

**0902859 [2009] RRTA 612 (20 July 2009)**

**DECISION RECORD**

**RRT CASE NUMBER:** 0902859

**DIAC REFERENCE(S):** CLF2009/15423 CLF2009/44878

**COUNTRY OF REFERENCE:** Zimbabwe

**TRIBUNAL MEMBER:** Nicole Burns

**DATE:** 20 July 2009

**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, being a person to whom Australia has protection obligations under the Refugees Convention; and
- (ii) that the second and third named applicants satisfy s.36(2)(b)(i) of the Migration Act, being members of the same family unit as the first named applicant.

## **STATEMENT OF DECISION AND REASONS**

### **APPLICATION FOR REVIEW**

1. This is an application for review of decisions made by a delegate of the Minister for Immigration and Citizenship to refuse to grant the applicants Protection (Class XA) visas under s.65 of the *Migration Act 1958* (the Act).
2. The applicants, who claim to be citizens of Zimbabwe, arrived in Australia [in] December 2008 and applied to the Department of Immigration and Citizenship for Protection (Class XA) visas [in] February 2009. The delegate decided to refuse to grant the visas [in] April 2009 and notified the applicants of the decision and their review rights by letter [on the same date].
3. The delegate refused the visa application on the basis that the first named applicant is not a person to whom Australia has protection obligations under the Refugees Convention.
4. The applicants applied to the Tribunal [in] April 2009 for review of the delegate's decisions.
5. The Tribunal finds that the delegate's decision is an RRT-reviewable decision under s.411(1)(c) of the Act. The Tribunal finds that the applicants have made a valid application for review under s.412 of the Act.

### **RELEVANT LAW**

6. Under s.65(1) a visa may be granted only if the decision maker is satisfied that the prescribed criteria for the visa have been satisfied. In general, the relevant criteria for the grant of a protection visa are those in force when the visa application was lodged although some statutory qualifications enacted since then may also be relevant.
7. Section 36(2)(a) of the Act provides that a criterion for a protection visa is that the applicant for the visa is a non-citizen in Australia to whom the Minister is satisfied Australia has protection obligations under the 1951 Convention Relating to the Status of Refugees as amended by the 1967 Protocol Relating to the Status of Refugees (together, the Refugees Convention, or the Convention).
8. Section 36(2)(b) provides 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 (i) to whom Australia has protection obligations under the Convention and (ii) 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 Migration Regulations 1994 for the purposes of the definition.
9. Further criteria for the grant of a Protection (Class XA) visa are set out in Part 866 of Schedule 2 to the Migration Regulations 1994.

## Definition of 'refugee'

10. Australia is a party to the Refugees Convention and generally speaking, has protection obligations to 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.
11. The High Court has considered this definition in a number of cases, notably *Chan Yee Kin v MIEA* (1989) 169 CLR 379, *Applicant A v MIEA* (1997) 190 CLR 225, *MIEA v Guo* (1997) 191 CLR 559, *Chen Shi Hai v MIMA* (2000) 201 CLR 293, *MIMA v Haji Ibrahim* (2000) 204 CLR 1, *MIMA v Khawar* (2002) 210 CLR 1, *MIMA v Respondents S152/2003* (2004) 222 CLR 1 and *Applicant S v MIMA* (2004) 217 CLR 387.
12. 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.
13. There are four key elements to the Convention definition. First, an applicant must be outside his or her country.
14. 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)). The expression "serious harm" includes, for example, a threat to life or liberty, significant physical harassment or ill-treatment, or significant economic hardship or denial of access to basic services or denial of capacity to earn a livelihood, where such hardship or denial threatens the applicant's capacity to subsist: 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.
15. 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. However the motivation need not be one of enmity, malignity or other antipathy towards the victim on the part of the persecutor.
16. 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.

17. 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 persecution for a Convention stipulated reason. A fear is well-founded where there is a real substantial basis for it but not if it is merely assumed or based on mere speculation. 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.
18. 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.
19. Whether an applicant is a person to 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.

#### *Protection Obligations*

20. Subsection 36(2) of the Act, which refers to Australia's protection obligations under the Refugees Convention, is qualified by subsections 36(3), (4) and (5) of the Act. These provisions apply to protection visa applications made on or after 16 December 1999. They provide as follows:

#### *Protection obligations*

(3) Australia is taken not to have protection obligations to a non-citizen who has not taken all possible steps to avail himself or herself of a right to enter and reside in, whether temporarily or permanently and however that right arose or is expressed, any country apart from Australia, including countries of which the non-citizen is a national.

(4) However, if the non-citizen has a well-founded fear of being persecuted in a country for reasons of race, religion, nationality, membership of a particular social group or political opinion, subsection (3) does not apply in relation to that country.

(5) Also, if the non-citizen has a well-founded fear that:

(a) a country will return the non-citizen to another country; and

(b) the non-citizen will be persecuted in that other country for reasons of race, religion, nationality, membership of a particular social group or political opinion;

subsection (3) does not apply in relation to the first-mentioned country.

21. This means that where a non-citizen in Australia has a right to enter and reside in a third country, that person will not be owed protection obligations in Australia if he or she has not availed himself or herself of that right unless the conditions prescribed in either s.36(4) or (5) are satisfied, in which case the s.36(3) preclusion will not apply.

22. In determining whether these provisions apply, relevant considerations will be: whether the applicant has a legally enforceable right to enter and reside in a third country either temporarily or permanently; whether he or she has taken all possible steps to avail himself or herself of that right; whether he or she has a well-founded fear of being persecuted for a Convention reason in the third country itself; and whether there is a risk that the third country will return the applicant to another country where he or she has a well-founded fear of being persecuted for a Convention reason.

### **CLAIMS AND EVIDENCE**

23. The Tribunal has before it the Department's file relating to the applicants. The Tribunal also has had regard to the material referred to in the delegate's decision, and other material available to it from a range of sources.
24. According to his protection visa application the first named visa applicant (the applicant) was born in Harare, Zimbabwe in 1961. His religion is Seventh Day Adventist (SDA) and he was a pastor for the SDA church in Zimbabwe before he came to Australia. His wife died in a car accident in September 2008. His daughter and son, aged 17 and 13 respectively, are included in the visa application as members of the applicant's family unit.
25. It is stated that the applicant fears being persecuted by agents of the ruling ZANU-PF (including the Central Intelligence Organisation, CIO) because of his imputed political opinion (i.e. his perceived support for the Movement for Democratic Change, MDC) if he returns to Zimbabwe. He claims that his problems began after he married two SDA congregation members in May 2005, against the wishes of the groom's girlfriend ([Mrs A's name deleted under s431(2) of the Migration Act 1958 as this information may identify the applicants]). [Mrs A] blamed the applicant for registering the marriage and sought revenge by framing the applicant for an erroneous plot to kill the president, Mr Mugabe in May 2008. The applicant was questioned and followed by CIO officers extensively from May 2008, including into Mozambique when he was shopping for food. He claims that the car accident which resulted in his wife's death in September 2008 was deliberate and that he was specifically targeted.
26. It is stated that the applicant and his children have permanent residency for South Africa, acquired in 2007 on the basis of his mother-in-law's South African residency. The applicant does not want to live in South Africa however, because he fears that he and his children may become victims of anti-Zimbabwean sentiment and xenophobic violence. He also fears that the CIO would be able to track him down in South Africa. He claims that the South African government can not protect him and his family.
27. The applicant provided a copy of court documents related to the personal dispute between the couple the applicant married in 2005 and [Mrs A].
28. The delegate refused to grant the applicant a visa [in] April 2009 on the basis that they found that the applicant had effective protection in South Africa. The applicant's claims for protection relating to Zimbabwe were not assessed.
29. The applicant applied for a review of the delegate's decision [in] April 2009. He submitted another statutory declaration dated [in] June 2009 to the Tribunal, addressing some of the delegate's concerns. In it he argues that the police in South Africa do not have the resources or inclination to control xenophobic violence. He states that police corruption is rife in South

Africa. He recalled two incidences where he was intimidated whilst on shopping trips to South Africa; including being held up at knifepoint in 2007 after his assailants recognised his car's Zimbabwean number plates. He states that whilst he agrees with the delegate that his problems started with a personal vendetta by [Mrs A], these problems took on a political aspect in May 2008 when the CIO intercepted a fax (sent by [Mrs A]) which identified the applicant as a MDC member and implicated him in a plot to destroy the president. From then on the CIO believed that the applicant was a MDC member. He states that in Zimbabwe there is a history of eliminating political threats (perceived or real) through car accidents. (He attached numerous articles describing similar situations). He also states that a South African current affairs show called 'Carte Blanch' reported CIO officers following Zimbabweans into South Africa.

30. [In] June 2009 the applicant's representative provided a submission to the Tribunal in which she outlined and expanded upon the applicant's claims for protection (regarding South Africa and Zimbabwe), referring to relevant country information. In it she submits that the applicant has a well-founded fear of persecution in Zimbabwe because of his imputed political opinion as a supporter of the MDC and as someone who has made direct threats against Mugabe. She also submits that the situation in Zimbabwe has not improved, despite the 'Unity Government' coming into force in February 2009, and those grave human rights abuses, including against perceived opposition supporters, continue. She also argues that the applicant does not have effective protection in a safe third country, despite holding South African permanent residence, because of the real chance that he would face persecution in South Africa due to his race and his membership of a particular social group(s) of 'perceived foreigners and South African residents who are foreign born'.

### **The Tribunal hearing**

31. The applicant appeared before the Tribunal [in] June 2009 to give evidence and present arguments. He was represented in relation to the review by his registered migration agent, who attended the Tribunal hearing.
32. The applicant said he has a large family: two sisters, seven brothers, four step-sisters and four step-brothers. Three of his brothers, two of his sisters and three step-sisters live in Australia. His mother came to Australia as a refugee – perceived to be a MDC supporter - in 2007. He has a brother in Canada. The rest of his siblings are in Zimbabwe. His father died in 1985.
33. The applicant said he was brought up a Catholic. He joined the SDA church in 1981 because he thought it offered a true interpretation of the 'word' and because of the SDA church's emphasis on the Ten Commandments and health reform. He studied theology after high school – two years in Zimbabwe and three years in South Africa (from 1983-86) before returning to Zimbabwe as a pastor. In 2004 he started the [organisation deleted: s431(2)], with another SDA pastor called [name deleted: s431(2)], in an attempt to reach people more effectively. Their congregation grew fast, because they were dealing directly with the community. The applicant said his wife became baptized as a SDA member when he was living in South Africa and his children were brought up as SDA followers.
34. The applicant said the SDA church does not encourage open political activities in Zimbabwe, however members are allowed to do what they like. Since 2002 when the MDC became a strong opposition force, CIO officers have attended church services and pastors have been followed because they are seen as men of influence who could sway congregations.

35. The applicant was asked about the MDC. He said the MDC began in 1999 (previously a trade union) and advocated the principles of democracy, fair treatment of people, socialism, and freedom from persecution. The applicant embraced this philosophy. When asked if he was politically active, the applicant replied that people can be politically active without standing on the street. He saw himself as a 'passive resister'; i.e. someone who does not support the mainstream or oppressive practices. He said many people in Zimbabwe do not support the government because they are tyrannical and extremely oppressive. The applicant was asked if it became increasingly difficult to be a 'passive resister' in Zimbabwe. He referred to a saying that one in three people spy for the government in Zimbabwe. Therefore it became increasingly difficult to express one's opinion, to anyone.
36. The applicant was asked why he came to Australia. He explained that in May 2005 he married two members of his congregation: [Ms B] and [Mr C]. However [Mr C] had another girlfriend, a widow called [Mrs A]. [Mrs A] and [Ms B] had numerous fights over [Mr C], who was 78 and owned a lot of property. When [Mrs A] found out that [Mr C] had married, she invited the applicant to her home and asked him to confirm if the wedding took place, which he did. She told the applicant that [Mr C] had denied the wedding took place. She told him also that if he had failed to come to her house she was thinking of burning down his church. She referred to herself as 'Taliban' because her ancestors were from Afghanistan.
37. [Mrs A] phoned the applicant the next day and threatened trouble if he registered the wedding between [Mr C] and [Ms B]. The applicant ignored her threats and registered the wedding. [Mr C's] subsequent attempts to have the wedding annulled were unsuccessful. Divorce was not an option because [Mr C] never acknowledged that the marriage took place. Instead he made an application for an interdict at the Magistrate's Court to say the wedding did not happen and to prevent [Ms B] from using [Mr C's] title in any business transactions. The magistrate threw his application out and [Mr C] subsequently lodged an appeal to the High Court (which is pending). [Mr C] abandoned [Ms B] and continued visiting [Mrs A], who had more power over him.
38. The applicant believed [Mrs A's] strategy was to destroy his credibility as a marriage officer because he was the key witness at the wedding between [Ms B] and [Mr C]. [Mrs A] wanted to marry [Mr C] and access his properties. Although [Ms B] died from AIDS last month, her family could still try and access [Mr C's] wealth. The case is unresolved.
39. [Mrs A] has political connections. [Information deleted: s431(2)].
40. The applicant said in May 2008 [Mrs A] passed him a message (via friends and family) that she would get him into trouble with the State. A week later the applicant received a phone call from a man calling himself [Mr D] who asked him to pick up a fax at a hotel. The applicant stayed away from the hotel however, after talking to a church elder who warned that it may be a trap. A few hours later [name deleted: s431(2)] called the applicant and told him that [Mr D] had phoned his niece (also [Ms B's] daughter) about the fax. She had picked up the fax (in an envelope addressed to the applicant), returned home and ten minutes later a van arrived full of CIO officers. The officers opened the envelope then took [Ms B's] daughter to the police station. They interrogated her for about three hours, threatened her then took her home.
41. Three days later six CIO officers arrived at the applicant's church and took him to an office where they questioned him about the fax. They told him the fax had come from the UK and included threats against the president. The applicant glanced at the fax and saw plans to

destroy the president and reference to collusion between the British government and the MDC to do so. The fax was typed, in English. His name was on the fax and the envelope. He denied any knowledge of the fax. When asked by the CIO officers if he suspected anyone, the applicant said he suspected [Mrs A], and briefly explained why.

42. The CIO officers asked the applicant if they could search his house and drove him home. However they did not search his house after the applicant's wife demanded to see a search warrant. The applicant was asked why the CIO officers would be concerned about having a search warrant. He said that maybe if he was a normal citizen they would not care, but because he was a pastor they did.
43. After the applicant was questioned by the CIO officers he noticed that he was being followed. Those following him did not try to hide it; they wanted to pass a message to let the applicant know that they were on his case. He suspected surveillance teams at his house, as well as at his church.
44. The applicant was asked when he started to think about leaving Zimbabwe and why. He said he and his wife had wanted to leave earlier because of the poor political situation and political unrest in 2007/08. Many people in his congregation had told him stories of intimidation around the elections. Also he was unable to get basic commodities in Zimbabwe and had to frequently travel to South Africa to buy supplies; at least twice a year.
45. The applicant was asked if he had any problems whilst travelling to South Africa on his shopping trips. He said when parked in his car (with his family) in a shopping centre in South Africa in April 2007 two men demanded money at knifepoint. The men said they had a gun and brought up the fact that the applicant and his family were Zimbabweans. They threatened to kill the applicant and his family. The applicant told his assailants that he did not have any money and they left. His friends told him how lucky he was not to escape. Somebody else made a threatening gesture at him and his family whilst driving during that same trip. He and his family returned to buy supplies in South Africa in December 2007 because they had little choice. The applicant was asked if he thought the men who had threatened him at knifepoint had just wanted money. He replied that they do not like foreigners and saw them as a soft target.
46. In March 2007 the applicant and his family obtained permanent residence for South Africa. At the time they were thinking of leaving because of the general harassment, intimidation, and insecurity in Zimbabwe. The applicant's wife's mother had moved to South Africa in 1990, and they obtained their permanent residency on that basis. The applicant was asked if his mother-in-law had had any trouble living in South Africa. He said that she has lived there for so long and has now blended. The applicant was asked if he planned to move to South Africa at the time. He said he and his wife had decided to wait for the election outcomes because there was some hope that things would change in Zimbabwe. However once the CIO officers started following him the applicant felt very unsafe.
47. The applicant said he believes the car accident involving him and his family [in] September 2008 was not an accident. He and his family were on their way to visit his brother in [location deleted: s431(2)], [number]km from Harare, travelling in the early morning. The applicant was driving on a two-lane road and saw a truck and bus coming head on toward his car. He tried to get off the road, however the bus also swerved and prevented him from exiting. The bus then drove through the applicant's car. The applicant's wife died. He hit his head and his son's leg was hurt. The ambulance took two hours to arrive. He and his son



were taken to a nearby makeshift hospital by the police whilst his daughter stayed with the vehicle. The police did not ask the applicant anything about the accident nor ask for a statement. They also lied and told him his wife was still alive. The applicant was asked if he thought this was more to do with police incompetence. The applicant said that it was not a normal accident and looked as if someone had planned his death. The police did not arrest the bus driver. There were no newspaper reports of the accident. The applicant was asked if he thought staging an accident like that was extraordinary lengths for someone to go to in order to harm him. He replied that it is easy if an accident, because no one can prove foul play.

48. The applicant was hospitalised for two weeks following the accident. CIO officers attended his wife's funeral from a distance. They were watching to see if any political statements were made. The applicant decided he had to leave Zimbabwe and contacted his family in Australia. His brother-in-law paid for his and his children's tickets to Australia. They went via South Africa for two weeks because of the cholera epidemic in Zimbabwe at the time. They stayed with the applicant's mother-in-law in Cape Town. He was followed there too.
49. The applicant was asked if he had any trouble leaving the airport in Harare. He said he did not because he did not tell anyone he was leaving and the authorities would have surmised he was going shopping.
50. The applicant said about three million Zimbabweans live in South Africa. There are some CIO officers based in South Africa.
51. The applicant said that in Zimbabwe if a person makes an allegation against you the government, who do not know whether it is real or not, will see it as a political threat. If you are put under surveillance the government considers that you are a serious threat. The applicant believes that the CIO did follow him to South Africa and took the purported threat against Mugabe seriously.
52. The applicant said despite the so-called 'Unity Government' in Zimbabwe there is no change on the ground. Intimidation still occurs and will occur in the lead up to elections next year because the president does not want to lose. Anyone aligned to the opposition will be perceived as a threat.
53. The applicant's representative submitted that even though the applicant's fears have risen from a personal vendetta, this vengeance has taken on a political dimension. The authorities take any threat to the president seriously. She argued that the applicant does not have effective protection in South Africa because he would not be able to obtain security from the police, due to xenophobic violence amongst the population and the authorities, and because of his fears that he would be followed by the CIO, or other Zimbabweans in South Africa who may have an affiliation with the ZANU-PF.
54. The representative also noted country information about road accidents being used as a way to target political opponents; she said that whilst it does take some planning it is not an uncommon method in Zimbabwe.
55. [In] June 2009 the Tribunal received a number of articles about suspicious road accidents in Zimbabwe, incidences of recent intimidation against MDC supporters, and reports of xenophobic violence against Zimbabweans in South Africa from the applicant in support of his claims.

## Country information

56. In assessing the applicant's claims against the Convention grounds, the Tribunal has considered information from a range of external sources regarding the situation in Zimbabwe and South Africa.

### *South Africa*

57. A background paper prepared by the Forced Migration Studies Programme at the University of the Witwatersrand for open hearings on xenophobia hosted by the South African Human Rights Commission (SAHRC) with the Portfolio Committee of the Department of Foreign Affairs and Home Affairs and published in January 2005 reports that "South Africa is a highly xenophobic society, which out of fear of foreigners, does not naturally value the human rights of non-nationals". The paper reports that "there is strong evidence that non-nationals living and/or working in South Africa face discrimination, at the hands [of] citizens, government officials, the police, and private organizations...".
58. The paper also reports that "there is strong evidence that non-nationals living in the country suffer from systematic discrimination, social exclusion, and political alienation". The discrimination "results in non-nationals facing disproportionate difficulties in accessing employment, accommodation, banking services, and health care". This discrimination also "legitimized extortion, corruption, and the arbitrary arrest and detention of suspected non-nationals", with foreigners "also disproportionately the victim of crime". Much of this discrimination appears to turn on perceptions that foreigners are a threat to economic security. The paper notes that "South Africans' negative attitudes towards non-nationals are largely oriented towards other Africans" (Landau, Loren B. et al 2005, *Xenophobia in South Africa and Problems related to it*, January, Forced Migration Working Paper Series 13, Forced Migration Studies Programme at University of the Witwatersrand website, pp.2, 4 & 21 [http://migration.org.za/wp-content/uploads/2008/03/13\\_Xenophobia.pdf](http://migration.org.za/wp-content/uploads/2008/03/13_Xenophobia.pdf))
59. Among the findings of the hearings held by the SAHRC and published in July 2006, is the following [see South African Human Rights Commission 2006, *Report – Open hearings on Xenophobia and problems related to it*, July, pp.7-8: [http://www.sahrc.org.za/sahrc\\_cms/downloads/Xenophobia%20Report.pdf](http://www.sahrc.org.za/sahrc_cms/downloads/Xenophobia%20Report.pdf) ):

Xenophobia in South Africa has a particularly racialised expression with largely black African foreigners facing abuse and discrimination. Xenophobia was found to impact on the ability of foreigners to meet their socio-economic needs such as seeking employment, accommodation, health care, education and social security. Those tasked with the protection of foreigners, such as the South African Police Service (SAPS), the Department of Home Affairs (DHA) and the Lindela Repatriation Centre, were found to display the highest levels of xenophobia, despite government's condemnation of it.

60. The same report by the Forced Migration Studies Programme cited above reports of "strong evidence that non-nationals living and/or working in South Africa face discrimination at the hands [of]...the police". The paper goes on to say that there "is considerable evidence that non-nationals are particular targets for police harassment and corruption":

Criminals, along with the police...have learned to exploit foreigners' vulnerabilities. As a result, foreign nationals are far less likely to feel secure on the streets, even during the day. In Johannesburg, 81% felt unsafe compared to 38% of South Africans (Leggett 2003:54)...The Wits University survey in Johannesburg, for example, found that 72% of migrants reported

that they or someone they lived with had been a victim of crime in the country, compared with 56% of South Africans...this insecurity is not only at the hands of petty crooks, but is a result both of direct targeting by the police and an apparent unwillingness on the part of South Africa's security services to provide non-nationals with adequate protection.

Non-South Africans living or working in Johannesburg consequently report having been stopped by the police far more frequently than South Africans (71% versus 47% in the Wits University survey) despite having generally lived in the city for a shorter period. Although under instruction to respect the rights of non-nationals, police often refuse to recognise work permits or refugee identity cards. Some respondents even report having their identity papers confiscated or destroyed in order to justify an arrest (cf.SAHRC 1999) Furthermore, there have been numerous assertions that police elicit bribes from apprehended persons (documented and undocumented) in exchange for freedom. A Sierra Leonean man, quoted in Plamary, et al, (2003:113) recounts his experience:

61. An article dated 18 April 2006 in *Business Day* reports that "XENOPHOBIA is still rife in the police force, and even South African citizens who are found without identity documents are targeted for being "too dark" or for being in the wrong place at the wrong time, a study has found" (Benjamin, Chantelle 2006, 'Police Bias Against Foreigners 'Common'', *Business Day*, 18 April, allAfrica.com website <http://allafrica.com/> ).
62. The Centre for the Study of Violence and Reconciliation's report on the South African Police Service (SAPS) published in May 2007, states that the "black immigrant population is a major target of police abuses in South Africa, which include the denial of policing services, arbitrary arrests and corruption". The report continues:

In the context of a series of murders of Somali immigrants in Khayelitsha and other parts of Cape Town, one representative of the Somali community said that:

The problem is that people are reluctant to talk to the police because they fear for their safety. Even though the police are notified of these incidents, community members don't talk to them when they arrive because they are scared.

But, rather than finding ways around these problems, police practice relating to foreigners is likely to reinforce the chasm between the two communities. Based on research with African migrants in South Africa, Harris provides examples of foreigners being turned away when they approach police for assistance. One was told that "You are not our brother, we can't help you", another to "Go back to your country. In fact, you are not supposed to be here in South Africa" A Somali woman told of going to a police station to report that her goods had been stolen only to be laughed at and told: "You are just a refugee"...

63. The UN Office of the Resident Coordinator South Africa provides the following summary regarding the May 2008 violence against foreign nationals in South Africa:

Government sources state that since the wave of attacks on foreign nationals began on 11 May, 2008, 42 people have been killed and more than 500 injured with violence now spreading to all but two provinces in South Africa. Attacks have occurred mostly at night and have targeted foreign migrants from Bangladesh, Burundi, DRC, Kenya, Malawi, Mozambique, Nigeria, Pakistan, Somalia, Zimbabwe and other countries as well as non-Zulu speaking South Africans. They appear to be increasingly coordinated and threats of attack are sometimes issued with leaflets distributed in townships.

The violence began on the night of 11 May 2008, when angry mobs attacked foreign nationals and non-Zulu speaking locals in the Alexandra Township (Johannesburg metropolitan area)

killing three and injuring more than 40. Several homes were also burned. Almost 1,000 people fled to the local police station for safety. Attacks were then reported in the East Rand townships of Tembisa, Thokoza and Primrose and by 18 May 2008 had reached the centre of Johannesburg. Since 21 May 2008, violence has spread to other areas of South Africa and only two provinces remain unaffected, including Limpopo and Northern Cape Province. The situation has resulted in generalized fear and anxiety throughout the country.

As a result of the attacks, many foreign nationals have fled from areas of danger to police stations for protection. The NDMC [National Disaster Management Centre] has counted more than 21,800 people displaced so far with 19,375 persons displaced in Gauteng Province, 1,573 person sin Western Cape, 800 in Mpumalanga and 81 in Limpopo...

64. According to Freedom House's *Freedom in the World* report published in July 2008, "Increased illegal immigration, particularly from Zimbabwe and Mozambique, has led to a rise in xenophobia and occasional attacks by police and vigilantes. Immigration and police forces have been accused of abusing illegal immigrants and detaining them longer than allowed under the Immigration Act" (Freedom House 2008, *Freedom in the World – South Africa*, 2 July <http://freedomhouse.org/template.cfm?page=22&year=2008&country=7491>)
65. An article dated 5 September 2008 in *New Era* reports that the punishment of the perpetrators of the May 2008 violence is a "logistical nightmare" for two reasons: the difficulties associated with identifying the perpetrators and the "already over-burdened criminal justice system". The article continues:

The punishment of the perpetrators of the violence is a second logistical nightmare – firstly because of the difficulties of identifying perpetrators of the violence. Foreign nationals cite fear and intimidation or their own illegal immigrant status as barriers to reporting, while South Africans cite an unwillingness to get involved or the fear of being seen to be on the side of foreigners.

Secondly, any mass prosecution of the perpetrators would place a terrible strain on an already over-burdened criminal justice system. This means that justice may well not be served for the victims of the xenophobic violence – those injured and displaced, as well as those who lost property and possessions, and those who lost family members... (*Xenophobia, Crime and Security in SA' 2008, New Era, 5 September, allAfrica.com website <http://allafrica.com/>*).

### **Zimbabwe**

66. Despite the power-sharing arrangement between President Mugabe and the MDC Leader, Prime Minister Tsvangirai, the politically motivated violence declined and rose but the levels of violence continue to be unpredictable. Deaths, torture, abductions and disappearances continue. The UK Border Agency report of March 2009 states:

The MDC, together with human rights monitors, reported that political violence continued after polling day with ZANU-PF forces continuing to target the MDC, particularly its officials. Meanwhile, increasing numbers of people fled Zimbabwe, with many showing signs of beating or torture

Following the run-off, Robert Mugabe faced growing international condemnation, with even previously sympathetic neighbouring governments declaring the election to be illegitimate because of the blatant violence and vote rigging. This, combined with an economy in freefall, left Mugabe with little choice but to talk to Morgan

Tsvangirai, and under the mediation of South African President Thabo Mbeki, Mugabe and Tsvangirai agreed to start talks aimed at resolving the crisis.

By 22 August 2008, the Foreign and Commonwealth Office (FCO) was reporting that levels of political violence and intimidation had fallen compared with the peak period of electoral violence, with the groups of ZANU-PF youth previously prevalent in the northern, wealthier suburbs of Harare having dispersed. The situation remained tense however, particularly in parts of Mashonaland and Manicaland, where the ZANU-PF leadership is exceptionally vicious. Access to the rural areas continued to be restricted by roadblocks with groups of ZANU-PF youth still present in those areas and the main bases still in place. Attacks, abductions and arrests of perceived MDC activists were still occurring around the country, but at a lower level than April - June. The FCO concluded that while there was a downward trend in violence, the situation remained unpredictable and incidents of violence across the country continued, noting that it could deteriorate further without warning.

67. The 2008 US Department of State reports:

There were numerous reports of politically motivated abductions during the year. MDC leaders reported that state security agents and ZANU-PF party supporters abducted and tortured hundreds of opposition and civil society members, as well as student leaders, as part of a systematic government-sponsored campaign to dismantle the opposition party's structures before the March 29 election and, especially, immediately preceding the June 27 presidential run-off. In the majority of cases, victims were abducted from their homes or off the streets by a group of unidentified assailants, driven to remote locations, interrogated and tortured for one or two days, and abandoned. In some cases, the abducted person was located in police custody days or weeks later. Between late October and year's end, approximately 32 people were abducted by suspected state security agents and held for up to two months before being brought to court. At year's end an estimated 14 were still missing.

Government supporters, including youth militia and war veterans trained by ZANU-PF, were also deployed to harass and intimidate members of the opposition, labor, student movement, and civic groups, as well as journalists considered critical of the government. For example, on May 4, Zimbabwe Election Support Network (ZESN) observers in Mount Darwin East were attacked by suspected ZANU-PF supporters for allegedly facilitating an MDC victory in the March harmonized election. The attacks involved harassment, assault of the observers and their relatives, vandalizing and setting fire to observers' homes, and looting of their property, including blankets and food reserves. At least seven observers and two of their relatives sustained serious injuries in the attacks and were hospitalized.

No action was taken in the other 2006 or 2007 cases of abuse.

The government continued to restrict freedom of speech, particularly by those making or publicizing comments critical of President Mugabe. Passage of the 2007 ICA increased the government's ability to monitor speech and to punish those who criticized the government.

Under authority of the Official Secrets Act, Public Order, and Security Act (POSA), or the Criminal Law Act, the government arrested individuals for criticizing President Mugabe in public.

There were credible reports that CIO agents and informers routinely monitored political and other meetings. Persons deemed critical of the government were frequently targeted for harassment, abduction, and torture.

68. The 2009 Human Rights Watch report makes the following comments:

The brutal response of President Robert Mugabe and the ruling Zimbabwe African National Union-Patriotic Front (ZANU-PF) to their loss in general elections in March 2008 plunged Zimbabwe deep into political turmoil. After a month's delay in releasing the results of the presidential poll, the Zimbabwe Electoral Commission declared that opposition Movement for Democratic Change (MDC) leader Morgan Tsvangirai had failed to win by a 50-percent-plus-one vote majority, necessitating a run-off on June 27. ZANU-PF launched a campaign of violence against MDC activists and supporters, mobilizing a system of repression and violent intimidation that remained in place, if less overtly active, at the end of the year. The months leading up to the run-off were marked by widespread abuses, including killings, torture, beatings, looting, and burning of property. Perpetrators, including the police, military, and local ZANU-PF officials, as well as government-backed militia and war veterans, committed abuses with almost absolute impunity. At least 163 people were killed and some 5,000 were tortured or beaten. Tens of thousands more were displaced by the violence, which eventually forced Tsvangirai to withdraw from the poll, leaving Mugabe to declare himself the winner. In September, in the face of international pressure and a severely weakened economy, Mugabe signed a power-sharing agreement with Tsvangirai under the mediation of then-president Thabo Mbeki of South Africa. However, the frailty of the deal was soon apparent as the parties rapidly reached a deadlock on the distribution of ministries, with violence and intimidation against the MDC still taking place. Zimbabwe's political situation remains precarious, and the future looks bleak if the political leadership does not end abuses and address accountability for both past and present abuses.

#### Post-Election Violence and Repression

The build up to the March elections was generally peaceful, despite some flaws in the electoral process. However, the months afterwards were marked by a well planned and systematic campaign of violence by ZANU PF and its allies. In an attempt to overturn the vote in the presidential run-off, government-backed militia and war veterans, ZANU-PF officials and supporters, and senior military officers waged a vicious campaign of intimidation against MDC activists and suspected supporters. Entire villages were cordoned off and those suspected of having voted for the MDC were brutally beaten and tortured. The militia and war veterans beat, tortured, and mutilated suspected MDC activists, supporters, and their family members in hundreds of base camps—many of them army bases—established across the provinces as local operation centers. Thousands of people were forced to attend abusive “re-education” meetings. Suspected ZANU-PF supporters and militia targeted and killed up to 163 MDC activists. In an effort to subvert the run-off electoral process and instill fear in election officials and observers, police arrested more than 100 presiding officers and election officials on politically motivated charges of electoral fraud. Police also arrested hundreds of MDC supporters and officials on spurious charges of inciting violence, while ZANU-PF supporters, who were responsible for the majority of the violence, were allowed to carry out abuses with almost absolute impunity.

#### Impunity and the Rule of Law

Zimbabwe's long history of impunity for politically motivated crimes has worsened the political crisis. Those who committed past abuses have remained free to carry out

further violence and other crimes. Since 2000 the government has led an onslaught on the judiciary that has included physical and verbal attacks against judges and bribes intended to compromise the impartiality and undermine the work of the judiciary.

Law enforcement agencies have subverted the rule of law. The police are responsible for widespread violations, including harassment, threats, and violence against opposition supporters and human rights activists, as well as torture and other mistreatment. Police have routinely refused to take action against ZANU-PF supporters and militia implicated in political violence. Public confidence in the judiciary and police—especially regarding independence and impartiality—is eroded. There have been no investigations into the role of senior government, military, and ruling party officials implicated in mobilizing and inciting militia forces responsible for election-related violence.

69. The UK Home Office Country of Origin Information Reports – Zimbabwe of 25 March 2009 provides the following current comments on politically motivated violence:

Politics and politically motivated violence

24 March Minutes of a meeting between Roy Bennett and MDC colleagues reportedly stated that high-ranking, hard-line elements within Zimbabwe's military and members of the ZANU-PF are resisting political reforms. The minutes reported that resistance could soon see Zimbabwe entering a “perilous period” that might threaten the current transitional arrangement. But the minutes also stated that “There is a feeling of hope amid the MDC in that ZANU (PF) realises the game is up” and gave an example of a senior official in the ministry of agriculture appointed by President Mugabe who had “crossed the floor”. Business Day, ZANU (PF) hardliners 'a threat to transition, 24 March 2009. [http://www.zimbabwesituation.com/mar24a\\_2009.html#Z4](http://www.zimbabwesituation.com/mar24a_2009.html#Z4)).

70. In a recent briefing the International Crisis Group (ICG) report about the political challenges still being faced in Zimbabwe:

The long talks over implementation of the Global Political Agreement (GPA) signed by ZANU-PF and the MDC on 15 September 2008 gave few signs that President Robert Mugabe genuinely accepts the need for political and economic reforms and national reconciliation. He has described the new inclusive government as a temporary one in which ZANU-PF remains in the driver's seat. By contrast, Tsvangirai sees it as a transitional process that can stabilise the country, leading to elections under a new constitution in two years. In effect, the deal has established two power centres and left the ZANU-PF establishment ample opportunities to block or undermine reforms.

Some old regime elements seek to cause the new government to fail, out of fear of prosecution, loss of power and its financial sinecures, hatred for Tsvangirai or the MDC or a genuine belief that they are the guardians of the country's liberation. They are thus continuing to provoke and frustrate the MDC, as shown by such actions as continuing arrests and detention of MDC activists, refusal of police to carry out some government orders, efforts to drive out the last few hundred white farmers by continued farm invasions and stalling on the appointment of provincial governors as well as reconfiguration of ministerial powers. (International Crisis Group, Zimbabwe: Engaging the Inclusive Government, Africa Briefing No. 59, 20 April 2009, [www.crisisgroup.org/home/index.cfm?id=6064&I=1](http://www.crisisgroup.org/home/index.cfm?id=6064&I=1) Accessed 20 July 2009)

## FINDINGS AND REASONS

### *Safe third country – South Africa*

71. The delegate refused to grant the applicant a protection visa on the basis that he had a right to enter and reside in a safe third country: i.e. South Africa. The delegate formed this view because the applicant, and his children, had obtained permanent residency in South Africa in March 2007.
72. Based on copies of the applicant and his children's passports on file, the Tribunal accepts that the applicant was granted permanent residency for South Africa in March 2007 and therefore finds that the applicants have a legally enforceable right to enter and reside in South Africa. However, the applicant has argued that as a Zimbabwean and a foreigner, he has a well-founded fear of being persecuted for a Convention reason in South Africa itself, which the Tribunal will now consider.
73. The applicant has claimed that his (and his family's) life was threatened when visiting South Africa in 2007 during an attempted robbery. Although the incident was largely criminal in nature, the applicant argued that he was a soft target because the perpetrators knew they were Zimbabwean. The Tribunal found the applicant to be a credible witness at the hearing and accepts that this incident occurred as claimed.
74. Looking to the future, country information cited above indicates that systematic discrimination and harassment against foreigners does occur in South Africa, whether they are permanent residents or not. The Tribunal accepts that particularly since May 11, 2008 there has been xenophobic violence spreading across South Africa, together with high levels of violent crime across racial and economic divides which continue to inhibit the full enjoyment of human rights. It would appear that the anti-foreigner violence has been sparked by immigrants being seen to be blamed for job losses and increasing levels of crime and violence.
75. The Tribunal accepts that the applicant belongs to a particular social group comprising of foreigners or perceived foreigners. The Tribunal finds that the country information demonstrates that the applicant's profile means that there is more than a remote chance that he will face serious harm now and in the reasonably foreseeable future due to his membership of that particular social group.
76. In terms of sufficiency of protection as a foreigner in South Africa, the Tribunal has had regard to whether the applicant would now and in the reasonably foreseeable future be able to avail himself of state protection which accords with "international standards". The country information such as the paper by the Forced Migration Studies Programme cited above indicates that the police and some institutions have an endemic problem with corruption and xenophobia, blaming foreigners for crime and social unrest. Such country information suggests that, given the police complicity in the targeted discrimination of foreigners, the State would not be able to provide adequate protection.
77. The Tribunal accepts that the applicant has been threatened in the past in South Africa on account of being a foreigner, and based on country information, finds that there is a real chance of serious harm were he to return to South Africa now or in the reasonably foreseeable future on the basis of his membership of a particular social group comprising foreigners or perceived foreigners. Therefore the Tribunal finds that the applicant does have



a well founded fear of persecution for a Convention reason. The Tribunal also finds that effective protection is not available to the applicant in South Africa and that he would be unable to reasonably relocate anywhere within South Africa given the unwillingness and inability of the authorities to provide effective protection.

78. Accordingly the Tribunal finds that s.36(3) does not apply to the applicant with respect to South Africa.

***Protection claims – Zimbabwe***

79. Based on copies of the applicants' passports on file, the Tribunal finds that the applicant and his children are Zimbabwean citizens.
80. The applicant claims he is in need of protection for reasons of his imputed political opinion; that is as an MDC supporter in Zimbabwe.
81. The Tribunal finds that the harm feared by the applicant involves serious harm and systematic and discriminatory conduct, and that the essential and significant reason for the harm claimed to be feared is his imputed political opinion, which is a Convention reason.
82. The applicant claims that he supported MDC's principles, particularly from 2002 as the Mugabe regime became more oppressive. He was not politically active however, and circumspect about political matters when delivering sermons to his congregation as a respected SDA pastor in Harare. However, he claims to have come to the attention of the CIO from May 2008 on suspicion that he was an MDC member planning to destroy the president, with help from the UK. He claims that these allegations were fabricated by [Mrs A], embittered because the applicant had married her partner ([Mr C]) to another woman in 2005, thus preventing her from marrying [Mr C] and accessing his fortunes. The applicant claims that from May 2008 he was under constant CIO surveillance. He claims also that the car accident in September 2008 which resulted in his wife's death was politically motivated and he was the prime target.
83. The Tribunal found the applicant to be a credible witness at the hearing. His evidence was consistent with his written claims and country information available. The Tribunal therefore accepts these events occurred as claimed. The Tribunal accepts that the applicant was involved in a personal dispute with [Mrs A], which escalated and took on a serious political flavour. The Tribunal accepts that the applicant was imputed with an anti-government political opinion and was under CIO surveillance. The Tribunal accepts that the applicant believes the car accident in which his wife was killed was deliberate and targeted at him; country information indicates that removing political opponents through staging road accidents in Zimbabwe is not uncommon. The Tribunal therefore accepts that the applicant has suffered harm and intimidation in the past for reasons of his imputed political opinion.
84. Looking to the future, country information such as the 2009 Human Rights Watch report and the US State Department human rights report for 2008 cited above indicates that the power-sharing arrangement between President Mugabe and the MDC Leader, Prime Minister Tsvangirai, is fragile and the level of political violence remains unpredictable in Zimbabwe. Human rights abuses, including disappearances and extra-judicial killings, continue. The latest briefing from the ICG cited above indicate that resistance among "some old regime elements" continues and that arrests and detention of MDC activists continue. Based on such country information the Tribunal is of the view that it is too early to assess whether real

reform has occurred and politically motivated violence remains a serious risk in Zimbabwe against MDC members and supporters. Given that the Tribunal accepts that the applicant has been imputed with an anti-government political opinion and suffered harm and intimidation in the past for this reason, the Tribunal finds that the applicant faces a real chance of serious harm amounting to persecution for reason of his imputed political opinion if he were to return to Zimbabwe now or in the reasonably foreseeable future.

85. The Tribunal is of the view that the applicant's fears about what might happen to him in the future if he returns to Zimbabwe are well-founded. The applicant's claims are supported by country information which tends to confirm, for example, that there are elements within the ZANU-PF who are resisting change and continue to view anyone who supports the MDC as a potential enemy and potential target for intimidation and harm.
86. As the perpetrators of such harm are the State itself, the Tribunal finds that the applicant would not be able to avoid the harm he fears by relocating elsewhere in Zimbabwe.
87. Accordingly, the Tribunal finds that the applicant has a well-founded fear of persecution for a Convention reason (i.e. his imputed political opinion) in Zimbabwe should he return now or in the reasonably foreseeable future.

## CONCLUSIONS

88. The Tribunal is satisfied that the first named applicant is a person to whom Australia has protection obligations under the Refugees Convention. Therefore the first named applicant satisfies the criterion set out in s.36(2)(a) for a protection visa and will be entitled to such a visa, provided he satisfies the remaining criteria.
89. The other applicants applied as members of the same family unit as the first named applicant. The Tribunal is satisfied that they are the children of the first named visa applicant and are members of the same family unit as the first named applicant for the purposes of s.36(2)(b)(i). The fate of their applications depends on the outcome of the first named applicant's application. As the first named applicant satisfies the criterion set out in s.36(2)(a), it follows that 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

90. 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, being a person to whom Australia has protection obligations under the Refugees Convention; and
  - (ii) that the second and third named applicants satisfy s.36(2)(b)(i) of the Migration Act, being members of the same family unit as the first named applicant.

I certify that this decision contains no information which might identify the applicant or any relative or dependant of the applicant or that is the subject of a direction pursuant to section 440 of the *Migration Act 1958*.

Sealing Officer's I.D. prrt44