

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

**REFUGEE APPEAL NO 75960**

**REFUGEE APPEAL NO 75961**

**REFUGEE APPEAL NO 75993**

**AT AUCKLAND**

<b><u>Before:</u></b>	B A Dingle (Member)
<b><u>Counsel for the Appellants:</u></b>	C Amery
<b><u>Appearing for the Department of Labour :</u></b>	No Appearance
<b><u>Dates of Hearing:</u></b>	19, 20 & 21 February 2007
<b><u>Date of Decision:</u></b>	10 January 2008

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**DECISION**

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[1] This is a conjoined appeal against decisions of a refugee status officer of the Refugee Status Branch (RSB) of the Department of Labour (DOL), declining the grant of refugee status to the appellants, two of whom are citizens of South Africa and one of whom is a Zimbabwean national.

**INTRODUCTION**

[2] The appellants are a husband, wife and daughter. For the purposes of this decision, *Refugee Appeal No 75960* will be referred to as “the wife”, *Refugee Appeal No 75993* will be referred to as “the husband” and *Refugee Appeal No 75961* will be referred as “NN”.

[3] The appellants were heard jointly, and consent to the evidence of each

appeal being treated as evidence in the appeal of the other. The claims of the wife and NN are considered jointly in this decision because they arise from almost identical factual grounds (although where necessary individual considerations will be given to each appeal). The determination of the husband's claim is considered separately in this decision because it is based on different factual grounds.

[4] The wife and NN claim to be at risk of being persecuted in South Africa because they will be at risk of violent crime and will not receive adequate protection from the South African police. In particular, the female appellants claim to have been targeted for harassment (along with other members of their family) by members of a criminal gang after they had personal possessions stolen by the gang. Furthermore, they claim that they will suffer discrimination in day-to-day life in South Africa, including in the sphere of employment and activities such as shopping and eating in restaurants.

[5] The husband claims to be at risk from the authorities in Zimbabwe after he verbally insulted President Mugabe and the ruling regime during a border crossing in 2005.

## **DELAY**

[6] The Authority acknowledges that there has been a delay in the determination of this conjoined appeal, the last day of the appeal hearing having been 21 February 2007. That delay must be seen against the procedural background of post-hearing matters raised by the appellants.

[7] The Authority Member did, at the conclusion of the last hearing date (21 February 2007) review the evidence and record serious concerns in respect of the credibility of the appellants, those concerns having been made clear to the appellants during the hearing. Consideration was postponed, however, pending receipt of the further evidence and submissions which counsel, Mr Amery, indicated he wanted to submit, including a psychological report for the wife addressing her psychological state of mind as a result of events experienced in South Africa and Zimbabwe, focusing in particular on issues of memory and the effect that her state of mind may have had on her ability to present evidence in the Authority hearing.

[8] A psychological report was submitted to the Authority on 20 March 2007. However, rather than addressing the effects of events experienced prior to her

arrival in New Zealand, the report focused on what appeared to be complaints by the wife about the way in which the appeal hearing proceeded and the conduct of the presiding Authority Member. On that basis, and in accordance with the Authority's *Practice Note 1/04* (23 February 2004), the Chairperson of the Authority initiated a formal complaints investigation procedure which included production of a transcript of the hearing.

[9] In a letter dated 27 April 2007, the Authority informed the appellants and counsel of the procedure, provided them with a copy of the hearing transcript and invited them to submit any further evidence and submissions they wished to have considered in relation to the complaint. On May 17 2007, counsel wrote to the Chairperson to indicate that the complaints would not be maintained by the wife. Counsel's letter also enclosed a letter from the wife (dated 14 May 2007) stating that she did not wish to make a complaint against the Member and that the psychological report was withdrawn and was not to form part of the record of proceedings.

[10] The Member was therefore delayed in determining the appeals until the matters above were resolved in late May 2007. The production of this decision has been further delayed because by the time the matter was resolved, the Member had been scheduled well in advance for other appeals, including one fixture which required six weeks of continuous preparation and hearing time. Scheduled leave and other Member obligations have also been a factor in the subsequent delay. For such delays as the Authority is responsible, an apology is offered.

[11] The Member of the Authority has since reviewed the totality of the evidence, submissions, and supplementary material provided by counsel. The findings of credibility and of fact which follow later in this decision are the product of that process.

[12] It is now intended to summarise the evidence given by the appellants at the hearing. An assessment of that evidence follows later in this decision.

## **THE APPELLANTS' CASE**

### **THE WIFE'S EVIDENCE**

[13] The wife is in her late 40s and was born in (as it is now known) Zimbabwe. Her mother was also born in Zimbabwe but her father was born in South Africa and, despite living in Zimbabwe for over 50 years, did not acquire Zimbabwean citizenship. She is of coloured ethnicity and is a practising Roman Catholic.

[14] In 1977, the husband and wife married. In 1978, she was issued with a Rhodesian passport. In 1980, Rhodesia gained independence and became the Republic of Zimbabwe.

[15] In approximately 1993, the wife was issued with another Zimbabwean passport. She had no difficulties in obtaining it.

[16] For the purposes of this appeal, until late 2002, the wife's life was unexceptional. She raised three children, NN, ZZ and SS, born between 1978 and 1984, the youngest of whom is NN. She was also employed outside the home throughout the 1980s and 1990s, undertaking various accounting and administrative roles.

[17] In approximately 2002, one of the wife's friends, who was involved in an opposition political group, was jailed. The wife visited him several times in jail and his wife at home and when she did she believed she may have been followed by plain-clothes officials. She also believes that between approximately 2000-2005 their telephone line was tapped – a state of affairs she accepted as being quite usual for a non-black Zimbabwean. The wife did not have any other difficulties relating to her friend's political involvement or detention.

[18] In approximately late December 2002, her passport expired. In January 2003, when attempting to renew it at the Home Affairs office, she was informed that she did not qualify for a Zimbabwean passport because her father had not been born in Zimbabwe. The officials told her that new legislation required individuals with a foreign-born parent to make a special application and apply to renounce their entitlement to citizenship in their foreign-born parent's home country. The fee to do so was ZWD40m. She was shocked and surprised to learn that the legislation applied to her because her father had lived in Zimbabwe for over 50 years. She was also informed that the Home Affairs office were now

alerted to the fact that she was essentially an “alien” in Zimbabwe and that unless she paid the ZWD40m fee and renounced her right to South African citizenship promptly, she would have to return to South Africa to live. Although she wished to abide by the new legislation and secure her Zimbabwean citizenship, she and her husband were unable to pay the ZWD40m fee required.

[19] Throughout 2003, the wife made attempts, both through her local Home Affairs office and at the Home Affairs office in Harare, to resolve the matter. None of these attempts were successful. She also took advice from lawyers and judges that she knew, but none appeared to be aware of the legislation and they all advised her to take South African citizenship and move there.

[20] Finally, in January 2004, when the wife and her husband had spent considerable funds trying to secure her Zimbabwean citizenship, they gave up and instead approached the South African embassy to apply for citizenship there. At around the same time, the Zimbabwe Home Affairs office demanded she surrender her Zimbabwean identity documents, including her expired passport, birth certificate, driver’s licence and national identity card.

[21] In mid-2004, the wife’s South African birth certificate was issued, which identified her as having been born in Zimbabwe. In October 2004, she was issued with a South African passport valid until October 2014.

[22] Approximately one month later, she surrendered all of her Zimbabwean documents and was informed that she was no longer a Zimbabwean citizen.

[23] Once she had surrendered her Zimbabwean citizenship, the Home Affairs office contacted her children (including NN) and informed them that they too had to surrender their Zimbabwean citizenship because they now had a parent who was a foreign citizen. No-one had previously informed the family that this would happen.

[24] In early 2005, the wife left Zimbabwe and went to live with her oldest daughter, ZZ, in Johannesburg. The husband remained in Zimbabwe.

[25] For the next nine or ten months, she travelled frequently between South Africa and Zimbabwe, often staying in Zimbabwe for the maximum allowable visiting period of 90 days. She did not have any serious problems travelling across the border although she did encounter verbal harassment from some border guards, who called her a “white sell-out”. These comments upset her. At

times, she also had to surrender some of the food and other items she was carrying with her from South Africa to Zimbabwe.

[26] The wife undertook some temporary work in Johannesburg for approximately three months. Although she had no particular difficulties in this employment, she felt socially excluded by other employees who spent most of their time talking in Afrikaans, a language she does not understand well.

[27] During her time spent living in South Africa, she encountered discrimination in restaurants and while out shopping. She recalled several incidents when she went to restaurants and was either seated in a separate area from white South Africans or was not offered the same level of service. She also witnessed occasions when NN experienced sexual harassment from black South African men.

[28] In approximately March 2005, the wife applied for her husband to be able to join her in South Africa. He was granted a two-year multiple entry South African relative's permit which enabled him to stay in South Africa although he was not permitted to work. From about this time on, the husband began selling their assets in Zimbabwe in anticipation of moving to South Africa.

[29] At the end of September 2005, the sale of the family home in Zimbabwe settled. For approximately two months prior to the house settlement, the wife stayed with her husband in the home, making the last arrangements in relation to their household goods and pets. In early October 2005, the wife, husband, NN and ZZ's husband departed Zimbabwe together by car to travel overland to South Africa.

#### The border crossing

[30] When they arrived at the border crossing, the wife and husband entered the immigration building together but had their passports processed separately. The wife finished having her passport stamped and moved on to the customs counter. When she did so, she began receiving insults from one of the officers who called her a "white sell-out" and harassed her about living in South Africa where "they treat white people like kings". The officer also held her passport down on the counter to prevent her from picking it up. The wife felt humiliated and upset on a day which was very emotional because she was leaving her homeland for the last time. She began crying. The husband had completed his immigration procedure

and came to her side. When he realised she was upset, he confronted the official and began insulting the Zimbabwean regime.

[31] The Zimbabwean officials became angry and, in fear of the consequences for her husband, the wife went outside in search of assistance. She asked a South African border official to come and intervene on her behalf which he did. He spoke to the Zimbabwean officials and persuaded them to let the husband cross the border into South Africa. As the husband, wife and South African official left the building, the wife heard the Zimbabwean officials threaten that they would arrest the husband on his return from holiday.

[32] The rest of the journey was completed without difficulty and the husband, wife and NN travelled to ZZ's house where they were stayed for the next month.

#### Beach incident

[33] In early November 2005, the wife and NN ("the female appellants") travelled to another city to stay with NN's brother (SS) and his wife. One day while there, the female appellants visited a nearby beach. After walking on the beach, they went to buy some lunch, at which time they met a mother and two small children. After chatting with them for some 30-45 minutes, the female appellants went and sat alone on the beach to eat their lunch. After a short while, a group of coloured men arrived at the beach. They were drinking alcohol and behaving raucously, some 20 or 30 metres away.

[34] Soon after the men's arrival, the female appellants were called over by an elderly white couple who were sitting nearby. The couple warned them that the men had been talking about them (the female appellants) in Afrikaans and suggested that they should all sit together. After another few minutes, two men began walking towards the appellants' group and demanded that they hand over all their personal possessions, such as jewellery, watches, mobile telephones and handbags.

[35] The women did as they were told and then, after further discussion between the two coloured men in which the wife believes she heard the word "rape", the elderly white man shouted at his wife and the appellants to run. One of the coloured men, who had been threatening the group with a knife, then pushed the elderly man and a scuffle broke out. The three women ran up the beach to the adjoining car park.

[36] Meanwhile, the elderly white man was stabbed with the knife but, after what the appellants assume was intervention from others who had seen the incident, he managed to escape. The police were called and duly arrived. The elderly white man talked with them about the incident and, while the wife assumes he identified her and NN as victims of the attack, they did not identify themselves directly to the police.

[37] At one point, the wife asked one of the policemen whether he was coming to talk to her, but when the policeman asked why, she did not explain that she had been attacked. The elderly white woman told them to leave the talking to her husband. The female appellants were in such shock that they just gave SS's telephone number to the elderly lady and left the scene.

[38] Within the next week, the elderly man rang the wife and told her that the police file for the incident appeared to have been misplaced and that the woman and young children that they had met at the beach had been murdered on the same day as they had all been attacked. The appellants and the elderly man assumed that they were murdered by the same group of men who attacked them, although that has not been verified.

[39] After the incident, the female appellants and various members of their family experienced incidents of harassment which were related to the attack. While they were still at SS's house, groups of men on motorcycles would ride around the neighbourhood, asking about them and the elderly couple. SS's wife was approached on two occasions, and asked if she knew the appellants or "the people that used to live here", meaning the appellants. On one occasion, while SS's wife was driving some distance away, she was pushed off the road by men on motorcycles and in a car. When she got out of the car to confront them about what they were doing, they again asked her about where the "two women" were and assaulted her by pushing her to the ground. She subsequently suffered a miscarriage.

[40] ZZ received telephone calls from people she did not know, who were asking what her address was. She refused to provide any information.

[41] The female appellants assume that the attackers found the contact information for their family members on various documents and pieces of identification that were in their stolen handbags.



[42] In early 2006, SS and his wife moved to another city. Also within a short time of receiving the telephone calls, ZZ changed her residential address. To the appellants' knowledge, none of the family members have received any further harassment since that time.

[43] In mid-November 2005, approximately two weeks after returning to Johannesburg, the appellants agreed that the wife and NN should travel to New Zealand. They had no particular plans to try and settle here but wished to go somewhere safe and peaceful after their traumatic experience. At the end of November 2005, the female appellants departed South Africa legally using their South African passports. After their departure, the husband continued to live with ZZ while his visitor visa application for New Zealand was processed.

### **NN'S EVIDENCE**

[44] NN is the youngest of three children. She was born in Zimbabwe and lived there until 2005 when she surrendered her Zimbabwean citizenship and adopted South African citizenship in similar circumstances to that of the wife.

[45] For the purposes of this appeal, her life until 2005 was unremarkable.

[46] In approximately February 2005, NN moved to South Africa and lived with ZZ (her older sister) in Johannesburg.

[47] NN obtained part-time employment for a period of approximately nine months at which time the employment was terminated because she was no longer required. She applied for several more jobs but was not successful because, she believes, she was discriminated against because of her former Zimbabwean nationality.

[48] She also recalls up to 10 incidents that year where she was talked to or verbally harassed by black South African men when out in public. The encounters usually occurred when men would ask her on a date or for her telephone number. On one occasion a man grabbed her hand but did not assault her further.

[49] When NN crossed the border from Zimbabwe into South Africa with her parents and her brother-in-law in October 2005, she did not witness the altercation between her father ("the husband") and the Zimbabwean official. She and her brother-in-law passed through immigration with their passports first and then stayed with the car while it was processed through customs. She does not recall

seeing her parents until they emerged from the immigration building and got into the car to drive across the border. She recalls that her mother seemed upset for the remainder of the trip but she did not become aware what had happened until some time later.

[50] NN accompanied her mother to visit SS in early November 2005. Her evidence as to the beach incident in which she and her mother (“the wife”) were verbally abused and robbed largely mirrors that given by the wife and will not be repeated here.

[51] Following the beach incident, NN was traumatised and felt too fearful to resume a normal routine in her daily life. She did not want to go out alone and believed that she was at risk of violent crime wherever she lived in South Africa. After returning to ZZ’s house, she and her mother agreed to travel to New Zealand to escape what they felt was a dangerous and violent society. She left with her mother at the end of November 2005 and arrived in New Zealand on 1 December 2005.

## **THE HUSBAND’S EVIDENCE**

[52] The husband was born, grew up and remained living in a city in the south of Zimbabwe until his departure from that country in late 2005. He is a Zimbabwean citizen and is of coloured ethnicity. He was born and raised as a Muslim, but voluntarily chose to convert to Catholicism after he married.

[53] He attended primary and secondary school, but did not complete his secondary education past form five because of his family’s financial situation. For almost all of his working life, he has worked in a range of skilled and technical roles in what became, after independence, the National Railways of Zimbabwe (NRZ). Although he was exposed to some danger and unfavourable working conditions at times of civil conflict, the appellant did not experience any particular difficulties in his employment which are relevant to his refugee claim. He periodically attended training courses relating to his employment and obtained qualifications and promotions as a result.

[54] Although the husband has known individuals who are involved in opposition political groups in Zimbabwe, some of whom have suffered serious harm or even death because of that involvement, he has never been involved in politics himself. He confirms that he has never had any personal difficulties relating to politics in

Zimbabwe.

[55] From approximately 2001, when Zimbabwe began suffering shortages in fuel and basic commodities, the husband began making regular trips across the border to Botswana to buy fuel and other goods. He would also take the opportunity to visit ZZ (his oldest daughter) who was living there at the time. Sometimes other members of the family would accompany him. During those border crossings, the husband and his family were often harassed by Zimbabwean border guards who felt resentful that white and coloured people could afford to buy goods in Botswana that were not available in Zimbabwe. They often had to surrender some of their fuel and goods when they crossed back into Zimbabwe.

[56] In late 2002, the wife began experiencing difficulties in relation to her Zimbabwean passport and citizenship. The husband observed the significant stress it was having on her, and the whole family, and was appalled at the treatment she received from the Zimbabwean authorities.

[57] In early 2005, when the wife went to live with ZZ in South Africa, the husband remained at the family home in Zimbabwe. When he realised that the family would be unable to live together permanently in Zimbabwe, he resigned his job and made preparations to sell the family home.

[58] In March 2005, the wife applied for the husband to live with her in South Africa. Within weeks, he was granted a two-year, multiple-entry South African relative's permit which enabled him to live in South Africa, although he was not permitted to work.

[59] In late 2005, the settlement for the house sale in Zimbabwe went through and the husband and wife (who was back in Zimbabwe for two months before the settlement date) made final preparations to move to South Africa. On the day of the move, NN and ZZ's husband drove up from South Africa to collect them. That same day, the four of them travelled from their family home to South Africa by car.

#### The border incident

[60] When they arrived at the border post, NN and her brother-in-law were processed through immigration first and then took the car to be cleared through customs. After that, the husband and wife entered the immigration building on the Zimbabwe side of the border. The wife went to a separate immigration counter

and the husband recalls her having her passport stamped before she moved on to a separate customs counter in order to declare the household goods they were transporting to South Africa. The husband also got his passport stamped without any difficulties.

[61] Having no further immigration or customs procedures to complete, he then walked over to the wife. On his approach, or when he stood beside her, he could see that she was upset. She explained that she had been insulted by the customs officer who had suggested that she was a “white sell-out”. The husband then confronted the officer about the insults and an argument developed. During the argument, the husband lost his temper and insulted President Mugabe and the ruling regime and expressed his disgust at the way his family had been treated by the government of Zimbabwe.

[62] After he had insulted the President, the officers threatened to arrest him. However, the wife had, in the interim, sought help from a South African immigration officer who intervened and persuaded the Zimbabwean officers to let him cross the border. He was permitted to leave but as he did so the Zimbabwean officers threatened that they would arrest him on his return to Zimbabwe. The husband believes that his details were recorded by the Zimbabwean officials in their computer and that if he ever tried to enter Zimbabwe again, he would be immediately arrested and detained.

[63] The husband and wife then met up with the car and crossed the border into South Africa. The remainder of their journey was without incident.

[64] On arrival in South Africa, the appellants all stayed with ZZ in Johannesburg. The husband could not get any formal employment because he did not have a work permit. However, he did give some individuals advice about house renovations.

[65] Within days of arriving in South Africa, he applied for a visitor’s visa for New Zealand, using a letter from his sister (dated 6 October 2005), who is a permanent resident of New Zealand, as proof of support in New Zealand. At around the same time, return flights from South Africa to New Zealand were booked for all three appellants through a travel agent in Johannesburg.

[66] In late November, when the wife and NN travelled to another city to visit SS, the husband remained in Johannesburg to receive medical treatment.

[67] When the wife and NN returned, having been robbed while visiting a beach, the husband agreed that they should travel to New Zealand as soon as they could, despite the fact that he was not able to travel with them because he did not yet have the requisite visitor's visa.

## **NEW ZEALAND**

[68] The female appellants arrived in New Zealand on 1 December 2005 and were issued with visitors' permits on arrival. In February 2006 they extended those permits for a further three months. In mid-February 2006, the husband was issued with a three month visitor's visa to New Zealand and he arrived here in early March 2005.

[69] In approximately April 2006, after the husband had arrived in New Zealand, he was informed by SS that a maternal cousin with the same surname had been questioned by Zimbabwean border guards at the border post where the husband had been threatened. The cousin was asked about the husband's whereabouts and other personal details. The cousin denied all knowledge of the husband and stated that they were not known to each other. The husband was unable to recall where or in what circumstances SS and the cousin had met. He was also unable to give any details about the cousin's address or occupation.

[70] On 1 June 2006, the day on which the wife and NN's visitor permits expired, the Refugee Status Branch received applications for refugee status from all three appellants. They were each interviewed by the RSB over the course of three days on 1, 2 and 3 August 2006. A decision declining each of their claims to refugee status was delivered on 29 September 2006. It is from those decisions that the appellants now appeal.

## **OTHER MATERIAL SUBMITTED**

[71] Prior to the appeal hearing, the Authority received (by email on 13 February 2007) submissions on the appellants' behalf, accompanied by country information relating to both Zimbabwe and South Africa.

[72] During the hearing, counsel helpfully provided further country information, including:

- (a) a map of border posts between South Africa and Zimbabwe and a map

each of Zimbabwe and South Africa;

- (b) a one page tabulated list of the crime statistics of South Africa for the years 2001-2006 (Institute for Security Studies, *South African Crime Statistics By Category: 2006*, accessed at [www.issafrica.org](http://www.issafrica.org)); and
- (c) copies of two diagrams completed by the appellants depicting the beach scene at which the November 2005 incident occurred and the border post at which the husband was involved in an altercation.

[73] Following the hearing, the Authority received a letter from Carole Fleming, Director of Catholic Family Support Service, Hamilton, recording her memory of a conversation between herself and the wife in March 2006 (submitted under cover of a letter of counsel dated 28 February 2007).

[74] On 7 March 2007, the Authority received under cover of a letter, material relating to the issue of failed asylum seekers who are involuntarily returned to Zimbabwe from the United Kingdom (UK) including three newspaper articles relating to legal proceedings on the matter and the UK Court of Appeal judgement of *AA (Zimbabwe) v Secretary of State for Home Department* [2007] EWCA Civ 149 (6 March 2007).

[75] These materials have been considered and, where appropriate, are referred to in the decision below.

[76] Further correspondence from counsel regarding a psychological assessment of the wife was received on 21 March 2007, 1 May 2007 and 17 May 2007. However, as noted above, the psychological assessment has since been withdrawn and has not been considered further in the determination of this decision.

## **THE ISSUES**

[77] 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."

[78] 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 APPELLANTS' CASE**

[79] Before the identified issues can be addressed, an assessment must be made of the appellants' credibility. The Authority's credibility concerns were clearly articulated during the hearing. In assessing credibility, the Authority has taken into account all the evidence and submissions received both during the hearing and subsequently.

[80] The Authority has no reason to doubt the credibility of the appellants as to their life in Zimbabwe and the process by which the wife and NN surrendered their Zimbabwean citizenship and adopted citizenship of South Africa. The account of their lives until the wife moved to South Africa in early 2005 is accepted.

[81] However, the Authority does not accept their account as to the events which are claimed to have occurred since January 2005 and which form the basis of their refugee claims, for the following reasons.

#### **The beach incident and subsequent harassment**

[82] The evidence about the beach incident in November 2005 in which the wife and NN claim that they were attacked is inconsistent and, in some respects, implausible.

[83] At the appeal hearing, much was made of the fact that a mother and two small children, with whom the wife and NN had talked for some time, were murdered on the same day as the female appellants were robbed. They both believed that the murders were committed by the same men who attacked them.

[84] Surprisingly, this significant aspect of their account was not articulated by the wife or NN during the RSB interview or in any previous written statements.

When asked to explain the previous omissions, the wife suggested that she had not felt comfortable sharing the evidence with the refugee status officer but that she wished to disclose it to the Authority because the presiding Member was a woman. She was unable to provide any further explanation of why she had failed to recount this important aspect of her claim previously.

[85] The Authority does not accept the wife's explanation. No sensible reason was given why she would have chosen not to reveal it to the RSB when she gave so much detail about all the other aspects of that day. There is no sexual or other gender specific aspect of the evidence about the mother and children which might explain her unwillingness to share it with the refugee status officer. If she and NN had spent time at the beach with a mother and children who were murdered later that day, it is inexplicable that they would have failed to mention such an event in one of their two statements or their detailed RSB evidence about the incident, particularly given her belief that the murderers were the same persons who had attacked/threatened her and NN. Furthermore, when she was re-examined by counsel, the wife's explanation for the omission changed and she said that she had not previously mentioned it because she was afraid of being called as a witness for the matter.

[86] The claimed genuineness of the omission by the female appellants in their RSB interviews and then the claimed spontaneous revelation to the Authority is further undermined by NN's statement to the Authority that she has never discussed the events of that day with her mother because it is too traumatic. It is unbelievable that, in the absence of any discussion, they would both omit an important part of their account at the RSB and then spontaneously and independently disclose it to the Authority. Rather, the Authority finds that the omission of the evidence prior to the Authority hearing was because the evidence has been created to bolster their refugee claim.

[87] Further underscoring this view is the fact that the wife stated in the early part of her RSB interview that a white woman and her two children were murdered a few days after the incident at the beach. The fact that she did so, but then failed to recall the murder which she now claims occurred on the day of her attack to people she had met is too implausible to be believed.

[88] As to the length of time the wife and NN stayed with SS, their evidence was inconsistent. To the RSB, the wife said that they stayed there, in total, "[f]or a few days. While it was going to be longer, to relieve pressure on [ZZ], but things went



wrong". To the Authority, she stated that they stayed on for two weeks after the incident, during which time they were subjected to constant harassment from the group of men who rode about the neighbourhood on motorcycles yelling abuse and looking for them. When NN was asked by the Authority how long they stayed after the incident, she stated that it was "a couple of days". When asked to explain why the wife would have said that they stayed for two weeks she said that she did not know and "maybe she [the wife] remembers clearly, I don't know". NN then asserted that she had not mentioned the figure of "a couple of days", an assertion which is plainly contradicted by the hearing transcript.

[89] The Authority does not accept NN's explanation for the discrepancy. First, there is no plausible reason why the appellants would be unable to recall with relative accuracy whether they had stayed for approximately two days or for a matter of weeks after the incident. Second, NN's explanation for the discrepancy between her and her mother's evidence on appeal does not explain why her mother's evidence to the RSB was that they had only stayed for a few days. NN's attempt to retract her evidence about two days in the face of inconsistent evidence illustrates that she is willing to spontaneously mould her evidence in an attempt to reconcile it with that of the other appellants.

#### Post-attack harassment

[90] The appellants' claims about the harassment visited upon them and other family as a result of the beach incident has been evolving and inconsistent.

[91] With regards to the harassment suffered by SS's wife (the daughter-in-law), the evidence evolved between the RSB interview and the appeal hearing. To the RSB, the wife stated that SS and his wife were exposed to harassment via the men on bikes riding in their neighbourhood and because the daughter-in-law was asked whether she knew the elderly couple or the wife and NN. However, on appeal, the wife said that, in addition to those events, the daughter-in-law's car was pushed off the road as she drove to university one day. When the daughter-in-law got out of her car to confront the harassers she was physically assaulted, pushed to the ground and had a miscarriage as a result.

[92] When asked why she had not disclosed this most serious incident of harassment to the RSB, the wife said it was because she did not hear about it until after the RSB interview. The Authority does not accept her explanation because SS and his wife had allegedly given them many other details about the

harassment they had suffered and the fact that SS's wife suffered a miscarriage as a result. There is no sensible reason why they would have omitted the information about the most serious assault. The Authority is satisfied that this belated disclosure of events is another attempt to reinforce the perceived threat against the appellants. The evidence is rejected.

[93] Similarly, at the appeal hearing the claimed consequences of harassment of ZZ have been inflated from those claimed at the RSB. To the RSB, both the wife and NN stated that when they returned to Johannesburg after the attack, ZZ moved house. NN said that ZZ had moved before or during the time of the attack "but not because of the incident". The wife told the RSB that ZZ moved because she and her husband had bought their own house. However, on appeal the wife said that ZZ had moved because of the harassment. This is another example of the way in which the evidence has been moulded in order to bolster the claim for refugee status. It is therefore rejected and found to be another part of the appellants' fabricated account.

[94] For all of the reasons set out above at [82] to [93], the Authority finds that the account of the appellants as to the beach incident and the subsequent harassment of them and other family members is not credible. The evidence is rejected.

[95] In making this finding, the Authority has carefully considered the letter (dated 23 February 2007) from the Carole Fleming, Director of the Catholic Family Support Service, Hamilton, which records a conversation between herself and the wife in March 2006 in which the beach incident was discussed and the wife talked about the murder of the mother and children. The Authority has no reason to doubt Ms Fleming's record of the account which was told to her. However, the Authority must make a finding as to whether that account is a genuine one. In doing so, the Authority has observed the wife and NN giving oral evidence over the course of two days and has had the benefit of examining them in detail about the incident and reading the evidence they have previously given about the incident. The Authority is of the view that the letter from Ms Fleming does not outweigh the credibility concerns in relation to the beach incident which are detailed above.

#### Plans to come to New Zealand

[96] The finding in [94] is further underscored by the wife and NN's evidence

regarding their plans to travel to New Zealand. In their initial written statements submitted to the RSB and at the RSB interviews, the appellants all claimed that the decision to travel to New Zealand was made after, and as a result of, the claimed attack of the wife and NN at the beach in early November 2005.

[97] Their initial written statement (dated 26 May 2006) outlines the claim for each of the three appellants, is signed by each of them, and was submitted in support of their Confirmation of Claim forms. It is written in first person by the husband. As to the context of events which led to the wife and NN's travel to New Zealand the statement summarises the beach incident and then states:

“...[NN] went into shock and just wanted to get away from all the senselessness of Africa and the good possibility of it happening again because the gang members know who they are and the area they were staying in. They were living in fear so my wife chose New Zealand because it was the furthest place on earth with no neighbouring countries, all on it's own, offering them solace, safety and a chance to regain their dignity. I did not object to them coming here on the spur of the moment because of what happened.” (emphasis added)

[98] NN's Confirmation of Claim form states (at E8) “We left our home country (South Africa) as we were attacked and South Africa is an extremely violent place.” Similar statements appear in both the wife and NN's subsequent individual statements written in July 2006. These statements give the clear impression that the trip to New Zealand was spontaneously planned as a consequence of the beach incident in November 2005.

[99] This evidence was confirmed by the wife and NN at the appeal hearing. When asked by the Authority, they claimed that the first time they considered travelling to New Zealand was when they returned to ZZ's house after the attack at the beach in November 2005.

[100] Contradicting this evidence, documents in the husband's file relating to his application for a visitors visa for New Zealand indicate that all three appellants were planning to visit New Zealand in early October, within days of their last arrival from Zimbabwe. The relevant documents include: a visitor's visa application for the husband, received by the New Zealand High Commission on 18 October 2005; a travel itinerary for the three appellants (dated 8 October 2005) for confirmed return travel from South Africa to New Zealand with a planned departure date in late November 2005 and a return date to South Africa of mid-February 2006; and a letter (dated 6 October 2005 and sent by facsimile from New Zealand on the same day), from the husband's sister, resident in New Zealand, confirming that she would provide accommodation and cover the expenses of his visit to New

Zealand.

[101] When the husband was asked to explain the apparent discrepancy between these documents and the evidence of the wife and NN that they had made no plans to travel to New Zealand before early November 2005 he suggested that they had been planning to travel here, but only on holiday. This explanation cannot be reconciled with the earlier evidence of the wife and NN that they had had no previous plans to travel to New Zealand or his own previous statement that they had travelled to New Zealand “on the spur of the moment”. The Authority finds that the appellants had clearly been planning to travel to New Zealand prior to the beach incident.

#### The border incident: late-2005

[102] The evidence in relation to the border crossing in which the appellants’ allege the husband insulted President Mugabe and the Zimbabwean regime is inconsistent and is rejected.

[103] The husband has given inconsistent evidence about how the incident occurred. In his original statement, he stated that he was insulted by the immigration official who had stamped his passport and that sparked his (the husband’s) insults of Mugabe and the regime. Surprisingly, no mention is made in the statement of his wife being harassed by an immigration official or that she was upset by the harassment – the very event which he now claims sparked his anger.

[104] In contrast, he initially told the RSB that the immigration official who stamped his passport had said nothing insulting to him. When the inconsistency between his statement and his RSB evidence was put to him in the RSB interview report, he changed his evidence and said that he had been insulted by the immigration officer who stamped his passport but that he had not responded and that he had responded to the officer insulting his wife. To the Authority, he reverted to his initial RSB evidence and stated that he was not insulted by the officer who processed his own passport. When asked by the Authority to explain the apparent mobility in his evidence, he responded by saying that he had not studied his previous evidence and so could not recall it word for word. He could not sensibly explain why there were discrepancies between who had insulted him and with whom he had argued.

[105] The Authority notes that the husband claimed in re-examination to have

memory problems and that his recall of events is hindered by the fact that he was angry at the time of the border incident. However, the Authority does not accept that this explains the discrepancies in his evidence because when he was then asked by counsel to recall the events in question, he was able to do so in great detail including describing such matters as when he had put on and removed his glasses and providing an almost verbatim record of what he had said.

[106] The appellants also gave inconsistent evidence about the sequence of events on the day. They all claimed that NN was not in the immigration processing building at the time of the father's altercation and that her absence explains her inability to give evidence about the incident. NN and the father said that NN had gone through immigration first and was clearing the car through customs when the argument broke out. In contrast, the wife claimed to have taken NN's passport (and that of ZZ's husband) into the immigration area and processed them on their behalf. No sensible explanation was given for the discrepancy. The Authority finds that it has risen out of the appellants' attempts to create a reason why NN did not see the incident and cannot therefore be expected to give evidence about it.

[107] The Authority also has concerns about the evidence the husband gave in relation to events after the border incident.

[108] Despite claiming that the border officials had recorded his details in the computer and being fearful that the Zimbabwean authorities would pursue and him in Zimbabwe because of his outburst, the husband made no attempts to warn either his father (who was still living in Zimbabwe until after the husband came to New Zealand) or ZZ and SS about potential difficulties they might have in Zimbabwe.

[109] When asked by the Authority whether his father had been approached by officials trying to locate him, the husband said that he had not been in contact with his father. When asked when he had last spoken to his father, the husband gave equivocal answers and was not able to clarify whether he had spoken with him while he (the husband) lived in South Africa or after he came to New Zealand. When the Authority pointed out that in correspondence with INZ relating to his visitor application he had indicated he was in contact with his father, the husband suggested that he might have been in contact but he could not remember. The Authority finds it inherently unlikely that the husband would not recall whether or not he had spoken to his father after leaving Zimbabwe. This is particularly so in

light of the fact that his father has since died and the husband would therefore have had cause to think about the last time they were in contact.

[110] The husband also stated that he did not warn ZZ and SS (his children who live in South Africa) about possible difficulties they might have if they travelled to Zimbabwe. He confirmed that both of them have travelled through the border at least once in 2006, when they visited Zimbabwe to organise his father's funeral. Neither of them were questioned about the husband's whereabouts.

[111] When asked why he had not warned them about the possible dangers of travelling to Zimbabwe, the husband suggested that they were not known to the border officials and there are many people with the family surname who live in their hometown. When asked whether he thought ZZ would be at risk if he travelled to Zimbabwe, he said that ZZ's name is not the same as his (the husband's), impliedly asserting that the difference in first names removed any risk. This suggestion is rejected because the husband's cousin also had a different first name and yet the husband claims that he (the cousin) was questioned. The Authority finds it implausible that in the circumstances in which the husband says he left Zimbabwe, where he claims to fear the immigration officials and other officials who may have been informed about him, he would not have warned his children about the potential dangers of visiting there. The fact that he did not indicate that he does not have a genuine belief that he and his family are at risk of harm in Zimbabwe for the reasons he claims.

[112] In summary, the Authority concludes that the incident the appellants claim to have occurred at the border in October 2005 during which the husband insulted President Mugabe and the regime and was threatened with arrest and serious harm did not occur. In making this finding, the Authority has given careful consideration to the claimed context of the border incident and the fact that, if it had genuinely occurred, it would have been a highly charged atmosphere in which minor details of events may not have been accurately recalled. However, considered cumulatively, and in light of the Authority's other credibility findings, the Authority is satisfied that the account of the border incident is not credible.

#### **OTHER CREDIBILITY CONCERNS**

[113] The Authority has other concerns in relation to the husband's general credibility which strengthen the view that his account cannot be relied upon:

- (a) the husband's admission to the RSB that he lied on his visa application form to increase his chances of being granted a visa by claiming that he had property in Zimbabwe and "substantial financial investments" when in fact the property had been sold and the claimed investment was very small; and
- (b) the husband's claim in his visa application to have been a "business advisor". When asked by the Authority to explain this he justified the claim by saying that he had given friends in South Africa advice about building "entertainment areas" in their homes. When asked to clarify, the husband could provide no sensible reason why giving advice about how to complete minor home renovations related to his claim to be a "business advisor".

[114] The timing and nature of these false assertions do not suggest that they were made in an effort to escape a genuine situation of harm and nor was this claim ever made by the husband. The Authority finds that the false information provided to the New Zealand authorities in the context of his visa application simply indicates a willingness on the husband's part to provide false information when he considers it will advance his desired ends.

### **CONCLUSION ON CREDIBILITY**

[115] Considered cumulatively, the Authority finds that the above credibility concerns leads it to conclude that the core elements of the account given by the appellants, namely the October 2005 border incident and the November 2005 beach incident (and subsequent harassment) are not credible. The facets of each of the appellant's claims that rest on those factual grounds need not therefore be considered further.

[116] Notwithstanding the withdrawal of the psychological report addressing aspects of the wife's oral evidence, in making the credibility findings above the Authority has carefully considered the oral submissions of the appellants and counsel about the wife's inability to recall details of some parts of her evidence. These submissions were made particularly in relation to her evidence as to travel between South Africa and Zimbabwe during 2005. The Authority accepts the wife's assertion that she cannot accurately recall the details of all the trips she made during that year and no adverse credibility findings have been made in relation to her inability to do so.

[117] With regard to the adverse credibility findings made above however, the Authority has weighed the general assertions by the appellants and counsel that the wife has memory problems against observations of the wife giving detailed oral evidence over two days of the hearing and her previous evidence given in statements and recorded from RSB interviews. As regards the credibility concerns identified above (for example, the previous omission of information about the murder of the mother and children and mobile evidence about subsequent harassment), no submissions were made that they arose specifically as a result of memory problems and nor are they the kinds of discrepancies which could be sensibly explained by memory deficiency. The relevant concerns with her evidence, where they arise, are not the result of difficulties in recalling genuine events but are due to a fabricated account which has evolved in an effort to secure refugee status and which has, at times, been recalled incorrectly in subsequent examination because it is not true.

[118] This decision now turns to consider any remaining grounds for the appellants' respective claims to refugee status that are accepted by the Authority.

## **WHETHER OR NOT THE WIFE AND NN HAVE A WELL-FOUNDED FEAR OF BEING PERSECUTED**

### Zimbabwe

[119] A component of the wife and NN's claims at the RSB, and in counsel's submissions on appeal, was that the manner in which they had lost citizenship in Zimbabwe supported a finding that they had a well-founded claim to refugee status. In opening submissions for the wife, counsel argued that the involuntary nature of her surrender of Zimbabwean citizenship, accompanied by her fear of living in South Africa (where she currently holds citizenship) has led to a situation where she is now *de facto* stateless. In response, the Authority expressed a preliminary view (based on the evidence in the file) that the country of nationality, and therefore the country of reference for determining whether the wife and NN have a well-founded fear of being persecuted, is South Africa. Both appellants are nationals of South Africa and confirm that they have South African passports and full citizenship rights. Counsel conceded the point with the proviso that he wished to maintain the possibility of revisiting it in submissions before the determination of the appeal.

[120] No further submissions on this point have been received. The matter is not



one therefore that requires any further consideration.

[121] This decision now turns to consider whether the wife and NN have a well-founded fear of being persecuted in South Africa, the country of their nationality.

### South Africa

[122] Whether a particular appellant is at risk of persecution for a Convention reason is a forward looking test; the decision-maker must undertake an assessment of the future risk to the person. Past persecution is not a prerequisite to refugee status. In some cases, however, past experience may be indicative of the fate of a person upon their return; see *Refugee Appeal No 71404* (29 October 1999).

[123] Persecution has been defined by the Authority as "the sustained or systemic denial of basic or core human rights such as to be demonstrative of a failure of state protection"; Hathaway *The Law of Refugee Status* (Butterworths, Toronto, 1991) pp104-108, as adopted in *Refugee Appeal No 2039* (12 February 1996) and *Refugee Appeal No 74665/03* [2005] NZAR 60.

[124] It has long been established in New Zealand refugee jurisprudence that the assessment of whether someone is at risk of being persecuted is an objective one. As stated by the Authority in *Refugee Appeal No 72668/01* (5 April 2002):

"It is quite clear that the adjectival phrase "well-founded" qualifies both the word "fear" as well as the word "persecuted" and thus decisively introduces an overriding objective test for determining refugee status. An unbroken line of case law establishes that the focus of the Convention is not on the facts as subjectively perceived by the refugee claimant, but on the objective facts as found by the decision-maker."

[125] This point is made because counsel repeatedly submitted that the relevant question to be decided is the fear of persecution that these appellants subjectively feel about South Africa. For the reasons given above, that submission is rejected. To accept that a subjectively perceived fear of harm is a "well-founded fear" of persecution would be to breach the fundamental principle that well-foundedness is to be assessed objectively; see *Refugee Appeal No 71404* at [79].

[126] This decision turns on whether, on an objective assessment, the female appellants face a real chance of being persecuted upon return to South Africa. Put another way, the appropriate question to be considered for each of the female appellants is whether, considering the totality of the evidence, an individual, having

all of the appellants' characteristics, would face a real chance of serious harm for a Convention reason if she were sent back to South Africa; see *A v RSAA* (CIV 2004-4-4-6314, 19 October 2005, HC, Auckland, Winkelmann J) at [38].

[127] It will be recalled that the wife and NN claim that they are at risk of serious harm in South Africa for the following reasons:

- (a) they may suffer incidents of violent crime and will not be able to get police protection;
- (b) NN, as a young woman, will have a heightened risk of being the victim of violent crime, possibly rape, which NN and the wife will be powerless to prevent; and
- (c) the appellants will suffer discrimination in employment and accessing goods and services on account of their ethnicity and former nationality.

Risk of future violent crime (claims (a) and (b))

[128] There is no evidence before the Authority which establishes that the wife or NN would be at risk of future violent attacks in South Africa to the real chance level. The appellants and counsel both referred to the high rates of violent crime in South Africa and argue that this, accompanied by their subjective fear of crime, establishes a well-founded fear of being persecuted. In support of this contention, counsel submitted a table of crime statistics which outlines the statistics for crime in South Africa for the years 2001-2006 (Institute for Security Studies, *South African Crime Statistics By Category: 2006*, accessed at [www.issafrica.org](http://www.issafrica.org)). Counsel made particular reference to the statistics for rape which indicate that in the 2005/2006 year there were 54,926 rapes recorded in South Africa (population approximately 45.3 million). Notwithstanding what is unarguably a bleak statistic, it falls well short of establishing that the female appellants before the Authority are at risk of violent crime at the real chance level.

[129] Further, as noted above, the evidence must establish both that there is a risk of serious harm (via a sustained or systemic violation of a core human right) and a failure of state protection. Absent one, a claim to refugee status cannot succeed.

[130] It is a well-established principle of refugee law that nations are presumed capable of protecting their citizens. Clear and convincing evidence is required to

demonstrate a state's inability to protect its citizens; see *Refugee Status Appeal No 523/92* (17 March 1995). This principle has particular application where a refugee claimant comes from an open democratic society, such as South Africa, with a developed legal system which makes a serious effort to protect its citizens from harm. The appellants have not provided clear and convincing evidence which demonstrates South Africa's inability to protect its citizens to the threshold required by the Refugee Convention. In the Authority's view, the presumption of state protection applies to the appellants' circumstances in South Africa and they have failed to rebut this presumption.

[131] For the sake of completeness, the Authority notes that even if the claimed beach incident had occurred (and it is not accepted that it did), there is no Convention reason relevant to the incident.

#### Discrimination (claim (c))

[132] The wife and NN have also claimed that, should they return to South Africa, they will be discriminated against in employment and accessing goods and services.

[133] In support of this contention the wife recalled that she had been turned down for one job in South Africa because "I was Zimbabwean and didn't have South African experience". The wife also told the Authority that at the job she did have in South Africa the other workers did not really interact with her but mostly spoke in the Afrikaans language. In re-examination she stated that as part of the job she was expected to clean and make tea which she found demeaning. Concerning other instances of discrimination suffered, she spoke of two occasions on which she directly experienced differential service in food outlets because of her nationality or ethnicity. For example, when she went to a restaurant with her eldest daughter, they were not offered a tray of condiments which was offered to other diners. She also told the Authority she was once sexually harassed (verbally) by a black South African man in a shopping mall.

[134] For her part, NN also claimed to have been discriminated in finding employment. She states that she was never refused work on the stated grounds of her nationality but she believes that that was the cause of the rejections. Notwithstanding her belief, of between 10-20 jobs NN applied for over a period of approximately nine months, she was given four interviews. She was also employed on a part-time basis by one company for nine months between January

and September 2005. As to other areas of discrimination, NN recounted incidents where she was in a public area and experienced verbal sexual harassment by men who wanted to get her phone number or ask her out. During one of these incidents, a man grabbed her hand.

[135] While these incidents are unfortunate and undoubtedly unpleasant for the female appellants, they fall well short of being a “sustained or systemic denial of basic or core human rights such as to be demonstrative of a failure of state protection”. It is well established in refugee law that persecution must be distinguished from discrimination which is not sufficient to establish a case for refugee status. As stated in *Refugee Appeal No 71404* (29 October 1999):

"It is important to bear in mind that discrimination *per se* is not enough to establish a case for refugee status. A distinction must be drawn between a breach of human rights and persecution, a distinction the Authority has repeatedly emphasised in its jurisprudence. See for example *Refugee Appeal No 30/92 Re SM* (26 November 1992) 22; *Refugee Appeal No 2039/93 Re MN* (12 February 1996) 15-16 and *Refugee Appeal No 70618/97* (30 June 1998) 22."

[136] Even when viewed cumulatively, and taking into account all the characteristics of the female appellants, the Authority finds that their claim of discrimination falls short of the “being persecuted” threshold by a demonstrable margin.

### Family unity

[137] For the sake of completeness, the Authority notes counsel’s submission that Article 23 of the International Covenant on Civil and Political Rights (ICCPR) is relevant to the wife and NN’s claims. Although this submission was not traversed in detail, the Authority understands counsel’s submission to have been that the right to live together as a family unit is covered by Article 23 and should therefore be upheld for these appellants by the South African government.

[138] No evidence has been put before the Authority to suggest that South Africa has violated that right in any way. In fact, as indicated by the Authority during the hearing, pursuant to the Immigration Act 2002 of South Africa the husband is, *prima facie*, entitled to permanent residence on the basis that his wife is a citizen of South Africa. The relevant part of Section 26 of that Act provides:

“Direct residence  
26. Subject to section 25, the *Department* shall issue a permanent residence permit to a *foreigner* who ...  
(b) is the *spouse* of a *citizen* or *resident*, provided that –  
(i) the *Department* is satisfied that a good faith spousal relationship exists;

and  
(ii) such permit is issued on condition that it shall lapse if at any time within three years from its *application* the good faith spousal relationship no longer subsists, save for the case of death; ...

[139] The Authority therefore rejects counsel's submission that any argument can be advanced on the basis of Article 23 of the ICCPR. The Authority notes that even in the absence of such a provision, the argument advanced on the basis of Article 23 of the ICCPR would not, without further evidence satisfy the "being persecuted" threshold in the Refugee Convention. It is not necessary to address the argument further in this decision because counsel's submission is rebutted by the South African legislation and by the appellants' concession that the husband was issued with a permit to remain in South Africa in 2005 and could apply for another one if he were to return there.

#### **SUMMARY OF FINDINGS FOR THE WIFE AND NN**

[140] Having examined each of the strands of the wife and NN's claims separately and cumulatively, the Authority finds that none of them on their own or taken together satisfy the Convention requirement that there be a well-founded fear of being persecuted. The Authority has also separately considered whether a person having all of the characteristics of the respective female appellants, in the particular circumstances they have identified, would face a real chance of being persecuted in South Africa. For the reasons given, the Authority has concluded that the answer is "No". The wife and NN do not face a real chance of being persecuted should they return to South Africa.

[141] Therefore, the first issue framed for consideration is answered in the negative for the wife and NN and the second issue as framed does not arise for consideration.

#### **DOES THE HUSBAND HAVE A WELL-FOUNDED FEAR OF BEING PERSECUTED IN ZIMBABWE?**

[142] It will be recalled that the Authority rejects the appellants' account of the incident at the border in October 2005 which the husband claims to have put him at risk of being persecuted in Zimbabwe. The Authority therefore finds that the circumstances faced by the husband on return to Zimbabwe are that he would be returning as a Zimbabwean citizen, with a valid Zimbabwean passport and with no profile with the Zimbabwean authorities.

[143] Counsel has submitted that the husband has a well-founded fear of being persecuted in Zimbabwe because he may have to return there as a failed asylum seeker. In opening written submissions, counsel has suggested that returning as a failed asylum seeker “may well be an imprisonable offence at the very least”. No further specific information was presented in support of the contention in those opening submissions and the Authority is not aware of any.

[144] Following the hearing, counsel submitted to the Authority a copy of the United Kingdom (UK) Court of Appeal case, *AA (Zimbabwe) v Secretary of State for Home Department* [2007] EWCA Civ 149 (6 March 2007) (“the Court of Appeal case”) which was a test case in which the Secretary of State wished to confirm a finding on the facts that involuntary returnees to Zimbabwe from the United Kingdom do not, by that fact alone, face a real risk of torture or of inhuman or degrading treatment. It is not intended to traverse the decision of the Court of Appeal (or the previous Asylum and Immigration Tribunal (AIT) determinations which led to the test case being taken) in detail in this decision. It is sufficient to record that the Court of Appeal sent the matter back to the AIT for a reconsideration of the country guidance given in *AA (Risk for involuntary returnees) Zimbabwe CG* [2007] UKAIT 00061 and additional evidence submitted by the parties.

[145] There is nothing in the Court of Appeal case which establishes that an individual with the characteristics of this appellant, that is a person without a profile and with a valid Zimbabwean passport, would be at risk of serious harm on return to Zimbabwe. There were no further submissions from counsel on this point accompanying the submission of the Court of Appeal case. Neither is the Authority aware of any other information which would support the contention that a documented citizen with no profile would be at risk of serious harm on return to Zimbabwe. The submission that he is at risk of being persecuted on return as a failed asylum seeker is therefore rejected. The Authority finds that there is no real chance of the husband being subjected to serious harm for reason of being a failed asylum seeker should he now return to Zimbabwe.

[146] This view is confirmed by the recent decision of the AIT and in its decision of *HS (returning asylum seekers) Zimbabwe CG* [2007] UKAIT 00094 (9 November 2007) in which it reconsiders the situation of Zimbabwe returnees from the UK, as directed by the Court of Appeal case. In its decision, the AIT reconfirms its finding that failed asylum seekers do not, without additional risk

factors, face a well-founded risk of being persecuted or seriously ill-treated on return to Zimbabwe.

[147] For the sake of completeness, the Authority notes that there is no credible evidence before it to establish that the husband has a well-founded fear of being persecuted in South Africa, should he now return to live there with his wife and family.

[148] There is no other credible information before the Authority which supports a finding that the husband has a well-founded fear of being persecuted for any other reason should he now return to Zimbabwe.

[149] Therefore, the first issue framed for consideration is answered in the negative for the husband and the second issue as framed does not arise for consideration.

## **CONCLUSION**

[150] For the reasons mentioned above, the Authority finds the appellants are not refugees within the meaning of Article 1A(2) of the Refugee Convention. Refugee status is declined to all three appellants. The appeals are dismissed.

"B A Dingle"  
B A Dingle  
Member