

REFUGEE STATUS APPEALS AUTHORITY
NEW ZEALAND

REFUGEE APPEAL NO 75971

AT AUCKLAND

<u>Before:</u>	A N Molloy (Member)
<u>Counsel for the Appellant:</u>	J Sutton
<u>Appearing for INZ:</u>	No Appearance
<u>Date of Hearing:</u>	19 January 2007
<u>Date of Decision:</u>	15 May 2007

DECISION

[1] The appellant, a young male of mixed race, is a national of Zimbabwe. He appeals against the decision of a refugee status officer of the Refugee Status Branch (RSB) of Immigration New Zealand (INZ) declining his application for refugee status.

[2] He claims that he will be persecuted by the Zimbabwean authorities if he were to return home. His predicament arises because he is of mixed race or "coloured".

[3] A summary of the account which the appellant presented to the Authority is set out below. This appeal turns upon whether the appellant's fear is well-founded.

THE APPELLANT'S CASE

[4] The appellant grew up in Harare where his father ran his own business. His mother also worked and the family's financial circumstances were comfortable.

[5] The appellant experienced discrimination and "low level" harassment throughout his life in Harare. He was discriminated against at school because of

his colour and as he grew older he was often provoked into fights by black youths who made racially-barbed comments.

[6] While he was frequently stopped by the police in the street, these were usually incidents of inconvenience rather than serious harm or mistreatment. Although he was hit on the head once by an officer, he did not experience any significant difficulties with the police in Zimbabwe.

[7] In the mid-1990s the family purchased a farm in an area on the fringe of Harare. Two years later they sold the farm and returned to the city due to the deteriorating political environment and financial pressure imposed by a failed crop.

[8] While his family owned the farm the appellant attended, on his family's behalf, a meeting which had been convened by members of the local ruling Zimbabwe African National Union-Patriotic Front Party (ZANU-PF) to resolve grievances between farmers and local villagers. The appellant was one of many farmers who addressed the meeting. They were frustrated by the tendency of the villagers to allow their cattle to graze on farm land without permission. The livestock tended to consume the farmer's crops, compromising their livelihood. The villagers were asked to ensure that their cattle no longer wandered onto the farm land.

[9] Although the villagers took more care for a while, they soon reverted to their previous practices. The ZANU-PF official who presided over the meeting took note of the appellant's name, however neither the appellant nor any members of his family experienced any adverse consequences as a result of this.

[10] In early 1998, the appellant and some of his friends happened to be in central Harare during a protest march against high inflation. The protest became violent and the appellant and his friends found themselves faced with a large number of people running towards them with the police in pursuit, firing tear-gas. The appellant managed to leave the area unharmed, but two of his friends were detained in police custody for a fortnight. The friends were interrogated and beaten, however they did not experience any further repercussions as far as the appellant is aware. He did not experience any adverse consequences as a result of that particular incident.

[11] The appellant's maternal grandparents left Zimbabwe during the mid-1990s with the intention of living in the United Kingdom for four or five years in order to earn enough money to retire in Zimbabwe.

[12] When they returned to Zimbabwe to visit family at the end of 1998, the grandparents noticed growing political dissatisfaction and economic deterioration and decided to remain in the United Kingdom indefinitely.

[13] Around the time of their visit, there were rumours that the government intended to introduce compulsory military conscription for young Zimbabwean males. The grandparents were worried that their young grandson would not fare well in the Zimbabwean army and they invited the appellant to return with them to the United Kingdom. He remained there until 2002.

[14] By that time the appellant's immediate family had decided to build a future elsewhere. The father obtained a job in New Zealand and moved here with the appellant's mother and siblings in the early 2000s. The appellant decided to leave the United Kingdom and join them in New Zealand in late 2002.

[15] After arriving in New Zealand, the appellant married and had a child. The relationship foundered and the marriage has since been dissolved. His behaviour became antisocial. He was convicted and fined for various minor offences between 2003 until 2006, when he was convicted of a relatively serious offence and sentenced to a term of imprisonment. By the time the appellant was released from prison (after six months) his work permit had expired. His application for a new work permit was declined because of his convictions and INZ sought to remove him from New Zealand.

[16] The appellant obtained legal advice and wrote to the Minister of Immigration, seeking special permission to remain in New Zealand. That application was unsuccessful. The appellant subsequently lodged his claim for refugee status in July 2006.

[17] After interviewing the appellant on 14 September 2006, a refugee status officer issued a decision dated 26 October 2006, declining his application for refugee status. He appeals against that decision.

[18] The appellant claims that if he is returned to Zimbabwe now he will be seriously harmed by the authorities because he is coloured. He said that the authorities will assume that he is a supporter of the opposition MDC party because he is coloured and therefore he might as well join anyway.

[19] On the morning of the appeal hearing, the appellant informed the Authority through his counsel that he had two relatives who were then holidaying in New

Zealand. Arrangements were made for both of those witnesses to give evidence on his behalf.

EVIDENCE OF WITNESS AA

[20] AA is the appellant's maternal grandmother. She corroborated the appellant's evidence with regard to her emigration from Zimbabwe to the United Kingdom in about 1995. She and the appellant's grandfather moved out of a desire to spend time in the United Kingdom before retiring in Zimbabwe. She also confirmed that when she returned to Zimbabwe in 1999 the economic and financial circumstances in Zimbabwe appeared to be so poor that she and her husband opted not to return permanently.

[21] AA referred to the fate of her brother-in-law, the appellant's great-uncle (the great-uncle). He had left Zimbabwe as a teenager, nearly 50 years ago. AA and her husband had lived with the great-uncle when they first arrived in the United Kingdom. Towards the end of the 1990s, the great-uncle returned to Zimbabwe to retire after being treated successfully for cancer.

[22] He died in February 2004, purportedly of heart disease. AA said that she and her family believe that his death is suspicious and may be politically related. Days before he died the uncle had obtained a positive health clearance from his doctor, in anticipation of undertaking a trip around the world. When they got to Zimbabwe for the funeral, AA and her family learned that the uncle had been involved in an organisation which aimed to improve the rights of mixed race or coloured people in Zimbabwe. AA believes that he may have been targeted and killed because of his political activity, although she has no evidence to support that belief.

[23] AA also confirmed the gist of the appellant's evidence about his departure from Zimbabwe in the late 1990s. She believed that if her grandson (the appellant) was to return to Zimbabwe he would be interrogated and he might be punished for having left without performing military service. She said that it is difficult to know what the Zimbabwean authorities will do because there is no rule of law.

EVIDENCE OF WITNESS, BB

[24] BB is the appellant's maternal aunt. She now lives in New Zealand, having moved here in 2006. For the 20 years before that, she had lived with her family in

the United Kingdom, having left Zimbabwe during the mid-1980s. She confirmed that she too had attended the great-uncle's funeral in Zimbabwe in February 2004.

[25] BB has returned to Zimbabwe from the United Kingdom on several occasions without ever experiencing any difficulties either entering or leaving. As far as she is aware her husband, who is also of mixed race, has never experienced any difficulties either, even though he has returned to Zimbabwe on other occasions without her. He returned most recently in around 2004/2005.

[26] BB was aware of mixed race Zimbabweans having problems at Harare airport from time to time. She has one acquaintance who returned there in 2006, having been required to leave the United Kingdom after living there for four years. He had a lucky escape in that an official in Zimbabwe found his MDC membership card in the passport handed over by British immigration officials who had accompanied him. That official told him in no uncertain terms that he had better get rid of it for his own safety.

[27] BB said that if the MDC membership card had been found by an unsympathetic official, then anything could have happened. In the event, his return was uneventful and he has now been able to go back to the United Kingdom where his immigration status has been regularised.

MATERIAL RECEIVED BY THE AUTHORITY

[28] Counsel's opening written submissions were received by the Authority on 18 January 2007. During the interview on 19 January 2007 counsel provided a copy of the letter dated 26 July 2006 which had been forwarded to the Minister of Immigration on the appellant's behalf. Counsel was in turn provided with a copy of a letter from the United Kingdom Home Office dated 1 November 2006, obtained by INZ following the provision of a privacy waiver by the appellant with regard to his status in the United Kingdom.

[29] Following the hearing, counsel was granted leave to lodge additional submissions and country information. These were received by the Authority on 23 February 2007. Counsel wrote again on 26 February 2007, with regard to two psychologists who might be potential witnesses. It is not clear whether the letter actually pertains to this appeal, or whether it had been sent in error. As a precaution the Authority, through its Secretariat, wrote to counsel to invite the appellant, within a specified period, to seek leave to adduce further evidence if desired. No response was forthcoming.

THE ISSUES

[30] 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."

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

- (a) Objectively, on the facts as found by the Authority, 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

CREDIBILITY

[32] Before assessing the appellant's claim it is necessary to determine the credibility of the evidence presented to the Authority.

[33] The Authority does not believe the appellant's claim that he would become a member or an active supporter of the MDC if he were forced to return to Zimbabwe now. He has never been remotely interested in or connected with politics in the past, and the Authority finds that his expression of intent to become prospectively involved should he be returned to Zimbabwe now arises out of a desire to remain in New Zealand with his family, rather than out of any sincere intention.

[34] Nor does the Authority accept that there is any evidence that the death of the great-uncle was politically motivated. Neither AA nor BB could substantiate their belief that he was murdered for political reasons. There is nothing inherently suspicious about the fact that a man in his late 60s, recovering from cancer, should die suddenly. In the absence of anything other than pure surmise, the Authority is satisfied that the great-uncle's death will not create any difficulties for the appellant if he were to return to Zimbabwe.

[35] Those aspects of the evidence aside, the Authority finds that the appellant's evidence is, in general, credible. It therefore finds that he is a young male of mixed race from Harare, who left Zimbabwe during the late 1990s. His appeal will be assessed on that basis.

OBJECTIVELY, ON THE FACTS AS FOUND, IS THERE A REAL CHANCE OF THE APPELLANT BEING PERSECUTED IF RETURNED TO ZIMBABWE?

[36] Persecution has been described as the sustained or systemic violation of basic or core human rights, such as to be demonstrative of a failure of state protection; see *Refugee Appeal No 2039/93* (12 February 1996).

[37] In his submissions dated 15 January 2007 counsel submitted that there is a real chance of the appellant being persecuted because of his ethnicity as a person of mixed race and on the basis of his "imputed political opinion".

[38] In his closing submissions dated 23 February 2007, counsel added that the appellant's ethnicity and the fact that he would return as a failed asylum seeker would "give rise to the assumption that he is an MDC supporter", particularly in light of the fact that he has family connections in both the United Kingdom and New Zealand. He also submitted that the appellant's "adverse military history" will place him at risk.

[39] Counsel also submitted that the appellant's Zimbabwean citizenship will be "considered revoked" because he has been outside the country for more than five years.

Mixed race

[40] Counsel provided some information relating to the situation of mixed race (coloured) people in Zimbabwe, for example; United Kingdom Home Office *Country Report Zimbabwe* (April 2006) para 6.130-6.131; Canadian Immigration and Refugee Board, Research Directorate *ZWE100933.E Zimbabwe: Racism, discrimination against "mixed race" (coloured) and the availability of state protection* (7 February 2006); NGO Network Alliance Project *Summary of the baseline study on the situation of coloured people in Zimbabwe* (29 October 2003).

[41] The sources provided refer to discrimination experienced by the mixed race community in terms of factors such as a lack of identity, prevention of access to education and poverty. The Authority accepts that the appellant experienced discrimination in Zimbabwe in the past because of his mixed race. However, the

Authority also notes that his parents were reasonably financially secure. They were themselves landowners for a period of time before they sold their farm in the late 1990s and the father was sufficiently highly skilled that he was able to come to New Zealand under general immigration policy.

[42] Nor can there be any suggestion that the appellant was deprived access to education, albeit that it was not a resource which suited his personality or of which he sought to take particular advantage.

[43] It is quite clear that, even considered cumulatively, discrimination which the appellant faced in the past did not amount to serious harm at a level which would amount to being persecuted.

[44] Notwithstanding this, the Authority's task is forward-looking. The relevant question is whether the appellant faces a real chance of being persecuted if he returns to Zimbabwe now. While past incidents may sometimes inform an assessment of the current and future risk, they are not of themselves determinative.

[45] Counsel submitted that the coloured community has been at the forefront of targeted groups and that they are by virtue of their race alone subject to being persecuted in Zimbabwe. If this were true, then it is inevitable that there would be country information which supports that submission. However, there is nothing in the information provided by counsel which does so (including the sources cited at para [40]), and nor has the Authority obtained any such information through its own research.

Adverse military history and actual or imputed political opinion

[46] Counsel submitted that the appellant comes within two categories of risk identified in a recent decision of the United Kingdom Asylum and Immigration Tribunal (AIT): *AA Zimbabwe CG* [2006] UKAIT 000061, 2 August 2006, (the AA case) namely:

1. Those whose military history discloses issues that will lead to further investigation by the security services upon return to Harare airport, and
2. Those with an adverse political profile, even if at a low level.

[47] Dealing first with the appellant's military "history", counsel submitted that this may expose the appellant to serious harm. He submitted that the appellant left

Zimbabwe to go to the United Kingdom out of fear that he may have been forcibly recruited by the ZANU-PF Youth Brigade, colloquially referred to as the “Green Bombers”. The appellant also sought to avoid having to enlist for compulsory military service.

[48] Counsel submitted that:

“Because his military history discloses issues of avoidance that may lead to further investigation by the security services on return to Harare airport there is also a risk that the appellant may be detained on this basis and incarcerated while the issues are investigated.”

[49] The Authority rejects that submission. Several years have passed since the appellant’s departure, and compulsory military conscription has not yet been introduced in Zimbabwe. Nor was the appellant ever asked to join either the Army or the Youth Brigade.

[50] In short, the appellant has no history of avoiding conscription in any overt sense. The Authority rejects the submission that there are issues to be investigated in this regard which could lead to the appellant being detained and investigated by the authorities upon or shortly after his arrival back in Zimbabwe.

[51] Nor does the Authority accept that there is a real chance that the appellant would be “press-ganged” into joining the youth militia. Counsel provided one article which referred to the coercion and forcible conscription of youths into the “Green Bombers”. It refers to the plight of 100 youths, aged between 18 and 22, and suggests that the youth militia are expected to have most impact in rural areas: Elias Mugwade “Youths coerced into youth militia” *Africa Reports: Zimbabwe Elections No 11* (1 March 2005).

[52] The appellant is now somewhat older than he was at the time he left Zimbabwe. He is certainly well outside the targeted age group referred to in the article provided by counsel, and (with the exception of his two years living on his parents’ farm), he grew up in the city.

[53] Turning to whether the appellant has a political profile, the Authority has rejected the appellant’s claim that he would seek to become involved in any political opposition to the current regime in Zimbabwe. We note further that there is no country information which substantiates counsel’s assertion that coloured persons are assumed by the authorities, in the absence of any additional evidence, to be “generally supporters of the MDC and ... opposed to the regime”. The

Authority notes in particular that none of the sources referred to at para [40] support that claim.

[54] The only two “incidents” of a political nature that the appellant could recall were his incidental proximity to a protest in Harare and his attendance at a meeting chaired by ZANU-PF, both during the late 1990s. Neither incident created any difficulties for the appellant in the past. The Authority finds that neither will cause him any difficulty in the future.

[55] The Authority finds that the appellant has no political profile, and the suggestion that officials in Zimbabwe would suspect otherwise is purely speculative, and without any basis.

[56] Counsel conceded that the AIT found in the AA case that “a failed asylum seeker returned involuntarily to Zimbabwe does not face a real risk of being subjected to persecution or serious ill-treatment on that account alone”.

[57] The Authority reaches the same view, and notes that the evidence given by the appellant and his witnesses is consistent with such a finding. The only specific incident the appellant’s aunt could recall was in connection with a friend who was a member of the opposition party who was forcibly returned to Zimbabwe from the United Kingdom, without incident. He was able to leave Zimbabwe again without difficulty, and has now regularised his residence in the United Kingdom.

[58] Nor does the Authority accept counsel’s submission that any risk to the appellant is created or exacerbated by the fact that he has family connections in both the United Kingdom and New Zealand. Again, the appellant has provided no evidence in support of that assertion, and reference to the recent experiences of his own extended family members provides clear evidence to the contrary: the appellant’s grandparents, aunt and uncle, all of whom are of mixed race, have each returned to Zimbabwe from the United Kingdom in recent years without experiencing any difficulties.

Zimbabwean citizenship

[59] Counsel referred to clause 13(1) of the Citizenship of Zimbabwe Act 1984 (the CoZ Act), which states that:

“... a citizen of Zimbabwe **by registration** shall cease to be a citizen of Zimbabwe if, after he has become of full age and while he is of sound mind, he is or has been absent from Zimbabwe for a continuous period of 5 years ...” [emphasis added].

[60] Counsel conceded that under clause 13(4)(d) the CoZ Act will not operate so as to render any person stateless. However, he submits that the CoZ Act prescribes a “lengthy and bureaucratic process” by which this would operate, and says that the appellant would “inevitably” be held in custody while that process ran its course.

[61] This appears to be pure speculation and counsel has provided no information which could provide a basis for his submission. For one thing, it ignores the fact that the appellant is currently in possession of a valid Zimbabwean passport.

[62] The Authority also notes that clause 13 of the CoZ Act explicitly applies to a person who is a Zimbabwean citizen “by registration”. The appellant has provided no evidence which establishes that his citizenship falls within that description, and there are good reasons for suspecting that he is not. The copy of the CoZ Act provided by the appellant also contains the following provision:

“A person who, immediately before [18 April 1980] was or was deemed to be a citizen by birth, descent or registration, shall, on and after that day, be a citizen of Zimbabwe by birth, descent or registration as the case may be.”

[63] The Authority is not in a position to decide the point, (and nor is it necessary to do so) but the evidence is that the appellant was born in Zimbabwe during the 1970s. It is therefore likely that for the purposes of the CoZ Act he is a citizen of Zimbabwe “by birth” rather than a citizen “by registration”. If that is the case, then clause 13 would appear to have no application to the appellant.

[64] The appellant has provided no evidence or country information which indicates that he would be at risk of losing his citizenship, or that he would be held in custody by virtue of clause 13 of the CoZ Act.

Prison conditions

[65] Counsel also provided copies of various reports which outline the degrading and abysmal conditions in many of the prisons in Zimbabwe. However, as the Authority finds that the risk of the appellant being detained upon his return to Zimbabwe is at best remote and speculative, this information is irrelevant.

Summary

[66] There is no doubt that the nation of Zimbabwe is largely dysfunctional, and that many of its inhabitants live in circumstances of great hardship. The most recent United States Department of State *Country Report on Human Rights*

Practices 2006 (6 March 2007) refers to an “authoritarian” government responsible for “pervasive and systematic abuse of human rights”. Political intimidation and violence, high crime rates and desperate economic circumstances prevail.

[67] However, even if it is accepted that the appellant may find himself confronted by some of the many problems which beset his country, the focus of the Refugee Convention is narrowly defined. The appellant must demonstrate that he has a well-founded fear of being persecuted for a Convention reason.

[68] The Authority has borne in mind the recent decision of the High Court, *A v Chief Executive of the Department of Labour* (CIV 2004-404-6314, 19 October 2005). In her decision, Winkelmann J found that when conducting its forward looking assessment of whether an appellant faces a real chance of being persecuted, the Authority must consider "whether an individual having all of [the appellant's] characteristics" would face a real chance of serious harm for a Convention reason (para 38).

[69] Taking into account all of the appellant’s circumstances, and considering their cumulative effect, the Authority finds that objectively, on the facts found, there is no real chance of the appellant being persecuted for a Convention reason if he were to return to Zimbabwe.

CONCLUSION

[70] The first principal issue for consideration is therefore answered in the negative. On that basis, the second issue does not require consideration.

[71] For these reasons the Authority finds that the appellant is not a refugee within the meaning of Article 1A(2) of the Refugee Convention. Refugee status is declined. The appeal is dismissed.

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A N Molloy
Member