

**1218445 [2013] RRTA 460 (4 July 2013)**

**DECISION RECORD**

**RRT CASE NUMBER:** 1218445

**DIAC REFERENCE(S):** CLF2012/183010 CLF2012/199608

**COUNTRY OF REFERENCE:** Zimbabwe

**TRIBUNAL MEMBER:** Peter Murphy

**DATE:** 4 July 2013

**PLACE OF DECISION:** Melbourne

**DECISION:** The Tribunal remits the matter for reconsideration with the following directions:

- (i) that the first named applicant satisfies s.36(2)(a) of the Migration Act; and
- (ii) that the other applicants satisfy s.36(2)(b)(i) of the Migration Act, on the basis of their membership of the same family unit as the first named applicant.

Any references appearing in square brackets indicate that information has been omitted from this decision pursuant to section 431(2) of the *Migration Act 1958* and replaced with generic information which does not allow the identification of an applicant, or their relative or other dependent.

## STATEMENT OF DECISION AND REASONS

### APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration to refuse to grant the applicants Protection (Class XA) visas under s.65 of the *Migration Act 1958* (the Act).
2. The first and third applicants claim to be citizens of Zimbabwe and the second applicant claims to be a citizen of [Country 1], applied to the Department of Immigration for the visas on 4 September 2012 and the delegate refused to grant the visas on 14 November 2012.

### RELEVANT LAW

3. The criteria for a protection visa are set out in s.36 of the Act and Part 866 of Schedule 2 to the Migration Regulations 1994 (the Regulations). An applicant for the visa must meet one of the alternative criteria in s.36(2)(a), (aa), (b), or (c). That is, the applicant is either a person in respect of whom Australia has protection obligations under the 'refugee' criterion, or on other 'complementary protection' grounds, or is a member of the same family unit as such a person and that person holds a protection visa.

#### Refugee criterion

4. Section 36(2)(a) provides that a criterion for a protection visa is that the applicant for the visa is a non-citizen in Australia in respect of whom the Minister is satisfied Australia has protection obligations under the 1951 Convention Relating to the Status of Refugee as amended by the 1967 Protocol relating to the Status of Refugees (together, the Refugees Convention, or the Convention).
5. Australia is a party to the Refugees Convention and generally speaking, has protection obligations in respect of people who are refugees as defined in Article 1 of the Convention. Article 1A(2) relevantly defines a refugee as any 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, is unable or, owing to such fear, is unwilling to return to it.
6. Sections 91R and 91S of the Act qualify some aspects of Article 1A(2) for the purposes of the application of the Act and the regulations to a particular person.
7. There are four key elements to the Convention definition. First, an applicant must be outside his or her country.
8. Second, an applicant must fear persecution. Under s.91R(1) of the Act persecution must involve 'serious harm' to the applicant (s.91R(1)(b)), and systematic and discriminatory conduct (s.91R(1)(c)). Examples of 'serious harm' are set out in s.91R(2) of the Act. The High Court has explained that persecution may be directed against a person as an individual or as a member of a group. The persecution must have an official quality, in the sense that it is official, or officially tolerated or uncontrollable by the authorities of the country of nationality. However, the threat of harm need not be the product of government policy; it

may be enough that the government has failed or is unable to protect the applicant from persecution.

9. Further, persecution implies an element of motivation on the part of those who persecute for the infliction of harm. People are persecuted for something perceived about them or attributed to them by their persecutors.
10. Third, the persecution which the applicant fears must be for one or more of the reasons enumerated in the Convention definition - race, religion, nationality, membership of a particular social group or political opinion. The phrase 'for reasons of' serves to identify the motivation for the infliction of the persecution. The persecution feared need not be *solely* attributable to a Convention reason. However, persecution for multiple motivations will not satisfy the relevant test unless a Convention reason or reasons constitute at least the essential and significant motivation for the persecution feared: s.91R(1)(a) of the Act.
11. Fourth, an applicant's fear of persecution for a Convention reason must be a 'well-founded' fear. This adds an objective requirement to the requirement that an applicant must in fact hold such a fear. A person has a 'well-founded fear' of persecution under the Convention if they have genuine fear founded upon a 'real chance' of being persecuted for a Convention stipulated reason. A 'real chance' is one that is not remote or insubstantial or a far-fetched possibility. A person can have a well-founded fear of persecution even though the possibility of the persecution occurring is well below 50 per cent.
12. In addition, an applicant must be unable, or unwilling because of his or her fear, to avail himself or herself of the protection of his or her country or countries of nationality or, if stateless, unable, or unwilling because of his or her fear, to return to his or her country of former habitual residence. The expression 'the protection of that country' in the second limb of Article 1A(2) is concerned with external or diplomatic protection extended to citizens abroad. Internal protection is nevertheless relevant to the first limb of the definition, in particular to whether a fear is well-founded and whether the conduct giving rise to the fear is persecution.
13. Whether an applicant is a person in respect of whom Australia has protection obligations is to be assessed upon the facts as they exist when the decision is made and requires a consideration of the matter in relation to the reasonably foreseeable future.

### **Complementary protection criterion**

14. If a person is found not to meet the refugee criterion in s.36(2)(a), he or she may nevertheless meet the criteria for the grant of a protection visa if he or she is a non-citizen in Australia in respect of whom the Minister is satisfied Australia has protection obligations because the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the applicant being removed from Australia to a receiving country, there is a real risk that he or she will suffer significant harm: s.36(2)(aa) ('the complementary protection criterion').
15. 'Significant harm' for these purposes is exhaustively defined in s.36(2A): s.5(1). A person will suffer significant harm if he or she will be arbitrarily deprived of their life; or the death penalty will be carried out on the person; or the person will be subjected to torture; or to cruel or inhuman treatment or punishment; or to degrading treatment or punishment. 'Cruel or

inhuman treatment or punishment’, ‘degrading treatment or punishment’, and ‘torture’, are further defined in s.5(1) of the Act.

16. There are certain circumstances in which there is taken not to be a real risk that an applicant will suffer significant harm in a country. These arise where it would be reasonable for the applicant to relocate to an area of the country where there would not be a real risk that the applicant will suffer significant harm; where the applicant could obtain, from an authority of the country, protection such that there would not be a real risk that the applicant will suffer significant harm; or where the real risk is one faced by the population of the country generally and is not faced by the applicant personally: s.36(2B) of the Act.

### **Section 499 Ministerial Direction**

17. In accordance with Ministerial Direction No.56, made under s.499 of the Act, the Tribunal is required to take account of policy guidelines prepared by the Department of Immigration – PAM3 Refugee and humanitarian - Complementary Protection Guidelines and PAM3 Refugee and humanitarian - Refugee Law Guidelines – to the extent that they are relevant to the decision under consideration.

### **Member of the same family unit**

18. Subsections 36(2)(b) and (c) provide as an alternative criterion that the applicant is a non-citizen in Australia who is a member of the same family unit as a non-citizen mentioned in s.36(2)(a) or (aa) who holds a protection visa. Section 5(1) of the Act provides that one person is a ‘member of the same family unit’ as another if either is a member of the family unit of the other or each is a member of the family unit of a third person. Section 5(1) also provides that ‘member of the family unit’ of a person has the meaning given by the Regulations for the purposes of the definition. The expression is defined in r.1.12 of the Regulations to include a spouse and a child.

### **CLAIMS AND EVIDENCE**

#### *The Protection application and departmental file*

19. The applicants are a husband, wife and their [child]. Only the first applicant (the husband) made claims for protection, whilst the second and third applicants rely on their membership of the family unit of the first applicant.
20. The first applicant stated he was born in [year] in Harare, Zimbabwe, married the second applicant in [date] in Australia, and had a child in Australia in [date]. Copies of his marriage certificate and the birth certificate for that child and were provided. He said he came to Australia in January 2010 as a student on a Zimbabwean passport issued in 2004 which is current to 2014. Extracts from that passport were provided. He said he had no difficulty obtaining a travel document such as his passport, and legally departed Zimbabwe in January 2010, to study in Australia, and had not returned to Zimbabwe. He stated he applied for refugee status in [Country 2] in January 2009, but that application was not determined. A copy of a document entitled “Asylum Seeker temporary Permit” for [Country 2] was provided. Several other documents, including an MDC membership card in the name of the first applicant and a letter of support from an MDC official were also provided.

21. The second applicant states she is a citizen of [Country 1], and extracts from, her [Country 1] passport issued in 2006 were provided.
22. In his protection visa application the first applicant states he left Zimbabwe due to fear for his life, and past persecution and intimidation as he was not a ZANU PF supporter but was a supporter of the MDC. He stated in the past he was tortured by the CIO, ZANU PF youth Militia and the ZRP and war veterans, and feared further harm because he actively took part in MDC campaigns and was seen at rallies and would continue MDC activities and oppose the ruling ZANU PF party, and would be labelled as a traitor.
23. The department file contained additional material provided after the protection application was received, including an “emergency travel document” issued by the Government of Zimbabwe to the third applicant which noted her as a citizen of Zimbabwe. That material also included a statement from the first applicant, a letter of support from his mother, and a brief and undated medical report concerning treatment received by him [in] November 2007.

*The delegate’s decision*

24. The application was considered by a delegate who refused to grant the applicants protection visas. The delegate’s decision is set out in a decision record dated 14 November 2012, and includes a “timeline” of events relating to the migration history of the applicants, including details of applications by the second applicant for review by the Migration Review Tribunal (“MRT”) of a decision refusing her a further student visa, and details of an application for Ministerial Intervention sought after the MRT affirmed that refusal.
25. The delegate found the first and third applicants were citizens of Zimbabwe, and that the second was a citizen of [Country 1]. She also found the first applicant was not eligible for [Country 1] citizenship because of his marriage to the second applicant, and did not have effective protection in any third country.
26. The delegate noted the first applicant displayed a “thorough knowledge” of the MDC, its history and ideology, but noted that information was available online. The delegate expressed reservations about the letter of support provided by [name ], but noted the MDC membership card provided “could be genuine”, and attested to his current MDC membership.
27. The delegate considered the five specific incidents between 2004 and 2009 in which the first applicant claimed to have been assaulted or detained, but did not accept those events occurred as claimed. The delegate also concluded the first applicant did not have a sufficiently high profile to be at risk of significant harm if returned to Harare. The delegate noted the first applicant’s travel to [Country 3] in [late] 2007 for two weeks and noted that country was a signatory to the UN Refugee Convention, and considered his failure to seek protection there and his willingness to return to Zimbabwe to undertake exams were inconsistent with a genuine fear for his life. The delegate also noted whilst the first applicant sought asylum in [Country 2] in January 2009 and was granted a 3 month permit to remain there, he had not sought permanent protection there, and considered if he genuinely feared harm he would have applied for asylum in [Country 2]. As a result the delegate concluded he did not have a well-founded fear of persecution in Zimbabwe at that time.
28. The delegate considered the failure of the first applicant to mention his own fear and concern over returning to Zimbabwe when providing a letter of support for the second applicant in her Ministerial Intervention application following refusal of her student visa application indicated

an absence of fear of return on his part. The delegate also considered the delay in seeking protection until 2012- more than two years after arrival in Australia to also indicate an absence of genuine fear. In light of the material available, the delegate concluded the first applicant did not have a well-founded fear of persecution for a Convention reason. She also concluded he was not owed protection obligations under the complementary protection criteria of the Act and refused him a protection visa. As a result of that finding, she also refused the remaining applicants protection visas as members of his family unit.

#### *The Tribunal application*

29. On 23 November 2012 the applicants sought review by the Tribunal. No new factual information was provided, but a copy of the delegate's decision record of 14 November 2012 was attached. The Tribunal subsequently received a copy of a letter dated 10 January 2013 from an MDC official ([name]), a medical report dated [in] January 2013 relating to the first applicant and a further submission from the applicant's adviser on 24 April 2013.
30. On 27 May 2013 the Tribunal wrote to the applicants and advised it had considered the information available, but was unable to make a favourable decision on that information. It invited them to appear before the Tribunal to give evidence and present arguments at a hearing. On 28 May 2013 and 25 June 2013 the Tribunal received further submissions and supporting material from the applicants' adviser.

#### **THE TRIBUNAL HEARING**

31. The applicants appeared before the Tribunal on 3 July 2013, and were represented by their registered [migration agent]. The hearing was conducted in English. At the commencement the first applicant and his adviser confirmed only the first applicant was giving evidence, and the other applicants made no claims in their own right, but relied solely on membership of the family unit of the first applicant.
32. The Tribunal was also provided with a report from a social worker with a counselling service at which the first applicant had received counselling in late 2012, in which the writer expressed the view the first applicant appeared to be experiencing post traumatic stress disorder due to "*torture and trauma at the hands of the authorities in Zimbabwe*".

#### *Evidence of the first applicant*

33. The first applicant said he was one of [a number of siblings], [most] of whom live in Zimbabwe, one who is studying in [another country] and a sister in Australia who [is an Australian citizen]. He said his mother continued to reside in Zimbabwe in the family home in a residential suburb of Harare, and his father died in [the late 1990's]. He said he came to Australia in January 2010 because he was running from harm in Zimbabwe, and got a student visa to study here, completed two qualifications, and had not left Australia since.
34. He said he married the second applicant in [date] in Australia and they had a child now [age] (the third applicant). He said his wife was a citizen of [Country 1], although she was born and raised in Zimbabwe and only spent two weeks of her life in [Country 1] when she applied for her passport. He said he had never been to [Country 1] and had no right to enter the country or reside there, and could not seek citizenship there because of his marriage to a female [Country 1] citizen. He said his [child] did not have a passport, but obtained an emergency travel document from Zimbabwe when it appeared the second applicant may have had to

leave Australia following a decision of the MRT. He said if his wife had left Australia then, she would have gone to Zimbabwe, where she had always lived, rather than [Country 1]. He said his wife and [child] never left Australia and his wife subsequently sought Ministerial Intervention, but withdrew her application when they sought protection.

35. He said he feared return to Zimbabwe because he was a member of the MDC, and had actively supported that party prior to his departure from the country. He said he joined MDC in 1999 when he was [a teenager] but did not become active until around about 2002 at the end of his schooling. In response to questioning he was able to provide clear and decisive responses to questions about the MDC, its leadership and history.
36. He recounted details of instances starting in 2003 when he was still at high school in which he claimed he was targeted, threatened or harmed by ZANU PF supporters because of his MDC involvement, and culminating in a significant assault in November 2007 after which he sought medical attention, and subsequently left Zimbabwe for an extended period.
37. He said in October 2007 his house was invaded by ZANU PF supporters looking for him, although he escaped without harm and went to his [sister]'s house which was nearby in the same suburb. He said his sister then made arrangements to get his passport, and shortly thereafter he went to [Country 3] where he remained for about two weeks before returning to Zimbabwe to continue studies and do exams. The Tribunal expressed surprise that after experiencing the threats he described, he would voluntarily return to Harare so soon if he genuinely believed he was at risk. It asked why, under the circumstances he did not remain in [Country 3]. He said he did not know about protection issues at the time, and needed to return to continue studies. He said however he did not return to his own home, but stayed with other relatives in two different areas of Harare.
38. He said after returning to Harare in October, he revisited his home to get some possessions, and on the way back from that trip was kidnapped, taken to a place he did not recognise, and was held for three days, during which time he was tortured and beaten severely and threatened about his MDC activities. He said he was then dumped on the side of a road, and found by some people who knew him, and was taken to a local medical practitioner who treated him and kept him for observation for almost a whole day because of his head injuries. He said he was then taken by an MDC colleague to his home.
39. The Tribunal asked why he would return to his own home in the very area he had previously been targeted if he genuinely feared harm. He said at the time the person who transported him from the clinic did not know any other address to take him, and he was in no fit state to provide information because of his injuries.
40. He said following these events he remained home for about seven days before going to [Country 2] towards the end of November 2007, and remained until about July 2009 when he returned to Zimbabwe to make arrangements for a visa to study in Australia. He said he entered [Country 2] illegally on that occasion as he did not have time to arrange a visa, and during his stay held a number of temporary resident permits issued to for asylum seekers.
41. The Tribunal observed his protection application did not indicate he had remained in [Country 2] between 2007 and 2009 as he now claimed. He said there were some errors in the details on the form - an assertion reiterated by his [migration agent] who said the applicant had previously pointed out to him there were errors in that information. The Tribunal referred to other documents on the departmental file, in particular a copy of the [Country 2] asylum

seeker temporary residence permit issued in January 2009, which it noted was consistent with the evidence of the first applicant that he was in [Country 2] in 2009. He said he held a series of such permits which were renewed on either a 3-6 month basis until July 2009 when he left [Country 2] because there were things happening there which were not conducive to Zimbabweans, and he had been told by family to try to get a visa to come to Australia.

42. He said he remained in Zimbabwe for about six months organising his student visa and during that time ZANU PF supporters again targeted him and his family, demanding to know where he had been, and enquiring about him with neighbours and family members. He said his home was again invaded, and despite going to the police, was told there was nothing that could be done. He said he then travelled to and remained in his rural homeland for a period before getting a student visa and coming to Australia. During that time he agreed he sought and was granted a police clearance certificate which was required to support the student visa application and conceded he had no difficulty obtaining that clearance. He also conceded he had no difficulty leaving Zimbabwe through Harare international airport in January 2009. The Tribunal referred to country information which it indicated if accepted, would suggest persons able to obtain relevant travel documentation such as passports, clearance certificates, and who were able to pass through immigration clearance at Harare international airport were unlikely to be persons of any real adverse interest to authorities in Zimbabwe. The applicant said he did not agree, and suggested one reason he may have cleared immigration in Harare was that on the day he left, there had been no electricity at the airport. The Tribunal observed it may have difficulty accepting this as plausible.
43. The Tribunal asked if he been involved in MDC related activity since coming to Australia. He said he was unaware of any MDC structures here, and had not been actively engaged in MDC matters, but had followed developments in Zimbabwe, as well as talking amongst other Zimbabweans in Australia about what was happening in the country.
44. The Tribunal asked why he delayed seeking protection for more than two years after arriving in 2010. He said when he arrived he thought if he finished his studies he could get permanent residency and there would be no issue for him. He agreed however he had never raised protection concerns in Australia prior to lodging the protection application in September 2012 and had not mentioned his fear of harm on return to Zimbabwe when it appeared his wife and [child] might have to leave Australia after her unsuccessful MRT review. He also agreed he had provided a letter of support to his wife for her Ministerial Intervention application, in which he detailed financial constraints on him being able to maintain contact with his family if they left Australia, but had not raised protection issues. The Tribunal observed it may appear inconsistent with his claim to fear harm on return to Zimbabwe that at a time he was communicating with the Minister about consequences of his wife and child going to Zimbabwe, he did not mention anything about why he could not travel with them, beyond the financial cost of such travel. He said he did not understand the protection process, and did not recognise he could raise his own concerns at that particular time.
45. The Tribunal observed he had now been away from Zimbabwe for more than five years with the exception of a short return to Zimbabwe in the second part of 2009 and asked whether he considered he was still at risk now given that passage of time. He said he was still at risk as he was a committed MDC supporter and if he returned he would not hide that support and would seek to engage in MDC activities like he had in the past. He said he would always support MDC, which would create problems for him.

46. He denied there was any other part of Zimbabwe to which he could reasonably relocate where he could avoid that harm, stating Zimbabwe was a place where everybody knew your business, and his MDC support would become known very quickly. The Tribunal asked if there were any other reasons he feared return to Zimbabwe beyond his political connection and activities with the MDC. He said he also believed he may be identified as a person who had been outside Zimbabwe for a long time, which may make him a target, and corrupt police may even seek money or bribes from him.
47. The Tribunal indicated that it had asked DFAT to make enquiries with the MDC about his claimed MDC membership, and the two letters of support provided. It indicated those enquiries confirmed he was an MDC member since 1999 as claimed, but that there was no record available of any harm suffered by him as a result of his membership or activities. It also noted however the MDC advised some records were missing, and that the Tribunal interpreted this to mean that the MDC were simply unable to confirm or refute that he had experienced past harm. The Tribunal also indicated that DFAT advised the authors of the two letters were contacted by either DFAT or the MDC itself, and had confirmed they had written those letters. The Tribunal noted DFAT reiterated earlier advice to the Tribunal that the MDC considered the only person authorised to write such letters of support was the Secretary General of the MDC, and neither author who provided the letters in this case was authorised or “mandated” to write those letters. The Tribunal asked how he came to get letters of support from those particular MDC officials. He said whilst he knew both of them from past association and MDC activities, essentially the letters were arranged by a relative in Zimbabwe, who approached the individuals for their support.
48. The Tribunal also referred to the medical report provided from a doctor in Zimbabwe who claimed to have treated the first applicant [in] November 2007 following traumatic injury. The Tribunal advised it had also asked DFAT to make enquiries about whether a doctor or a clinic by that name operated in the area where he claimed to have been treated. It noted the letterhead on which the report was written suggested the clinic was in a different location to where the applicant claimed to have been treated. The Tribunal indicated DFAT advised that a doctor of the same name as that shown on the report had operated a clinic at various times at both the address shown on the letterhead and in the area where the applicant claimed to have been treated. Whilst the Tribunal noted there were limited data about exactly where the doctor operated at a particular time, the thrust of the information was consistent with the assertion that the doctor was operating his clinic in late November 2007, and may have treated the first applicant at that time as claimed.
49. The Tribunal referred to country information relating to treatment of returnees to Zimbabwe, and treatment of MDC supporters and members in more recent times. The applicant indicated he did not agree with the thrust of those reports, and there were a lot of instances of harm occurring, and his family in Zimbabwe still told him Zimbabwe was unsafe for people who supported the MDC like himself. He reiterated if he went back he would be targeted by the ZANU PF, and stated his [sibling] who returned from [another country] to Zimbabwe very recently had been intimidated, and had to leave the country earlier than planned.
50. The Tribunal noted the recent report from a counsellor who had provided support to the first applicant, and who considered he was suffering post-traumatic stress. The first applicant said he saw the counsellor in December 2012, after referral by the Red Cross, but had not received any counselling or treatment prior to that time.

### *Evidence of a witness*

51. The Tribunal took evidence by phone from the Australian based sister of the first applicant, who lived in Zimbabwe until 2008 who was able to provide a first-hand account of events affecting the first applicant prior to that time. The Tribunal found her a credible witness, who confirmed aspects of the claims of the first applicant, particularly in relation to adverse treatment received in 2007. She indicated he was a long term MDC member and became active in MDC matters around 2002 in Harare where he and other family members lived. She said there were several instances where he was targeted and harmed, but the main one occurred in October 2007 when the house was invaded and he escaped to her place, and sheltered for a short time before she made arrangements for him to travel to [Country 3] where her husband was working. She said he remained in [Country 3] for about two weeks for things to 'cool down' before returning. She said shortly after he returned there was another incident where he was kidnapped and detained, before being left injured on a road, after which he required medical attention from a doctor in the area where he was left. She said after this there were further problems, and towards the end of 2007 he fled to [Country 2] where he remained until late 2009.
52. She said she believed if he returned to Zimbabwe he would face death or further harm, and that one of their other [siblings] returned recently from [another country] was targeted, and she believed it was because he was the applicant's brother, and people in the local area were still looking for him even after his considerable absence. She did not believe he could relocate elsewhere within Zimbabwe to avoid that risk, as once it became known he was not a supporter of ZANU PF, he would be in trouble.
53. The Tribunal invited the first applicant to add anything else. He said he just sought protection and safety in Australia. It also invited his adviser to make further submissions. [The migration agent] indicated the evidence of the first applicant was that he was not simply a low level MDC supporter, but was someone who had influenced others in the area to support the MDC, and had strong MDC beliefs and a willingness to express them, and as such had a well-founded fear of persecution if returned to Zimbabwe. He also made additional submissions relating to the status of the second applicant as a [Country 1] citizen, and asserted the first applicant had no right to live in [Country 1] even if the second applicant was able to live there.

### **COUNTRY INFORMATION**

#### *General information*

54. The United States Department of State "*Country Reports on Human Rights Practices*" for 2011 (published 24 May 2012) contained these general observations on Zimbabwe:

Zimbabwe is constitutionally a republic, but its authoritarian government was not freely elected and has been dominated by President Robert Mugabe and his Zimbabwe African National Union-Patriotic Front (ZANU-PF) since independence in 1980. Presidential and parliamentary elections held in 2008 were neither free nor fair. While the March 2008 election was generally peaceful--and two factions of the opposition Movement for Democratic Change (MDC) gained a parliamentary majority--violence and intimidation perpetrated by security forces and nonstate actors loyal to ZANU-PF in the months leading up to the June presidential runoff resulted in more than 270 confirmed deaths, thousands of injuries, and the displacement of tens of thousands of persons. Opposing presidential candidate Morgan Tsvangirai withdrew from the runoff contest, and President Mugabe was declared the winner. International condemnation of the presidential runoff election resulted in a mediated solution outlined in the 2008 Global Political Agreement (GPA) signed by ZANU-PF and the two MDC factions led by Morgan

Tsvangirai (MDC-T) and Arthur Mutambara (MDC-M). Mugabe retained the presidency, Tsvangirai became prime minister, and Mutambara became deputy prime minister. In January the MDC-M elected Welshman Ncube as its new president at the party's congress, changing the party's acronym to MDC-N. Mutambara retained his seat as the deputy prime minister. There were instances in which elements of the security forces acted independently of civilian control.

The most important human rights problems in the country remained the government's targeting for harassment, arrest, abuse, and torture of members of non-ZANU-PF parties and civil society activists, widespread disregard for the rule of law among security forces and the judiciary, and restrictions on civil liberties.

ZANU-PF's control and manipulation of the political process effectively negated the right of citizens to change their government. Prison conditions were harsh. Lengthy pretrial detention was a problem. Executive influence and interference in the judiciary continued, and the government infringed on citizens' privacy rights. Freedoms of speech, press, assembly, association, and movement were restricted, and the government continued to evict citizens, invade farms, and demolish homes and informal marketplaces. The government impeded nongovernmental organization (NGO) efforts to assist those displaced and other vulnerable populations. The government arrested, detained, and harassed NGO members. Government corruption remained widespread, particularly at the local level. Violence and discrimination against women; child abuse; trafficking of women and children; and discrimination against persons with disabilities, racial and ethnic minorities, the lesbian, gay, bisexual, and transgender (LGBT) community, and persons with HIV/AIDS were problems. Government interference with labor-related events occurred. Child labor, including the worst forms of child labor, was a problem.

The government did not take steps to prosecute or punish security force or ZANU-PF supporters who committed abuses, and impunity continued to be a serious problem.

...

There were reports that the government or its agents committed arbitrary or unlawful killings. Police units sometimes organized or participated in political violence. Perpetrators were rarely punished.

### *Returnees to Zimbabwe*

55. Over the past 10 years DFAT has provided several advices on returnees to Zimbabwe which has generally concluded that apart from high profile opposition figures, party officials and organisers, failed asylum seekers or returnees from Australia were not considered to be generally at risk. (See CX61279 DFAT, CIR No. 13/02. "*Treatment of returnees in Zimbabwe*" 18 January 2002). In April 2002 DFAT noted contacts in British and South African High Commissions and airlines from countries which "*ferry the bulk of deportees by air back to the country, have told us they are aware of no incidents where returnees have been taken away by authorities or otherwise subjected to harm on return.*" (See CX 63792 – CIR No. 091/02, 15 April 2002). In October 2007 DFAT updated that advice stating:

We are not aware of difficulties by Zimbabweans returning from study from overseas in countries critical of the Government of Zimbabwe (GOZ) such as Australia, the United States, Canada and the United Kingdom. We have seen no evidence that the simple fact of studying in those countries would attract punitive action by the GOZ. Officers of the Central Intelligence Organisation (CIO) have been working under cover for some time as Immigration Officers at Harare International Airport. If an individual student was active in organisations subject to harassment by the GOZ, such as the Movement for Change (MDC), trade unions or civil society organisations, it is possible that she might be identified on arrival at Harare Airport. If so, any punitive measures taken against her by the GOZ would be the result of such activism, not of simply having studied in Australia. (Department Foreign Affairs and Trade, 2007, DFAT Report No. 717, 23 October 2007)

56. In May 2011 DFAT responded to a Tribunal enquiry, stating:

Post does not consider that there is strong risk a person returning from studying abroad would be imputed with anti-ZANU-PF beliefs in the absence of other factors like prior political activism. Zimbabwe has an exceptionally large Diaspora. While the Diaspora is viewed as pro-MDC, most Zimbabweans of all political persuasions have close family and friends abroad. Many children of those who have attained wealth through their association with ZANU-PF seek to study abroad in countries like the UK, USA and Australia which are still seen as attractive destinations regardless of political persuasion.

Those returning to rural areas may face a higher risks but this risk is similar to that faced by those returning to rural areas after extended periods of time in Harare and Bulawayo, which are seen as pro-MDC urban areas. In some rural areas, those who have spent time abroad or in Harare or Bulawayo may be perceived to have pro-MDC beliefs and may have missed the opportunity to establish their loyalty and win the trust of local power structures. Nonetheless, the majority of Harare residents retain strong ties to their rural home, which they visit frequently without significant problems. (Source: DFAT report 1272 to the MRT/RRT: 12 May 2011).

57. Non-government sources also comment on returnees. In March 2009 the Institute for War and Peace reporting (IWPR) in an article entitled “*ZIMBABWE: Exiles Start to Return*” reported:

*Zimbabwean professionals, many of them teachers, are coming home and seeking readmission into the public service, in response to a move by the country's new inclusive government to pay civil servants in foreign currency and relax conditions for rejoining the sector.*

*The influx is a response to calls from President Robert Mugabe and Prime Minister Morgan Tsvangirai for the more than three million exiles, who sought refuge from their country's chaotic economic situation in Southern African Development Community, SADC, countries and abroad, to return to Zimbabwe to help rebuild the country.*

*Zimbabwe's public service commission has announced that teachers who resigned between January 2007 and March 1 2009 should be allowed to rejoin the profession. It has also waived existing procedures for re-engaging engineers, surveyors and other public servants.*

*Beitbridge and Plumtree - the busiest entry posts into Zimbabwe from SADC countries - have reportedly recorded an increase in recent weeks in the number of economic and political refugees returning to Zimbabwe... (IWPR 19 March 2009).*

58. In its 20 July 2009 “*Country of Origin Information Report*” for Zimbabwe, the UK Border Agency indicated at that time there was no recent information that identified any particular problems for returning failed asylum seekers, and noted both MDC leader and Prime Minister Morgan Tsvangirai and President Mugabe were reported to be encouraging Zimbabwean expatriates to return (see para 33). That sentiment was repeated in the September 2010 UK Border Agency “*Country of Origin Information Report*”.

59. A UK Border Agency report by a fact finding mission in August 2010 noted:

#### **Political environment**

Most organisations interviewed reported that there had been an opening-up of the political environment since the formation of the Government of National Unity in February 2009. However, uncertainty over the future and doubts about the sustainability of the current governing coalition were a concern.

Most organisations reported that the parliamentary constitutional outreach process (COPAC), which is consulting with the public about the content of the new constitution, had led to renewed reports of intimidation and violence. As a result, there were fears that the current situation may deteriorate ahead of national elections which are likely to take place in the next couple of years.

#### **Political violence**

All organisations reported that current levels of violence were down on that experienced during 2008. However, all organisations reported that low-level violence, or the threat of violence, continued, particularly in some rural areas, and that this had increased with discussions about the new constitution. Although, a couple of organisations suggested that recent reports of violence may be exaggerated.

While there were some reports of an improvement in the way the police operated, most organisations stated that the police remained politically biased and that they often ignored, or were complicit in, the persecution of Movement of Democratic Change (MDC) supporters and civil society activists.

All organisations reported that politically motivated violence was rare in most urban centres in Zimbabwe. Bulawayo and Harare were noted as being relatively safe, and that they benefited from higher levels of scrutiny by the media, civil society and international organisations than smaller towns and rural areas. However, rural areas, especially areas that had traditionally voted for the Zimbabwean African National Union – Patriotic Front (ZANU-PF) such as the Mashonaland provinces - Central, East and West - and Manicaland, were noted to be particularly problematic. Matabeleland North and South were however considered to be relatively safe.

While some organisations noted that influential MDC supporters could be at risk, ordinary opposition and MDC supporters were not thought to be at any particular risk.

#### **Non-Government Organisation (NGO) activity**

All organisations interviewed reported that they were able to operate relatively freely in most areas of the country - political interference was reported to have decreased since the formation of the Government of National Unity.

Urban areas were reported to be relatively open, with the distribution of aid less open to political manipulation. However, most rural areas were more tightly controlled by ZANU-PF, with politically-appointed district administrators holding a large measure of influence. Rural areas considered by ZANU-PF to be its ‘heartlands’ were more difficult to access, especially for organisations that distributed food and which were involved in projects that were perceived to have a political angle. The distribution of medicine and medical care was reported to be relatively free from interference.

#### **Internal relocation**

It was reported that there were no legal requirements or restrictions for those wishing to re-settle in other parts of Zimbabwe. While in theory resettlement to any part of the country was possible, in practice, resettlement to rural areas was reported to be difficult, especially for those considered to be opposed to ZANU-PF. However, most organisations stated that relocation to the country’s main urban centres posed relatively few problems – the main constraint being economic.

#### **Returnees to Zimbabwe**

In addition to interviewing international and national NGOs the mission also spoke to seven Zimbabweans who had previously claimed asylum in the United Kingdom but then had returned to the country in 2009 and 2010. While all seven reported that they had decided not to divulge the fact that they had claimed asylum in the United Kingdom upon arrival in Zimbabwe, none experienced any significant problems on return. All chose to resettle in Bulawayo or Harare. UK Home Office, 21 September 2010: “REPORT OF FACT FINDING MISSION TO ZIMBABWE HARARE 9 – 17 AUGUST 2010”).

60. The 2010 UK Border Agency “*Fact Finding Report*” (above) also noted the Zimbabwe Human Rights NGO Forum was unaware of mistreatment of returnees. It stated:

The Forum has not come across any cases of returnees from the UK being mistreated and would expect to know of any such cases because its member organisations are represented across the country. It works closely with the Zimbabwe Association in London and is alerted where there are concerns a returnee might be at risk but has not come across any cases where that is happened. They are unable to say that there have been no such cases but if there have been they have been isolated examples. They do however have concerns that those who are known to have claimed asylum in the UK would be considered necessarily to have been disloyal to Zimbabwe and may therefore face additional problems

reintegrating because the fact that they had claimed asylum would become known. This would not apply to returning economic migrants unless their families were known to be political activists. The Forum considers that the abolition of hate speech against asylum seekers returning from the UK is central to creating a more conducive environment.

61. The July 2012 UK Border Agency “Country of Origin Report” for Zimbabwe” repeats that information, and noted there was a challenge to the accuracy of the observations of the “*Fact Finding Mission*” in proceedings before the UK Immigration and Asylum Chamber Upper Tribunal in March 2011 (*EM and Others (Returnees) Zimbabwe CG [2011] UKUT 98 (IAC)*). That decision indicates the UK IACUT determined:

...the essential thrust of what W80 said to Ms Goodier and Mr Walker is satisfactorily captured in the notes published in the FFM report: that the Forum “has not come across any cases of returnees from the UK being mistreated and would expect to know of any such cases because its member organisations are represented across the country. (paragraph 109)

62. The August 2012 UK Border Agency Operational Guidance Note on Zimbabwe notes the decision in *EM and Others* was quashed in July 2012, but does suggest despite this, *EM and Others* summarises a considerable volume of country information which UK Border Agency accepts as reflecting the current country situation, and suggests its case officers may find it helpful to refer to the country information contained in the determination, even though the judgment itself cannot be relied on. (See p7 of the Zimbabwe OGN v10.0 August 2012).

63. Most recently, a December 2012 report from DFAT noted:

MDC party officials and civil society representatives did not consider Zimbabweans returning from overseas to be likely targets. Many of those who have lived overseas are relatively well-off and likely to live in wealthy areas of Harare and Bulawayo that tend to be more peaceful. Whether or not individuals are targeted, would most likely depend on their degree of political activity after returning, unless they were a particularly well-known activist prior to departure. Individuals who have been involved in fundraising overseas are also potentially at risk. The MDC does not have any formal structures in Australia at present so individuals returning from Australia are unlikely to be known external fund-raisers. (Source: DFAT report 1463 to the MRT/RRT: 20 December 2012).

#### *Treatment of MDC members and supporters*

64. In respect to the risk of politically motivated violence towards members and supporters of the MDC, DFAT provided the following observations in May 2011:

Ordinary MDC-T and MDC-N members may be vulnerable to targeted politically motivated violence and intimidation, but the risks to ordinary members are not high compared to highly vocal party activists. The degree of risk generally depends how vocal a member is and where that member lives. MDC-T officials have said that at present, individuals who have membership cards but are not vocal supporters, are not likely to be targets of violence. Those at greatest risk are those who are seen to be vocal supporters of the party or who are perceived to be influencing others in their beliefs. Such individuals are not necessarily party members but may be community leaders like teachers who haven't shown themselves to be sufficiently loyal to local ZANU-PF authority. (DFAT report 1272, 12 May 2011)

65. In August 2012 DFAT provided this advice based on information from MDC officials:

The officials confirmed the situation for their members had improved a lot in recent years. They believed there may be many instances of people seeking to remain in Australia for economic reasons, rather than concern for their welfare. Zimbabwe's economic situation has improved markedly since 2008, although Australia will continue to remain a much more attractive location for pursuing a career. Every case required separate consideration, with an individual's origins and their history of activism very relevant. Very few of the cases referred to post (and none in recent times) have been prominent activists and many have very dubious - even clearly fraudulent - credentials.

At present, violence and intimidation were concentrated at particular flashpoints where MDC supporters could be targeted. Current triggers for violence were MDC rallies, particularly, in sensitive areas. At a recent rally in Zvimba, eight people had been injured. While some rallies occur peacefully, problems were more likely to occur in areas that were considered to be ZANU PF strongholds, like the President's home area of Zvimba, or areas that ZANU PF had lost in the last elections and wanted to win back, for example in Manicaland. Poor urban areas in Harare, like the high density suburb of Mbare, were also flashpoints as ZANU PF vied for economic influence.

There were ongoing instances of intimidation but often it was sufficient for ZANU PF to remind people of what happened in 2008. Despite this, there are still many parts of the country, particularly the wealthier areas of Harare, where people can support MDC without being subject to harm. Many MDC politicians and their children, some of whom have returned from university education in Australia, are currently able to lead normal lives, although occasionally face intimidation from their political foes and possible violence at party rallies in sensitive areas.

As we approach elections, currently expected in mid-2013, there is still the possibility of increased violence. This is likely to be targeted towards active party members, or those in areas where ZANU PF feels under threat. Both ZANU PF and MDC face internal power struggles and the risk of intra-party and intra-party violence also remains. However the vast majority of Zimbabwean students in Australia, including genuine MDC members, have no reason for concern in returning to their homeland. (*DFAT Report 1415 – RRT Information Request: ZWE40895, 21 August 2012*).

66. In December 2012 DFAT provided this assessment of developments since the national unity arrangements and after the announcement by President Mugabe of elections in 2013:

In terms of the general atmosphere at present, the positive changes brought about the Global Political Agreement under which MDC was included in the government, continue to reduce the tension between the two parties outside the electoral context. MDC and ZANU-PF sit together in Cabinet and Parliament and many senior members of both parties have built working relationships with each other. Incidences of violence and intimidation continue to occur, but levels are relatively low compared to previous years, especially the peak in 2008, and the majority of MDC officials and supporters are able to conduct their activities without being harmed. Currently there are reports of intimidation in the form of forcing people to buy ZANU-PF electronic membership cards. The police and the judiciary, while not uniformly compromised, are led by partisan individuals who are able to deploy resources to political ends for politically sensitive trials or arrests.

...

The atmosphere is likely to change quickly once a date for elections is set. The dynamics for the upcoming election are still not clear but it is likely that the intimidation and violence will be proportional to the degree of threat ZANU-PF assesses that it is facing. There is a real prospect that it could be hard fought, with MDC-T and ZANU-PF wanting to overcome the frustration of shared power which has constrained them since 2008. ZANU-PF may also feel that this is the last roll of the dice under the 89 year old President Mugabe. On the other hand, it is also possible that the parties will reach some form of understanding about accommodating each other whatever the outcome, in which case the atmosphere may not be as tense. Also, the presence of effective monitoring mechanisms could limit levels of violence and intimidation.

It is very difficult to assess the risk faced by particular individuals. There are many people overtly engaged in assisting the MDC or working for civil society organisations who manage to do so without harm. At present, those most at risk are likely to be:

- those who are most vocal in their criticism of ZANU-PF or Mugabe
- those who are seen to be organising or mobilising support for MDC
- those at grass roots level who will not generate as much adverse publicity if they are harmed.

...there has not been a discernible change in the level of risk faced by MDC officials and supporters since the call for elections in March 2013. No firm date has in fact been set for elections which are unlikely until later in the year.

Similarly, there has not been a discernible change in the level of risk faced by family members of MDC officials since the call for elections in March 2013. Family members of MDC politicians and high

profile party officials are unlikely to be targeted due to the negative publicity that this would have. Post is aware of children of well-known MDC politicians returning from studies abroad to live in Harare without facing threats or intimidation. For less prominent MDC officials, while family members are less likely to be targeted than the official him or herself, there is still a risk family members may be harmed as a form of intimidation. The overall risk will be influenced by the factors outlined below.

There has not been a discernible change in the level of risk faced by family members of MDC supporters since the call for elections in March 2013. It is possible that family members of supporters could be targeted, especially if they are perceived to be more vulnerable for reasons like lack of education and awareness of rights. The overall degree of risk faced would depend on the factors outlined below and the degree to which the relevant supporter was active. Nonetheless, support for MDC is widespread, reflected in their parliamentary majority, and their rallies are well-attended so it is unlikely someone would be targeted simply for being a supporter, if that person was not particularly vocal or an organiser. (Source: DFAT report 1463 to the MRT/RRT: 20 December 2012).

## **FINDINGS AND REASONS**

67. The primary issue in this case is whether the first applicant is owed protection obligations by Australia. For the following reasons, the Tribunal concludes he is, and that the decision under review should be remitted for reconsideration. In reaching this conclusion the Tribunal had regard to Ministerial Direction No.56, made under s.499 of the Act, and in accordance with that Direction has taken into account policy guidelines prepared by the Department of Immigration (PAM3 Refugee and humanitarian - Refugee Law Guidelines) to the extent they are relevant to the decision under review.

### *Citizenship and country of origin*

68. The Tribunal finds the first and third applicants are citizens of Zimbabwe, and no other country. In reaching this conclusion the Tribunal relies on the fact the first applicant was born in Zimbabwe, and holds a current passport issued by that country, which he used to legally depart Zimbabwe and to enter Australia in January 2010. His protection claims are therefore assessed on the basis Zimbabwe is his country of nationality. The Tribunal also finds for the purposes of s.36(2)(aa) that Zimbabwe would be the “receiving country”.
69. In respect to the third applicant, the Tribunal notes whilst she was born in Australia, she has been granted an “emergency travel document” by Zimbabwe, which identifies her as a citizen of that country. In respect to the second applicant, the Tribunal finds she is a citizen of [Country 1] and no other country, and holds a current passport issued by that country, which she used to legally enter Australia. The Tribunal finds she makes no claims for protection if she was to return or be removed to [Country 1].
70. The first applicant claims to fear harm on return to Zimbabwe because of his political opinion arising from long term MDC membership and active support for that party in Zimbabwe, and because he had experienced multiple instances of past harm due to that support. At hearing he also claimed he faced harm because he had been away from Zimbabwe for a long time.

### *His own political opinion*

71. The Tribunal found the first applicant a generally credible witness. He claimed to be an MDC member, and the Tribunal accepts that this is the case. In reaching this conclusion, it relies on his evidence, supported by the MDC card provided, and importantly the outcome of enquires made by DFAT at the request of the Tribunal directly with the MDC. It is also supported by the testimony of his sister, whom the Tribunal found to be a credible witness. It is further

supported by letters written on behalf of the applicant by two MDC officials who attest to the MDC activities of the first applicant and adverse treatment of him because of his political beliefs prior to departure from Zimbabwe. Those letters were able to be verified by direct enquiries by DFAT with the MDC, and the Tribunal notes whilst the MDC has advised neither of the authors were mandated to issue such letters on behalf of the MDC, they nevertheless support the assertions by the applicant of mistreatment on past harm at the hands of ZANU PF supporters in his local area. The Tribunal concludes whilst the MDC may have an understandable preference to limit official letters relating to asylum seeker claims to the office of their Secretary General, and that these two letters did not comply with that requirement, it does not follow that the contents of the letters themselves are not accurate. In this case given that those contents are consistent with the claims of the applicant, supported by evidence from his sister, the Tribunal gives weight to those letters as evidence of past mistreatment by the applicant because of his political opinion and beliefs.

72. The applicant provided a relatively detailed and consistent history of past adverse treatment by ZANU PF supporters, and maintained those assertions under questioning and enquiry at hearing. On the material before it, the Tribunal is prepared to accept there were a series of incidents in which he was targeted by ZANU PF supporters and one incident in particular in November 2007 when he was detained for about 3 days, and tortured and beaten by persons who were ZANU PF or government supporters. In relation to an earlier incident said to have occurred in October 2007, the Tribunal had some reservations (as did the delegate in her analysis of the situation) about why he would return to Zimbabwe after a very short absence in [Country 3], following an alleged house invasion. It accepts however this return occurred prior to what appears to be the most significant and extreme mistreatment he claimed to have experienced because of his political opinion, and this may in part explain his willingness at that time to return to Zimbabwe, although the Tribunal also notes and accepts that on return he lived in locations other than his family home, which would be consistent with him having a degree of concern about his safety at that time.
73. The Tribunal considers it of some significance in this case that the first applicant was able to provide evidence of medical treatment for traumatic injuries consistent with that which he described as having been inflicted on him by his kidnappers in late 2007, and that shortly after that event he left Zimbabwe and resided in [Country 2] for almost 2 years. Whilst that medical report does not specifically state the injuries involved resulted from politically beating or torture, the Tribunal is prepared to accept that it is consistent with the timing of the incident alleged by the applicant and with the evidence of his sister and therefore gives it weight. The Tribunal also considers it significant that during his extended stay in [Country 2] after that incident, he took steps to formally register with the Government of [Country 2] as an asylum seeker, and was granted temporary residence based on that registration. Whilst an asylum determination was not finalised prior to him leaving [Country 2] in mid 2009, it is nevertheless consistent with his current claims to have experienced past harm and mistreatment in Zimbabwe prior to travelling to [Country 2].
74. The Tribunal had some concern about the delay by the first applicant in seeking protection after arrival in Australia in 2010, and the nondisclosure of any concern about returning to Zimbabwe when he was communicating with the Minister for Immigration in support of an application by his wife for Ministerial Intervention to prevent her removal from Australia. Whilst the Tribunal accepts that logically that process would have been an opportunity for him to raise concerns about his own return to Zimbabwe, in the sense he would be explaining why he would be unable to accompany his wife and child if they were removed, it also

accepts he may not have fully understood the significance of that opportunity, and in light of its acceptance of instances of past harm in Zimbabwe accepts as plausible his explanation that he considered the Ministerial Intervention application was about why his wife should not be removed from Australia, not why he could not return to Zimbabwe.

75. Depending on the circumstances of a particular case, a lengthy delay between arriving in a place of safety like Australia and seeking protection can indicate a lack of a genuine or well-founded fear of harm in a home country. In this case however, based on the totality of the material now available to it, the Tribunal accepts as plausible the explanation of the first applicant that when he arrived here he held a student visa, and anticipated a pathway which could lead to a [visa] along similar lines to that achieved by his sister who is now an Australian citizen. As such, the Tribunal places limited weight on his delay in seeking protection until September 2012 when determining the genuineness of his claimed fear.
76. On the material before it, the Tribunal accepts the first applicant has a genuine commitment to the policies and beliefs of the MDC, and demonstrated this in the past by active involvement in MDC matters in his local area in Harare. It also accepts as a result of those activities, he was identified as an MDC supporter, and experienced adverse treatment from ZANU PF supporters. The Tribunal accepts he continues to have such commitment and also accepts if he returned to Zimbabwe now or in the reasonably foreseeable future he would continue to hold and express such views and engage in similar activities again.
77. The Tribunal does not however accept he has a high profile with authorities in Zimbabwe, nor does it accept that when he left Zimbabwe or now - he was of any formal adverse interest to authorities in that country. In reaching this conclusion the Tribunal notes his ability to obtain his passport, police clearance certificate for his student visa, and his ability to leave the country in 2007 to go to Australia in 2010 without difficulty indicates the absence of any such profile. His passport also indicates multiple formal clearances through Zimbabwe immigration in the past (such as travel to [Country 3] in 2007) which is again more consistent with the absence of any formal identification of him as a high profile person of interest. Similarly, the Tribunal does not accept his explanation at hearing that his ability to clear immigration at Harare international airport in January 2010 was because there was no electricity when he left. The Tribunal considers this explanation was offered in an attempt to explain away his ability to leave the country, and it does not accept it as plausible.
78. Nevertheless, despite the absence of any high-level official adverse profile for the first applicant, the Tribunal accepts that at a local level his activities as an MDC supporter are known, and have attracted adverse attention to him in the past. It accepts in Zimbabwe much of the harm perpetrated against political opponents of the government is not carried out by formal elements of government, but by informal supporters and groups, in particular local ZANU PF groups, youth groups, militia and other organisations aligned to the government, and who act with its tacit support. That information (see the 2011 US Department of State "*Country Reports on Human Rights Practices*") also indicates informal elements that support the ZANU PF government continue to exercise considerable power, and act with relative impunity in their local areas. The Tribunal considers those informal local area elements are more likely to be the source of immediate adverse attention and mistreatment of the first applicant if he returned to Zimbabwe now or in the reasonably foreseeable future, particularly if he again engaged in active local MDC support. It also accepts awareness of his anti-government or pro MDC opinions was the cause of adverse treatment prior to his 2007 departure from Zimbabwe when he went to [Country 2].

79. This risk from supporters of the Government or its related elements, such as ZANU PF supporters and militias has been recognised for many years. The 2008 United States Department of State “*Country Reports on Human Rights Practices*” noted during 2008 and early 2009 unlawful killings and politically motivated abductions increased. It noted “*killings were primarily committed by members of ZANU-PF, ZANU-PF youth militia, war veterans, and, to a lesser extent, members of the military and police*”. It noted State-sanctioned use of excessive force increased in that period, and that security forces tortured members of the opposition, student leaders, and civil society activists with impunity. Since then there appears to have been some improvement, however reports still indicate security forces continued to refuse to document cases of political violence committed by ruling party loyalists against members of the opposition, and such perpetrators appeared to act with relative impunity. The 2011 US Department of State “*Country Reports on Human Rights Practices*” (above) also noted the government of Zimbabwe failed to prosecute or punish security forces or ZANU-PF supporters who committed abuses, and that impunity continued to be a serious problem. It also noted the government or its agents committed arbitrary or unlawful killings and police units sometimes organized or participated in political violence and perpetrators were rarely punished. The Tribunal accepts those reports.
80. Whilst country information, particularly more recent observations of the MDC itself (see DFAT reports since May 2011) indicates improvement in the overall situation for MDC supporters since 2008 and particularly since formation of the unity government, it does not suggest there is now an absence of risk, and continues to identify persons vocal in their criticism of the ZANU PF or Mugabe regime, those seen to mobilise or organise support for the MDC and those at grassroots level who will not generate much publicity if harmed, as continuing to be most at risk. The Tribunal concludes on the material before it that the first applicant falls within those risk categories.
81. Whilst the applicant concedes he returned to Zimbabwe in the second half of 2009 after about 18 months in [Country 2], and then spent time in his rural homeland, the Tribunal notes this was not a particularly long period, and accepts his claim to have taken steps to minimise awareness of his presence. Whilst such factors may reduce the risk of interaction with local supporters of the government and ZANU PF in the short term, they are unlikely to have any real impact if the first applicant was to return permanently to an area where he was well known and where his opposition to the government was known.
82. On the totality of the material before it, whilst the Tribunal does not consider there to be a high likelihood of harm to the first applicant, it nevertheless finds he faces something more than a remote or fanciful chance of this occurring from local elements such as ZANU PF supporters if he returned to Zimbabwe now or in the reasonably foreseeable future, and that there is accordingly a real chance of such harm occurring. In reaching this conclusion the Tribunal also takes into account the likelihood that there will be elections in the foreseeable future, and that traditionally election periods have coincided with an increase in politically motivated violence and intimidation. Whilst the December 2012 report from DFAT above indicates there has been no increase in violence since the announcement of elections on a yet to be disclosed date, the earlier August 2012 DFAT report (above) noted “*there is still the possibility of increased violence*” which was likely to be “*targeted towards active party members, or those in areas where ZANU PF feels under threat*”. The Tribunal considers this elevates the risk to the applicant if returned to Zimbabwe now or in reasonably foreseeable future.

83. The Tribunal also accepts the harm experienced in the past amounted to the “serious harm” required to constitute persecution, and accepts the real chance of harm the Tribunal has found exists for the first applicant on return would be of a similar level and would amount to persecution. It also finds such persecution would be for reason of his political opinion, and in particular the local profile he developed through political activities in Zimbabwe, particularly prior to late 2007. It further finds he would be unable to avail himself of protection from his own country because of politicisation of police. Under these circumstances, the Tribunal is not satisfied in the event he was threatened or experienced harm as in the past, he could avail himself of protection in Zimbabwe, or that such protection would be offered to him. The Tribunal is therefore satisfied his fear of persecution for reason of his political opinion if returned to Zimbabwe now or in the reasonably foreseeable future is well founded.

*Presence of the applicant in Australia and absence from Zimbabwe*

84. The applicant indicated at hearing that he may also be at risk on return to Zimbabwe because he lived in Australia and returned to Zimbabwe after an extended absence. The Tribunal is not satisfied he has engaged in any activities in Australia that would create any further adverse profile for him on return to Zimbabwe. In reaching this conclusion, the Tribunal notes and relies on his own evidence he was not involved in political or other activities here beyond discussion with fellow Zimbabweans about MDC and political matters.
85. The Tribunal does not accept lawfully leaving Zimbabwe and entering Australia as a student of itself will result in the first applicant being perceived or regarded as opposed to the Government of Zimbabwe. Similarly it does not accept simply living outside Zimbabwe creates a risk of harm for him, in the absence of other risk creating factors. Many Zimbabweans come to Australia for various reasons, such as study, and there is no indication this leads to harm on return to Zimbabwe from the Government of Zimbabwe or its supporters. In reaching these conclusions the Tribunal accepts information referred to at hearing that returnees, including students from Australia or other “western” countries are generally at no greater risk than persons remaining in Zimbabwe. Whilst that information does concede returnees may be scrutinised by authorities on arrival, such scrutiny alone does not amount to the “serious harm” required under the Migration Act to constitute persecution.
86. The Tribunal also accepts other information which indicates the Government of Zimbabwe, and both major parties have actively encouraged expatriate Zimbabweans to return to help rebuild Zimbabwe and its public services (see “ZIMBABWE- Exiles Start to Return” Institute of War and Peace Reporting (IWPR) 19 March 2009, and the UK Border Agency “Country of Origin Information Report” for Zimbabwe, 20 July 2009 set out above).
87. The Tribunal is therefore not satisfied the first applicant’s presence or study in Australia or absence from Zimbabwe results in a real chance of persecution if returned to Zimbabwe now or in the reasonably foreseeable future. It does however accept when viewed with his political profile, that his presence here and extended absence from Zimbabwe may lead to greater interest or attention on return to Zimbabwe, and that such interest may more readily disclose or reveal his political opinion and MDC activism and support.

*Third Country protection and internal relocation*

88. There is no evidence the first applicant has a legally enforceable right to enter and reside in any other country, and the Tribunal is not satisfied he has such right. In reaching this conclusion, it notes whilst he previously held temporary permits to remain in [Country 2] in

2009, they have expired, and he has no right to re-enter that country and reside there. The Tribunal is also satisfied whilst the second applicant is a citizen of [Country 1], the first applicant as her husband has no right to acquire citizenship of [Country 1] through marriage, and has no current right to enter and reside in [Country 1] as a result of his marriage. The Tribunal therefore finds he is not excluded from Australia's protection by s36(3) of the Act.

89. The Tribunal finds the harm feared by the first applicant exists in his local area, which was Harare. The Tribunal considered, but does not accept he could avoid that harm by relocating to some other part of Zimbabwe. Whilst country information (such as the May 2011 DFAT report above) suggests relocation might be possible in some cases, particularly to an urban area like Harare or Bulawayo, the Tribunal notes the applicant previously lived in Harare. The Tribunal considered whether relocation to some other urban area like Bulawayo or a rural area would avoid a real chance of serious harm. Country information indicates relocation to a rural area was, in practice considered difficult (see the UK Border Agency "*Fact Finding Mission*") and the Tribunal concludes relocation to a rural area is not be reasonable in his case. The Tribunal also concludes that given his profile and history, his MDC affiliation would become known if he was to seek to relocate to an area such as Bulawayo. In reaching this conclusion the Tribunal accepts the August 2011 UK Border Agency "Country of Origin Report" (above) that "*the intelligence systems of the main political parties are sophisticated and it would not be possible for those who have come to the adverse attention of a party to avoid that risk by relocating within Zimbabwe*". As such, the Tribunal is not satisfied relocation is reasonable in this case.

## CONCLUSION

90. For the reasons above, the Tribunal is satisfied the first named applicant is a person in respect of whom Australia has protection obligations and that he satisfies the criterion in s.36(2)(a). In light of this it is unnecessary to consider if he meets the alternative criterion in s.36(2)(aa).
91. The other two applicants make no claims in their own right, and the Tribunal is not satisfied either are persons in respect of whom Australia has protection obligations, and they therefore do not satisfy the criterion in s.36(2)(a) or (aa). However, the Tribunal is satisfied their relationship to first named applicant (wife and child) is such that they are members of the family unit of the first applicant for the purposes of s.36(2)(b)(i). As such, the fate of their applications depends on the outcome of the first named applicant's application. As he satisfies the criterion in s.36(2)(a), it follows the other applicants will be entitled to protection visas provided they meet the criterion in s.36(2)(b)(ii) and the remaining criteria for the visa.

## DECISION

92. The Tribunal remits the matter for reconsideration with the following directions:
- (i) that the first named applicant satisfies s.36(2)(a) of the Migration Act; and
  - (ii) that the other applicants satisfy s.36(2)(b)(i) of the Migration Act, on the basis of their membership of the same family unit as the first named applicant.

Peter Murphy  
Senior Member