Law and Reality: Progress in Judicial Reform in Rwanda* (July 2008).

[51] Judges in the gacaca courts are elected from among the populace and decide cases before a gathering of the local population. There is no need for legal training, or experience as grounds for their appointment. Fair trial guarantees are compromised in a number of key respects in the gacaca criminal process, where the right to legal representation, and to be charged promptly (defendants are not permitted legal representation during the trial, and are informed of the charges against them during the trial, not before) are denied; see United States Department of State *Country Reports on Human Rights Practices: Rwanda* (11 March 2010).

[52] The fairness of gacaca trials, judgments and sentences has been questioned by human rights groups. Human Rights Watch, in monitoring gacaca trials, found that some judges delivered fair and objective judgments. However, others issued heavy sentences (including life imprisonment in isolation) on the basis of little evidence; Human Rights Watch *World Report 2011 – Rwanda* (January 2011). A number of witnesses and judges were also subject to outside influence and corruption, affecting the outcome of trials. Repeated allegations were made that the courts sacrificed the truth to satisfy political interests and that defence witnesses were afraid to testify for fear of reprisals or being accused of genocide themselves; *Ibid.* See also Amnesty International *Annual Report for Rwanda* (May 2010).

[53] There is no bail in the gacaca system; United States Department of State *Country Reports on Human Rights Practices for Rwanda* (8 April 2011). Conditions of detention for persons accused or sentenced in the gacaca system are reportedly harsh and inhumane. In many prisons, those detained suffer from inadequate sanitary facilities, crowding, and shortages of food. Torture and cruel treatment from police and other security agents is also reported; see Human Rights Watch *Law and Reality: Progress in Judicial Reform for Rwanda* (July 2008); United Kingdom Border Agency, *Operational Guidance Note: Rwanda* (9 March 2009). Sentences for convicted persons in the system vary and range from long prison terms to unpaid public labour; *Ibid.*

[54] Children under the age of 14 years at the time they were charged with offences under the Organic law may not be prosecuted according to Article 78 of Organic law No 13/2008 and, instead, are subject to solidarity camps known as “ingando”. A journalist, and former ingando participant, has described “ingando” as: “about RPF political ideology and indoctrination”; see Chi Mgbako “Ingando solidarity camps: reconciliation and political indoctrination in post-genocide

Rwanda" 18 *Harvard Human Rights Journal,* p 201. Ingando camps fall into several categories described by Human Rights Watch in *Rwanda: The search for security and human rights abuses* (2000):

> [...]
>
> At camps of the first kind, officials, community leaders, students, and the general population ordinarily learn to shoot, wear military uniforms, and are subject to a quasi-military discipline. They are taught to accept RPF lessons about the past and the future of Rwanda. These camps generally last for one month. Local administrative officials and students preparing to enter the National University of Rwanda have attended the camps, as will soon officials of the judicial system and even staff of non-governmental organizations.
>
> Camps of the second kind are meant to provide political education for people from regions in which the insurgency was strong or for people who have returned recently from the Congo. One camp was said to house "infiltrators who had been taken from Masisi" and other regions of the Congo, suggesting that the camp participants had actually been captured in the Congo and then brought back to Rwanda, whether willingly or not. In one such camp held at the end of 1999 and in early 2000, people detained by soldiers in the illegal MILPOC facility were transferred for education at the camp. In these camps, participants do not learn to shoot. More than forty of the participants in a recent camp in Ruhengeri were, however, pressed to join forces departing to fight in the Congo. These camps last longer than those for the official elite, generally three months. During this time those who are cultivators are unable to attend to their crops. A substantial number of participants attend because they feel obliged to do so or because they have been told by authorities that they must. There is no law requiring attendance.

[55] There are inconsistent reports concerning the closure of the gacaca courts, some news sources claiming that they have closed already, and that remaining cases have been transferred to the regular courts (see Radio France Internationale (6 April 2010) cited in Refugee Documentation Centre (Ireland) *Information on Gacaca courts; General, Laws, Tribunals, Punishments handed down, Death penalty, Criminal prosecutions* (24 March 2011). However, the Human Rights Watch *Annual Report for Rwanda* (January 2011) states that while gacaca courts were due to end trials in 2010, the completion process has been delayed. Further, correspondence between the RSB and an advocate in Kigali in October 2010 attested to the gacaca continuing, and being in its final stage of completion.

Objectively, on the facts as found, is there a real chance of the appellant being persecuted upon return to Rwanda?

[56] The "being persecuted" element of the refugee definition is interpreted by the Tribunal as the sustained or systemic violation of basic or core human rights such as to be demonstrative of a failure of state protection; see J C Hathaway, *The Law of Refugee Status* (Butterworths, Toronto, 1991) pp104-108, as adopted

in *Refugee Appeal No 2039/93* (12 February 1996) at [38]. As such, the concept of persecution is a construct of two essential elements, namely, the risk of serious harm, defined by core norms of international human rights law, and a failure of state protection.

[57] When assessing the standard of state protection, the Tribunal must consider whether the protection available from the state will reduce the risk of serious harm to below the level of well-foundedness – or, as interpreted in New Zealand, to below the level of a real chance of serious harm; see *Refugee Appeal No 71427* (16 August 2000) at [66] and *Refugee Appeal No 75692* (3 March 2006).

[58] A summons exists for the appellant, as a member of the DD family (her father's name), to attend the gacaca court in Cyivugiza as an accused person. According to the summons, it appears that despite being aged only eight years at the time of the genocide she is charged, generally, with a category three crime. Having regard for the principle of non-retroactivity (the prohibition on punishing persons for crimes that were not defined as crimes when they were committed), it is not clear under which law the appellant, as a member of her family, has been charged for this offence. There have been a number of amendments to the Organic law that include the re-classification of offences. The Organic law No 8/96 outlines category three crimes as "criminal acts or whose acts of criminal participation make them guilty of other serious assaults against the person". On the other hand, Organic Law No 13/2008 of 19 May 2008 lists category three crimes as property offences. What is clear, however, is that the appellant's mother, subject to the same summons as the appellant, has been convicted, *in absentia,* of genocide and sentenced to 30 years' imprisonment that conviction and sentence reflect a category two offence and sentence in the Organic law and subsequent amendments.

[59] The conviction of the appellant's mother and the sentence then imposed upon her underscore the significance of the perceived involvement of the appellant's father in the genocide, the position he held in the MRND, and the consequent imputation made to his entire family. In the absence of any evidence before the Tribunal of the appellant's mother's involvement in the genocide, this conviction and sentence demonstrates the unjustified and arbitrary nature of convictions and sentences that can be imposed under the gacaca system.

[60] There is no evidence that the appellant, aged seven at the time of the genocide, has committed any offence contained within the Organic law and

amendments. The Tribunal finds that she has been falsely accused of a crime subject to the gacaca jurisdiction and summoned to attend trial. Were she to face trial under this system there is a real chance she would face an unfair trial, conviction, and sentence. There is also a real chance that she would be seriously harmed in detention.

[61] It is not clear from the Organic law whether the appellant would, in fact, be prosecuted, or subject to a special solidarity camp as outlined in Article 79 of the Organic law No 13/2008, which states that children under the age of 14 *at the time they were charged with an offence* under the Organic law, cannot be prosecuted, but can be placed in special solidarity camps. This provision must also be read in the light that Article 78 of the Organic law provides that persons convicted of crimes of genocide or crimes against humanity who *at the time of commission of the offence were between 14 to 18 years of age* may be sentenced to imprisonment, or community service, depending on the circumstances.

[62] If the latter, the Tribunal finds that the unfair, non-specific charge against the appellant under the Organic law, and likelihood that she will be placed, unjustifiably, in a special solidarity camp (irrespective of the conditions therein), violate her right to liberty and security of the person (Article 9 International Covenant on Civil and Political Rights (ICCPR)), the right to be free from discrimination on the basis of race, political opinion, or birth status (Article 26 ICCPR), and the minimum guarantees for charged persons, including the right to be informed promptly of the nature and cause of the charge against her (Article 14(3)(a).

[63] In short, such circumstances present a real chance of the appellant being persecuted at the hands of the authorities in Rwanda. Such persecution is not limited to Kigali alone, but would extend throughout Rwanda where the gacaca jurisdiction applies.

[64] Given this finding, it is unnecessary to consider the further fears that the appellant claims at the hands of her neighbours in Kigali and from Tutsi extremists throughout Rwanda.

Is the Anticipated Harm for a Convention Reason?

[65] As to the second issue raised by Article 1A(2), the harm faced by the appellant at the hands of the Rwandan authorities would be for reasons of her race and membership of a particular social group, namely, her family.

Conclusion on Claim to Refugee Status

[66] For the reasons stated above, the Tribunal finds the appellant is a refugee within the meaning of Article 1A(2) of the Refugee Convention.

THE CONVENTION AGAINST TORTURE – THE ISSUES

[67] 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 the Convention Against Torture

[68] Section 130(5) of the Act provides that torture has the same meaning as in the Convention against Torture, Article 1(1) of which 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."

Conclusion on Claim nder Convention Against Torture

[69] The appellant is recognised as a refugee. In accordance with New Zealand's obligations under the Refugee Convention, she cannot be deported from New Zealand, by virtue of section 129(2) of the Act (the exceptions to which do not apply). Accordingly, the question whether there are substantial grounds for believing that she would be in danger of being subjected to torture if deported from New Zealand must be answered in the negative. She is not a person requiring protection under the Convention Against Torture. She is not a protected person within the meaning of section 130(1) of the Act.

THE ICCPR – THE ISSUES

[70] 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."

Conclusion on Claim under ICCPR

[71] For the reasons already given, the appellant cannot be deported from New Zealand. Accordingly, the question whether there are substantial grounds for believing that she would be in danger of being subjected to arbitrary deprivation of life or cruel treatment if deported from New Zealand must be answered in the negative. She is not a person requiring protection under the ICCPR. She is not a protected person within the meaning of section 131(1) of the Act.

CONCLUSION

[72] For the foregoing reasons, the Tribunal finds that the appellant:

(a) is a refugee within the meaning of the Refugee Convention;

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

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

[73] The appellant is recognised as a refugee. The appeal is allowed.

"S A Aitchison"
S A Aitchison
Chair

Certified to be the Research Copy released for publication.

S A Aitchison
Member