

**AT AUCKLAND**

<b>Appellant:</b>	<b>AT (Zimbabwe)</b>
<b>Before:</b>	S A Aitchison (Member)
<b>Counsel for the Appellant:</b>	D Manning
<b>Counsel for the Respondent:</b>	No Appearance
<b>Date of Hearing:</b>	4, 5 May and 11 December 2015
<b>Date of Decision:</b>	21 December 2015

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**DECISION**

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[1] This is an appeal against a decision of a refugee and protection officer, declining to grant refugee status or protected person status to the appellant, a citizen of Zimbabwe.

**INTRODUCTION**

[2] The appellant is a citizen of Zimbabwe in her early 30s, who fears serious harm at the hands of state and non-state actors owing to her bisexuality and events that have stemmed from this. The central issue to be resolved in the appeal is whether the appellant holds a well-founded fear of being persecuted.

[3] Given that the same claim is relied upon in respect of all limbs of the appeal, it is appropriate to record it first.

**THE APPELLANT'S CASE**

[4] The account which follows is a summary of that given by the appellant at the appeal hearing. Two witnesses, AA and BB, also gave evidence at the hearing. The evidence is assessed later.

[5] The appellant, of Ndebele ethnicity, was born in Z, Zimbabwe. She is the eldest of five children, having three younger brothers and one younger sister. She and her siblings were brought up primarily by their grandmother, as their mother travelled for business and was home only intermittently. Their father passed away in 2000.

*Awareness of sexual orientation and early relationships*

[6] The appellant became aware that she was attracted to both sexes at an early age. By secondary school she considered herself to be bisexual, with a preference for females. In 2001, the appellant met a girl called CC. CC was open about her sexuality and people would identify her as a lesbian by the way she dressed and acted. After being friends for approximately a month, CC proposed that she and the appellant enter into a romantic relationship. They belonged to a group of friends at school that identified themselves as either lesbians or bisexual. Such relationships were not acceptable in the appellant's village and the girls were harassed by groups of men who were aware of their sexuality. The appellant ceased attending secondary school at the end of the first year, as her mother could not afford to fund her education.

[7] On 14 April 2002, while the appellant and CC were collecting firewood in the village, they were approached by two men who harassed them. They were referred to as lesbians and bisexuals, and beaten with branches of wood. The girls ran in different directions, and the appellant never saw CC again. She later learned that she had been stabbed and killed by these men.

[8] The appellant began working as a housemaid and continued to live with her grandmother. In January 2004, she met a young woman known as DD, and formed a romantic relationship with her. The appellant soon expressed her strong feelings for DD, who later reciprocated these feelings. They met approximately three times a week at the market, and intermittently at each other's homes. However, the relationship ended in March 2004, when a group of men attacked the appellant, DD, and another friend, while they were walking between their neighbouring villages. The men cursed them for being lesbians and bisexuals, and threatened to rape them to prove to them that they were women. The girls ran in different directions and the appellant never saw DD again.

*Relationship with FF*

[9] In February 2005, the appellant met a man called FF. She had met him while he was selling goods on the roadside, and they began to meet regularly. Soon after they met, he told the appellant that he loved her. On the second occasion that they slept together, the appellant fell pregnant. She had feelings for him, but she did not feel as strongly for him as she had for her previous female partners.

[10] On 21 January 2006, the appellant gave birth to her first son, who subsequently lived with her mother. FF visited the appellant and his son between business trips. Later the appellant confessed to him that she was bisexual and they broke up. FF then disclosed the appellant's sexuality to her family, who had not known previously.

[11] In March 2007, the appellant became pregnant with the couple's second child after a one-night reunion.

*Rape of appellant*

[12] In March 2007, on her way to a medical clinic for an examination, the appellant was approached by two men. They told her that she would be taught to act like a woman, and one man held her down while the other raped her. The appellant recognised one of the men as being one of the men who had harassed and beaten her on the occasion when DD went missing.

*Living in South Africa*

[13] In March 2007, the appellant moved to South Africa, and lived in Johannesburg until July 2014 when she travelled to New Zealand. In South Africa, she became self-employed, selling second-hand clothing and goods in various townships. In 2008, she fled to a local police station after being chased amidst xenophobic attacks. She moved to another area of Johannesburg after this event.

[14] While living in South Africa, the appellant attended a Christian church and made a friend there. However, this friendship ended when the appellant disclosed her bisexuality to her. The appellant obtained a false South African identity card, which she used to obtain a South African passport. She then made several return trips back to Zimbabwe.

[15] The appellant gave birth to her second son on 25 December 2007. Two months later, she sent him by taxi to live with her mother in Zimbabwe.

[16] In August 2013, the appellant began working as a cashier in a gaming casino. In November 2013, when returning home from the casino, she was beaten by a group of men who accused her of associating with a group of lesbians that frequented the casino.

### *Living in New Zealand*

[17] The appellant arrived in New Zealand on 11 July 2014 and claimed asylum at the airport. She made a claim for refugee status on 28 July 2014. Several weeks prior to her interview with the Refugee Status Branch (RSB) on 25 August 2014, the appellant was diagnosed with having HIV. The RSB declined her claim on 20 November 2014.

[18] The appellant has made attempts to contact women through a dating website in New Zealand, and since June 2015 has been regularly attending the ABC centre. She has formed relationships with several of the staff members there and is gaining a better understanding of her gender identity.

### **Evidence of AA**

[19] AA holds a diploma in youth work and is the support coordinator for ABC centre. Her role includes providing support to young gender diverse persons who contact the centre. The centre receives approximately 40 persons a month. AA works through guests' "stories and journeys" in order to assist them to understand their sexuality and gender identity. She also refers individuals to services, such as to counselling and for medical treatment.

[20] AA met the appellant in June 2015 and has come to know her well. Their first meeting was very intense, because the appellant disclosed her family history and a prior sexual assault in Zimbabwe.

[21] The appellant has been visiting the centre on a fortnightly basis and has enquired about the concept of gender identity with AA. On one occasion, AA explained the concept of a gender spectrum to the appellant, including the fact that our biological bodies do not always match our gender identities. As she did so, she noted that it appeared that a "light bulb had gone off in [the appellant's] head". The appellant told her that she felt as if she had two people living inside her, both

a boy and a girl. Since this discussion, the appellant has been more relaxed with her and has requested lesbian videos to view, and has discussed their content with AA.

[22] AA explained that a person's sexuality is not static. She considers a person to be "lucky" if they maintain a singular attraction throughout a lifetime. The gender spectrum can be likened to a sliding scale and there are "no set rules or tick boxes". AA believes that, as individuals learn new vocabulary for their feelings, their identity grows clearer.

### **Evidence of BB**

[23] BB is the education director at ABC centre, and has been in this role since March 2014. She holds a master's degree in art and design, and her specialist topic was the experience of gender minorities using collaborative arts practice.

[24] In her role at ABC centre, BB oversees the education programme and resources of the centre. She delivers diversity workshops in Auckland high schools, and develops and delivers professional development workshops for teachers, service providers and community organisations working with lesbian, gay, bisexual, transgender and intersex (LGBTI) young people. She also provides expert advice and consulting services to government departments, including the Ministry of Education, Ministry of Social Development and Ministry of Health. She has been involved in the preparation of the updated Sexuality Education Guidelines published in 2015 by the Ministry of Education.

[25] BB met the appellant in mid-2015, and has come to know her well over the course of her frequent visits to the centre. She has spoken to the appellant about her feelings and has addressed her questions. The appellant has expressed to her that she feels that she is a boy and a girl. She explained that, upon entering puberty in Zimbabwe, she wanted to cut off her breasts and to stop her periods.

[26] BB considers that the appellant has experienced gender dysphoria, with her body changing in ways that she does not approve of. As the appellant has grown up in a homophobic culture, she has little awareness of gender diversity. When BB explained the concept of gender identity to her, she noted the appellant was "full of terrified excitement as she realised that it was okay to feel like a boy and a girl at the same time".

[27] BB spoke about the stigma and discrimination faced by LGBTI persons globally, a predicament heightened for individuals living in repressive regimes such as Zimbabwe. BB is aware of the homophobic climate in Zimbabwe, as it is one she became acquainted with while volunteering at Amnesty International. This experience inspired her to write a letter to President Mugabe campaigning against his treatment of LGBTI persons in that country.

[28] BB considers that it is a terrifying prospect for a person to disclose their sexual orientation in a hetero-normative society. She states that LGBTI persons will choose what and when to disclose to others, depending on the cultural context. She considers that the appellant has regarded her own journey to be an unsafe one, and her story to be a “sinful narrative”. The appellant expressed to her that she “almost wished” that she had a girlfriend, so that she could prove her identity to the Tribunal, but she did not feel ready for a relationship.

### **Material and Submissions Received**

[29] On 24 April 2015, the Tribunal received evidence from counsel in support of the appeal, including a medical history for the appellant, and a psychological assessment report for the appellant from Amanda McFadden, Consultant Clinical Psychologist, dated 21 April 2015.

[30] On 28 April 2015, counsel tendered an amended copy of Amanda McFadden’s report (with a paragraph on mobile features of the appellant’s evidence omitted from the previously filed report), and on 29 April 2015, filed submissions and country information in support of the appeal.

[31] On 1 May 2015, the Tribunal submitted three country reports to counsel and the appellant for consideration.

[32] At the hearing on 6 May 2015, the appellant tendered a copy of a business card for “Auckland Queers 20s and 30s”, which she had been provided by counsel, and counsel provided three legal articles on the topic of sexual orientation.

[33] The hearing on 6 May 2015 was adjourned after the appellant reported during a break in proceedings that she had overdosed on prescribed medication. An ambulance was called and the appellant was hospitalised.

[34] Subsequent to the hearing, the Tribunal has sought updates from counsel on the appellant’s condition, her ongoing treatment, and revised indications as to

when the appellant would be fit to resume her hearing. The Tribunal also sought a copy of the appellant's hospital admission records.

[35] Counsel has corresponded with the Tribunal, and provided a letter dated 27 May 2015 from a consultant psychiatrist, stating that, on 12 May 2015, the mental health intake team had referred the appellant to "home-based treatment". The consultant psychiatrist assessed the appellant on 15 May 2015, and diagnosed her with "major depressive disorder...of moderate severity without psychotic features, and probably post-traumatic stress disorder", which he considered needed to be clarified with further history and assessment.

[36] On 16 November 2015, counsel filed a discharge report for the appellant from the XYZ Hospital, which notes in the clinical summary "mixed staggered OD Venlafaxine, Citalopram, Iron and Paracetamol". It records that the appellant's paracetamol level was "below treatment line" and that her "low grade tachy on arrival settled". It records that the appellant was observed for 13 hours then discharged with a Venlafaxine and Zopiclone dose.

[37] On 23 November 2015, counsel agreed to the hearing reconvening on 11 December 2015.

[38] On 4 December 2015, counsel filed an updated statement from the appellant (2 December 2015), and statements for AA (2 December 2015) and BB (2 December 2015).

[39] At the hearing on 11 December 2015, counsel submitted a copy of the Code of Conduct for Expert Witnesses from Schedule 4 of the Judicature Act 1908 and some brochures on gender and sexuality provided from the ABC centre.

[40] The Tribunal also has before it the RSB file, of which the appellant has a copy.

## **ASSESSMENT**

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

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

- (b) a protected person under the 1984 Convention Against Torture (section 130); and
- (c) a protected person under the 1966 International Covenant on Civil and Political Rights (“the ICCPR”) (section 131).

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

### **Credibility**

[43] The appellant’s evidence on matters at the heart of her claim, including her relationship history, history of trauma, and life in South Africa, bore inconsistencies and was mobile in areas. There is also a report from Dr McFadden, tasked with performing a psychological assessment of the appellant, who observed inconsistencies in the appellant’s self-reports and found, due to invalidity in the test results, that no conclusive opinion could be drawn as to her state of psychological health.

[44] Notwithstanding these features, the Tribunal has identified a hard core of acceptable evidence within the body of the appellant’s testimony. Her account of her evolving sexuality and gender identity during her middle childhood and early adolescence has been reported consistently throughout her claim and the appeal process. Her evidence of her strong attraction to women has been consistently clear, as has been her predilection to dress in a masculine fashion, and her pubescent struggle with her changing body. In both her statement and before the Tribunal, she has claimed that she wanted to cut off her breasts and find a way to stop her menstrual periods. Similar feelings of self-brutalisation have also been reported to staff at ABC centre. The appellant’s evidence of her male partner disclosing her sexual orientation to her family, and of herself disclosing this information to select individuals, was also clearly and consistently portrayed. Indeed, as recommended in the United Nations High Commissioner for Refugees (UNHCR) Guidelines on sexual orientation and gender identity claims, exploring elements around the appellant’s feelings of difference, shame and disclosure has distilled a stronger picture of the appellant’s sexual orientation and gender identity for the Tribunal; see UNHCR *Guidelines on International Protection No 9: Claims to Refugee Status Based on Sexual Orientation and/or Gender Identity Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees* (23 October 2012) (“UNHCR Guidelines”) para [62].



[45] There have been inconsistencies in the appellant's evidence as to her feelings for men. Indeed, while living in South Africa, the appellant set up a personal profile on a dating website and a Facebook page that both noted that she was looking for men. However, this does not necessarily signal a lack of veracity. Rather, the Tribunal is satisfied that these inconsistencies reflect her evolving self-identification as being on a continuum, which may include episodes of exclusive and non-exclusive attraction to the same or the opposite sex; see, here, UNHCR Guidelines, para [9]. The strong thread of the appellant's evidence is that she is bisexual, but has developed a clear preference towards females, rather than towards males. As explained in the UNHCR Guidelines at para [10]:

*"Bisexual describes an individual who is physically, romantically and/or emotionally attracted to both men and women. The term bisexuality tends to be interpreted and applied inconsistently, often with a too narrow understanding. Bisexuality does not have to involve attraction to both sexes at the same time, nor does it have to involve equal attraction to or number of relationships with both sexes. Bisexuality is a unique identity, which requires an examination in its own right. In some countries persecution may be directed expressly at gay or lesbian conduct, but nevertheless encompass acts of individuals who identify as bisexual. Bisexuals often describe their sexual orientation as 'fluid' or 'flexible'...."*

[46] Further, as stated by G Kassisieh in *From Lives of Fear to Lives of Freedom: a Review of Australian Refugee Decisions on the Basis of Sexual Orientation* Gay and Lesbian Rights Lobby (2008) at p2:

*"Sexual attraction, behaviour and identity will not always neatly correlate and may sometimes seem contradictory or not easily classifiable."*

[47] There is also the matter that the appellant failed to disclose her sexuality at an early stage during her interview with an immigration officer on arrival in New Zealand on 12 July 2014. At this time, she claimed that persons had sought to kill her because of "the gay thing" but later clarified "I am not gay but my friends are...". The appellant's explanation for this to the Tribunal was that she did not trust officials and was afraid. The appellant has also expressed shame about her bisexuality to the Tribunal. The Tribunal accepts that shame and internalised homophobia can affect an appellant's capacity to present their case in a forthright manner.

[48] As stated by the UNHCR Guidelines at para [59]:

*"...Where the applicant is in the process of coming to terms with his or her identity or fears openly expressing his or her sexual orientation and gender identity, he or she may be reluctant to identify the true extent of the persecution suffered or feared...."*

[49] Support for the appellant's claim that she was reluctant to disclose her bisexual self-identification at the time of her arrival in New Zealand to immigration officials can be found in her personal diary, which was found in her possession upon arrival at the airport by immigration officials. The appellant's fear and evident turmoil, concerning her coming to terms with her gender identity and sexuality, are apparent from the thoughts and expressions clearly expressed in this diary. Some of these expressions include (verbatim): "[in] the mighty name of Jesus Christ I pray... relieve me from this dirty thoughts, create in me a new heart and renew this spirit inside me" and "...my soul and my body be cursed...".

[50] Further candid evidence of the appellant's evolving gender identity was given by the staff at ABC centre, who candidly described what they called "a light bulb moment", after they had explained to the appellant the concept of gender identity and had given her reassurance that gender identity and its expression takes many forms and may be fluid and flexible.

[51] While still troubled by certain aspects of her evidence in relation to some of her past experiences, having weighed all the evidence in this appeal and giving allowance for the effect of trauma on memory, the Tribunal is left in doubt on these matters. In accordance with the principles which apply in the refugee and protection jurisdiction, the appellant is entitled to the benefit of the doubt.

[52] In any event, having seen and heard from the appellant at length over many days, and noting all of the evidence given in support of the appeal to date, the Tribunal has no doubt that the appellant is bisexual as she claims to be.

### **Facts as Found**

[53] The appellant is a young Zimbabwean woman in her early 30s, of Ndebele ethnicity. She has two sons who live with family in Zimbabwe. She identifies as bisexual, with a stronger preference for women. She has had several relationships with girls as a youth, which ended tragically. She had a relationship with the father of her children in the mid-2000s, and, while pregnant with her second child, was raped in a homophobic attack. While she has had friendships with women since this time, she has not entered into any romantic relationships with them. She would like to have an intimate relationship with a woman in the future, but does not yet feel ready for this.

[54] The appellant lived in South Africa from 2007 to July 2014 and arrived in New Zealand in July 2014. Since her arrival, she has made some contact with

women through an online dating service and regularly attends the ABC centre and interacts with staff there, who have supported her in her path to understanding and accepting her sexuality and gender identity. She was diagnosed with HIV-positive in 2014.

### **The Refugee Convention**

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

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

[56] 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.”

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

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

### **Assessment of the Claim to Refugee Status**

[58] For the purposes of refugee determination, “being persecuted” has been defined as the sustained or systemic violation of core human rights, demonstrative of a failure of state protection – see *Refugee Appeal No 74665/03* (7 July 2004) at [36]-[90]. Persecution can be seen as the infliction of serious harm arising from breaches of human rights, coupled with the absence of state protection – see *Refugee Appeal No 71427* (16 August 2000), at [67].

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

to a remote or speculative, chance of it occurring. The standard is entirely objective – see *Refugee Appeal No 76044* (11 September 2008), at [57].

*Objectively, on the facts as found, is there a real chance of the appellant being persecuted if returned to Zimbabwe?*

[60] The Constitution of Zimbabwe does not protect a person's gender identity or sexual orientation. In fact, consensual homosexual acts between men are criminalised in the country; see Section 73 of the Criminal Law (Codification and Reform) Act, which came into force in July 2006.

[61] Although the criminal law does not explicitly criminalise same-sex sexual conduct between women, the mere existence of laws criminalising homosexual acts between men impacts societal perceptions about "female" sexuality and prevents women from living openly as LGBTI persons.

[62] This is reflected by the conduct of the police. The criminal law is enforced by the Zimbabwean police and there have been widespread arrests, detention and ill-treatment of not just non-heterosexual males, but also other LGBTI persons; see D Villarreal "Zimbabwe President Mugabe Denounces UK Support for Pro-Gay Constitutional Protections" *International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA)* (28 February 2012); G Pswarayi "Gay in Zimbabwe: Arrests, Limited Access to Health Care" *Global Press Journal* (4 December 2009) ("Global Press Journal article"). Arrests have included high school girls; see "Zimbabwe High School Girls Arrested Over Homosexuality" *The Zimbabwe Mail* (3 August 2010). This news article also states that those arrested on the basis of their sexual orientation have also been prosecuted and convicted.

[63] In February 2003, 45 teenagers were expelled from a high school in Zimbabwe on suspicion that they were lesbians. In 2010 and early 2011, twenty school girls were arrested and questioned by the police for the same reason. The girls were not entitled to legal representation and their families were not contacted; see Gays and Lesbians of Zimbabwe (GALZ) *Report on Discrimination Against Women in Zimbabwe Based on Sexual Orientation and Gender Identity: Submitted to the Committee on the Elimination of Discrimination Against Women for the 51<sup>st</sup> Session, to be Held in Geneva* (6 January 2012) at p6.

[64] Further state repression of non-heterosexual identities results from attacks on civil society groups campaigning for the rights of LGBTI people in Zimbabwe. The police have conducted numerous raids over the past decade on the offices of

GALZ, the only organisation in the country representing LGBTI persons. In 2010, police raided the home of the director, and the GALZ office. Police searched the office and personal email accounts, seized documents and computers, and arrested two staff members. Two staff members were charged with “undermining the authority” of President Mugabe. They were also beaten while in police custody. The director was arrested and detained on several other occasions, and other staff were arrested and detained in two separate incidents in 2011; see *GALZ Alert: Detention, Harassment and Intimidation of GALZ Members* (1 April 2011); *GALZ Alert: Gays and Lesbians of Zimbabwe (GALZ) Raid and Arrests* (24 May 2010); Global Press Journal article.

[65] This legal backdrop, and police action, is indicative of prevalent homophobic attitudes in Zimbabwe. According to the Global Press Journal article, there is an “ingrained cultural, religious and political prejudice towards lesbians and gays”.

[66] J Moyo writes in “Persecuted Zimbabwean Gays Caught Up in Power Struggle” *Mail and Guardian* (28 May 2010):

“But in Zimbabwe’s deeply conservative society, homosexuality remains taboo and anti-gay sentiment is prevalent in religious circles. At open-air church sermons, it is not uncommon for ‘former gays’ to testify about how they had demons cast out of them, curing them of what many see as a disease.”

[67] President Mugabe himself has regularly used homophobic rhetoric and denunciations of homosexuality in public forums. He has referred to gays and lesbians as “worse than dogs and pigs”; see “Gay Rights Dismissed from Zimbabwe’s New Constitution” *The Zimbabwe Mail* (24 May 2010), and at an HIV and gender conference in Harare in May 2012, he declared that homosexuality would lead to the extinction of the human race; M Spencer “President Mugabe: Homosexuality Will ‘Lead to Extinction’” *Pink News* (25 May 2012). The government has encouraged citizen’s arrests of “gays” should they be seen in the streets, and the President called for the immediate arrest of anyone caught practicing homosexuality; see Global Press Journal article.

[68] Such attitudes manifest in discrimination against LGBTI persons. GALZ indicates that some LGBTI individuals have been evicted from their homes, fired from their jobs and denied employment on the basis of their sexual orientation; see *GALZ Report on Discrimination Against Women in Zimbabwe Based on Sexual Orientation and Gender Identity* (6 January 2012). They explain that:

“Many LBT people are unable to live openly because of their fear of stigma and discrimination. LBT people have been denied employment on the basis of their

sexual orientation; women have been denied custody, guardianship or access to their children on the basis of their sexual orientation.”

[69] Several sources, including the United States Department of State *Country Reports on Human Rights Practices for 2014: Zimbabwe* (25 June 2015) at pp51-52 and Z Ndebele “Zimbabwe: Sixteen Days of Activism Not for All, Say Police” *Inter Press Service (IPS)* (2 December 2010), report that, owing to social pressure, some families reportedly subjected their LGBTI members to “corrective” rape and forced marriages to encourage heterosexual conduct. Such crimes were rarely reported to police.

[70] As a consequence of such stigma, discrimination and ill-treatment, GALZ indicates that “most” LGBTI people in Zimbabwe live “underground”; GALZ *Sexual Orientation and Zimbabwe’s New Constitution* (22 April 2009). They also report that such individuals are frequently driven from their homes by violence or threats of violence.

### **Application to the Facts**

[71] It is apparent that, as a bisexual woman, the appellant may seek relationships with other females in the future in Zimbabwe. Consequently, against the backdrop of country information, there is a real chance that she will come to the attention of the authorities, who may arrest, detain and mistreat her. There is also a real chance that her bisexual relationships may become known to others in the community, who may subject her to harassment and assaults amounting to serious harm. The fact of her HIV-positive status may heighten the risk that, in the course of seeking medical treatment, her sexual orientation may become known. Such ill-treatment will interfere with her right to be free from cruel, inhuman or degrading treatment or punishment and to be free from arbitrary arrest and detention, in violation of Articles 7 and 9 of the ICCPR. Accordingly, the Tribunal finds that the appellant holds a well-founded fear of being persecuted upon return to Zimbabwe.

[72] As has been discussed above, the appellant has also been coming to terms with her gender identity while in New Zealand. It appears the appellant also questioned her gender identity while in Zimbabwe. It is important to note that issues concerning gender identity and sexual orientation should not be conflated (see UNHCR Guidelines, para 11). Therefore, the appellant's gender identity could be another reason that would give rise to a risk of her being persecuted if returned to Zimbabwe. Nevertheless, as the Tribunal has already found sufficient

grounds to recognise the appellant as a refugee due to the risk she faces of being persecuted on grounds of her sexual orientation (bisexual), the Tribunal does not need to explore this separate ground further.

[73] The first principal issue is answered in the affirmative.

*Is there a Convention reason for the persecution?*

[74] In *AC (Russia)* [2012] NZIPT 800151 at [79], the Tribunal re-affirmed its preference for the protected characteristics approach to the interpretation of the Convention ground of membership of a particular social group. Under this approach the group must be united by an innate or immutable internal defining characteristic, or a characteristic which is so fundamental to identity that the claimant ought not to be required to change it, or past association which is beyond their power to change. The appellant's bisexuality may properly be regarded as a characteristic which is so fundamental to her identity.

[75] The appellant's predicament is therefore contributed to by her membership of a particular social group, namely, bisexuals.

### **Conclusion on Claim to Refugee Status**

[76] The Tribunal finds the appellant is a refugee within the meaning of Article 1A(2) of the Refugee Convention. She is entitled to be recognised as a refugee under section 129 of the Act.

### **The Convention Against Torture**

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

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

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

"... any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It

does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.”

### **Conclusion on Claim under Convention Against Torture**

[79] Because the appellant is recognised as a refugee, she is entitled to the protection of New Zealand from *refoulement* to Zimbabwe. The recognition of the appellant as a refugee means that she cannot be deported from New Zealand to Zimbabwe; see Article 33 of the Refugee Convention and sections 129(2) and 164 of the Act. The exception to section 129 which is set out in section 164(3) of the Act does not apply. Therefore, there are no substantial grounds for believing the appellant would be in danger of being subjected to torture in Zimbabwe.

### **The ICCPR**

[80] Section 131 of the Act provides that:

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

...

(6) In this section, cruel treatment means cruel, inhuman, or degrading treatment or punishment.”

[81] By virtue of section 131(5):

“(a) treatment inherent in or incidental to lawful sanctions is not to be treated as arbitrary deprivation of life or cruel treatment, unless the sanctions are imposed in disregard of accepted international standards:

(b) the impact on the person of the inability of a country to provide health or medical care, or health or medical care of a particular type or quality, is not to be treated as arbitrary deprivation of life or cruel treatment.”

### **Conclusion on Claim under ICCPR**

[82] Again, because the appellant is recognised as a refugee, she is entitled to the protection of New Zealand from *refoulement* to Zimbabwe. For the reasons already given in relation to the claim under section 130 of the Act, there is no prospect of the appellant being deported from this country. Therefore, there are no substantial grounds for believing that the appellant is in danger of being subjected to arbitrary deprivation of life or to cruel, inhuman or degrading treatment or punishment in Zimbabwe. Accordingly, the appellant is not a person who requires recognition as a protected person under the ICCPR.



**CONCLUSION**

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

- (a) is a refugee within the meaning of the Refugee Convention;
- (b) is not a protected person within the meaning of the Convention Against Torture;
- (c) is not a protected person within the meaning of the Covenant on Civil and Political Rights.

[84] The appeal is allowed.

"S. A. Aitchison"  
S A Aitchison  
Member

Certified to be the Research  
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S A Aitchison  
Member