

AT AUCKLAND

Appellant: AB (Malawi)

Before: S A Aitchison (Member)

Representative for the Appellant: T Mukusha

Counsel for the Respondent: No Appearance

Date of Hearing: 23 March 2015

Date of Decision: 21 April 2015

DECISION

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

INTRODUCTION

[2] The appellant claims that her deceased husband's brother is using violence and threats against her and her new husband, to force her to marry him in accordance with the Sena customary practice of widow inheritance (*chokolo*).

[3] The central issue to be resolved in this appeal is whether the appellant's claim is well-founded. Given that the same claim is relied upon in respect of all limbs of the appeal, it is appropriate to record it first.

THE APPELLANT'S CASE

[4] The account which follows is that given by the appellant at the appeal hearing. It is assessed later.

Personal and Family Background

[5] The appellant, aged in her mid-20s, is of Ngoni ethnicity, and a Christian. She was born in Z town and has five older siblings. Her parents are now deceased. She maintains contact with one sister, AA, and a brother, BB, who live in Malawi.

[6] When the appellant's father died in 2000, her paternal uncles arrived and claimed his property. Being left destitute, the appellant's mother asked a paternal uncle EE if the mother and the appellant could live with him. The other siblings moved to other areas in Malawi and took care of themselves. While living with the uncle, the uncle paid for the appellant's secondary school education. However, the mother and the appellant were frequently physically abused. While they sought assistance from the police, they were told it was too difficult to challenge the uncle, owing to his wealth and connections with the Malawi authorities.

Forced Marriage

[7] In January 2003, when the appellant was in her early teens, she was told by her uncle, EE, that she must marry FF, a businessman from the Sena tribe. If she did not marry him, she would be killed by her uncles. She pleaded not to marry FF, but was told that a dowry had already been paid by FF. The uncle physically abused the appellant and locked her in a room for a week. She was then forced to marry FF in an informal ceremony. The marriage was not registered because it was a tribal marriage according to the Sena custom.

[8] FF was approximately 40 years old and had two other wives, who were older than the appellant, and had two adult sons each. The other wives lived in a semi-detached house in Y town, and the appellant also lived in a home approximately 20 minutes away.

[9] Throughout the course of the marriage, FF lived between the houses and wives, but saw the appellant approximately every day. FF had high profile connections with government ministers and police who visited the home frequently. He was physically abusive to the appellant, and threatened to kill her when she refused to sleep with him. The appellant reported the abuse to the police, but they took no action. On occasions when FF discovered the appellant had sought help from the police, he physically abused her.

[10] FF's other wives and sons would also visit and abuse the appellant. One of his sons attempted to rape her on one occasion. The husband's sons also called her a witch and threatened to kill her, accusing her of attempting to share their family wealth. When the appellant told FF that the sons were calling her a witch, he told her that she was responsible for the situation and assaulted her.

[11] In October 2003, the appellant's son was born. On his birth, FF paid the uncle, EE a further payment. In the course of her marriage to FF, the appellant continued attending school without FF knowing and also engaged in work as a part-time office administrator in her sister, AA's, engineering business.

[12] In January 2007, the appellant discovered she was pregnant again, but suffered a miscarriage in May 2007 after a physical assault from FF. He had come home one night intoxicated, pushed the appellant off the bed and beat her until she bled. She attended a medical clinic for treatment and was joined there by her mother. FF warned her mother not to tell the police about the matter. From 2008 to 2009, the appellant worked as a part-time farm assistant and also worked part-time in AA's engineering business.

[13] In December 2008, the appellant's mother died. At her funeral, the appellant talked to an aunt about the abuse she was experiencing in her marriage and the aunt encouraged her to leave. The appellant took her son to live with the aunt in X town. From there the aunt assisted the appellant to apply for a visa to come to New Zealand and escape her husband. FF often came to the address and tried to convince the appellant and son to return with him. He threatened to kill the appellant if she did not do so.

[14] The appellant arrived in New Zealand on 17 October 2009 and initially stayed with her sister, CC. She left her son in the care of her cousin, JJ in Malawi. The following year, she learned from AA that FF had died in a car accident. Sometime later, an aunt also died and the appellant returned to Malawi in December 2010.

Threats from KK and Widow Inheritance

[15] When the appellant returned to Malawi in December 2010, she stayed with her sister, AA in Z town, with her son and a niece. The appellant returned to work at her sister's engineering firm as an office administrator and became involved in a relationship with DD, who she had met in high school in 2001. They married on

30 April 2011. The wedding was broadcast on ABC FM at the time where DD was working as a journalist.

[16] Sometime after her wedding, the appellant was approached by her uncle and told that her deceased husband's brother KK was seeking to marry her according to the Sena tribe custom of widow inheritance. KK was also a wealthy businessman involved in transport businesses in Malawi and several other African countries. He had three wives with some eight children.

[17] In approximately September/October 2010, KK visited the appellant at her aunt's home, when she was alone with her son. He told her that she was required to marry him according to the Sena custom and that she had been paid for. She told KK that she had already married DD. However, KK insisted that she was required to marry him. He then left. Later the same month, KK appeared again when the appellant was at home with DD and the appellant and DD tried to explain to him that they had already married. KK grabbed the appellant's hand and tried to take her with him but DD physically prevented this and insisted that she was not leaving. KK threatened: "You will see what will happen to you" and "I will kill you". He slapped the appellant's face and left.

[18] KK continued to harass and threaten the appellant and her new husband. Later, their home was broken into and a note was left behind stating: "Think about your life". DD approached the police with the note but they simply told him that the matter could have been worse, and to be grateful that nothing had been taken from the house during the break-in.

[19] The appellant and DD moved to another address in October 2011 and also spent a week staying with a friend in the area. On 20 October 2011, the appellant went to Cape Town to escape KK. She stayed with a friend in Cape Town and worked part-time in a vineyard. Her son remained with DD.

[20] However, KK managed to locate her through the tight-knit Malawi community in Cape Town. In early November 2011, when the appellant came home from work, KK arrived at her address and pushed his way through the door. He demanded that she come with him, or he would kill her and DD. The appellant then travelled by bus with him from South Africa via Mozambique to Malawi. At the border, she managed to escape while passengers were disembarking and collecting their luggage and contacted DD. They remained there for several weeks before returning to their home in Y town to live. That month the appellant received two threatening text messages and two threatening telephone calls. She

answered one of the telephone calls and KK spoke to her saying: "If you do not come with me I'll kill you". The appellant did not answer the second telephone call. DD also received threatening messages. One message said: "If you do not leave [the appellant] we will kill her, you and your son".

[21] In early 2012, DD tried to find employment as a journalist, as his previous employment in radio had ceased soon after his marriage to the appellant. He applied for a position at DEF FM, a radio station in Malawi, but discovered that KK had already contacted the radio station, advising them not to hire him.

[22] From January to April 2012, the family lived in Y town. They moved to Z town in April and remained there until September 2012. From this time until early 2013, the family lived in Y town. The appellant worked part-time in her sister's business from 2010 until 2012, and then "on and off" until she came to New Zealand in June 2013.

[23] In April 2013, a group of men forced their way into the appellant's home, tied the appellant's hands behind her and physically assaulted DD. They stated that DD should leave the appellant as KK wanted to marry her. The appellant was told to leave DD.

[24] Since the appellant left Malawi to come to New Zealand in June 2013, DD has continued to be threatened by KK and his men. The appellant has received emails and telephone calls from DD concerning threats and attacks he has received from KK's men in late 2013, 2014 and in March 2014. He now lives in Z town.

[25] The appellant's son, now aged 10 years, attends a boarding school close to W town. This is some three hours away from where KK lives. He stays with DD during his holidays.

[26] The appellant believes that KK will continue to seek her, as according to Sena culture, he needs "to cure the spirits" by marrying her. She believes that he is receiving pressure from his family. She has learned from AA that he has suffered misfortunes because he has not cured the spirit. He has lost a son and his business has been deteriorating. The appellant fears being forced to marry KK and be "turned back into Islam," according to his religion. She fears being the victim of violent abuse again.

[27] The appellant knows of another person who has been forced to marry the brother of a deceased husband according to the Sena custom of widow inheritance. This person was the appellant's maid while married to FF.

[28] The appellant explains that she suffers from her past and wakes in the middle of the night unable to sleep. She has difficulties trusting people and feels scared that she will suffer similar treatment in the future and fears being forced to marry KK. The only relief she gets is when she prays in the night.

Evidence of the Appellant's Sister, CC

[29] CC provided a written statement, dated 9 March 2015, and gave evidence before the Tribunal. She is a New Zealand citizen and holds a master's degree in psychology. She works as a support coordinator for a health care organisation in New Zealand.

[30] CC's relationship with her sister, the appellant, is strained. She considers that the appellant blames her for being forced to marry FF at 15 years of age, instead of CC herself, who had managed to flee the country to the United Kingdom. Although the appellant stayed with her briefly in New Zealand during her first visit to New Zealand in October 2009, they do not have a good relationship. Since the appellant arrived in New Zealand in June 2013, they have had little contact. The appellant is currently staying with a friend.

[31] CC believes her family in Malawi blame her for not being able to secure the appellant's status in New Zealand. The appellant did not contact CC to appear as a witness at the hearing, she was instead approached by the appellant's lawyer. The appellant will not open up and talk to CC. Primarily, CC's knowledge of the appellant's circumstances has arisen through telephone conversations held with her sister AA and DD. CC is concerned about the appellant's psychological state and considers that she should attend counselling.

[32] CC has knowledge of the Sena tribal custom of bride inheritance or *chokolo*. According to the custom, when a woman's husband dies she is required to marry the brother of the deceased husband. The male who should marry the deceased's widow needs to be selected by family members. The widow does not have a right to refuse to be inherited. CC watched a *CNN* documentary on the custom while living in the United Kingdom and knows of two women who successfully claimed asylum on this ground there. She has also witnessed the custom applied to her sister, the appellant.

[33] Approximately two to three months after her sister was married to DD in 2011, CC learned from telephone conversations with her sister AA, the appellant and DD, that KK had approached the appellant to take her as his wife.

[34] CC learned that the appellant had left soon after her marriage to live in South Africa in an attempt to evade KK. CC contacted her sister AA and orchestrated her contacting KK's family to offer repayment of the dowry for the appellant's release. However, the family refused.

[35] Upon the appellant's return to Malawi, CC received a number of telephone calls from the appellant and DD, advising of threatening telephone calls and notes, attempting to force the appellant to marry KK. In early 2013, she received a call from the appellant and DD, advising her that DD had been attacked in their home by a group of unknown people demanding that he divorce the appellant so KK could marry her. CC then assisted the appellant to apply for a student visa to come to New Zealand.

[36] CC also learned through DD that there had been a few occasions in which KK's family had sought to take the appellant's son. They had threatened that they wanted the son back and that DD should divorce the appellant who belonged to them.

[37] CC also learned that DD has been assaulted since the appellant came to New Zealand in June of 2013, and also again at the end of 2014. She called him in March 2015, and he had reported that he was on his way from the police station to the hospital to get treatment after an assault by KK's people.

Material and Submissions Received

[38] On 11 March 2015, the Tribunal received correspondence from counsel, including a statement from CC and country information. On 17 March 2015, counsel filed opening submissions with the Tribunal. On 20 March 2015, counsel filed a copy of a letter of resignation by the appellant from her employment with AA, and a medical report dated 7 March 2015 from the Malawi Police Service for DD.

[39] At the hearing, counsel presented three country reports to the Tribunal including:

- (a) "Callista You Will Never Walk Alone Says Peter Muthrika" www.nyasatimes.com (23 April 2012).

- (b) Seodi White “No Ifs or Buts: Child Marriage Needs to be Abolished in Malawi, Once and For All” (3 March 2015) www.addition.cnn.com.
- (c) Mwale “Factors Generally Perpetrating the Spread of HIV/Aids in Malawi and Other High Prevalence Countries in Sub-Saharan Africa” (14 December 2010).

[40] At the hearing, the Tribunal presented the appellant with the following country information for comment:

- (a) R Curnow and J Watts “Lawyer Fights ‘Widow Sex’ Tradition in Malawi” www.addition.cnn.com (21 March 2013).
- (b) Excerpts from the *Monitoring Regional Integration in Southern Africa* Yearbook Volume 2 (2002), Gamsberg Macmillan.
- (c) Leitner Center for International Law and Justice, Fordham Law School “We Will Still Live: Confronting Stigma and Discrimination Against Women Living with HIV/Aids in Malawi” (2007).
- (d) M J Tembo “Gender Based Structural Violence in Relation to the Traditional Practice of Wife Inheritance – the Case of Malawi – an Empirical Study of the Violence Experienced by Widows Involved in Wife Inheritance Practice” Thesis submitted to University of Nordland (May 2013).
- (e) P Lomba “Widow Cleansing in Malawi” (2014) 4(1) *American International Journal of Contemporary Research*.
- (f) L Tauzi “Factors That Contribute to HIV Prevalence in Nsanje District in Malawi” Dissertation Submitted to University of Malawi (July 2006).

[41] On 14 April 2015, the Tribunal received further submissions from counsel.

ASSESSMENT

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

- (a) a refugee under the 1951 Convention Relating to the Status of Refugees (“the Refugee Convention”) (section 129); and
- (b) a protected person under the 1984 Convention Against Torture (section 130); and
- (c) a protected person under the 1966 International Covenant on Civil and Political Rights (“the ICCPR”) (section 131).

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

Credibility

[44] The Tribunal accepts the appellant’s claim of a lifetime of physical and psychological abuse from the age of 12 years when, upon the death of her father, she and her mother were inherited by a paternal uncle, and from the age of 15 years, he forced her to marry a business partner. She remained in this marriage until the death of her mother in December 2008, when she fled to her aunt’s home with her son (aged five years) seeking refuge from violence at the hands of her husband. On one occasion she was hospitalised and suffered a miscarriage as a result of a physical attack at the hands of her husband. The marriage was characterised by sustained violence and abuse. Despite approaching the police, they afforded her no protection.

[45] The appellant’s evidence of these events has been detailed and consistent in her statement before the Refugee Status Branch and to the Tribunal. It has been corroborated by her sister’s statement and evidence.

[46] Some inconsistencies appeared in the appellant’s evidence of the current risk to her, namely, that the brother of her now-deceased husband, KK, has been attempting to force her through threats and acts of violence into a marriage with him according to the Sena custom of *chokolo*. The Tribunal has also had some reservations owing to the fact that, while the appellant claims KK has sought to force her into a marriage and claim her son, in the few years that have transpired since the death of the brother, despite the resources at KK’s disposal, he has not succeeded in either endeavour.

[47] However, weighing these concerns in the round, in particular, taking into account the nuances and variations in the implementation of the cultural practice

of *chokolo*, including a strong emphasis on psychological pressure (discussed below at paragraph [64] of this decision), the effect that a lifelong history of abuse would have on the psyche of a young woman, and the robust, strong evidence of CC, the Tribunal resolves these concerns in favour of the appellant.

[48] Although the Tribunal does not have the benefit of a psychologist's report on the appellant's current psychological condition, it became apparent at the hearing that she is suffering from the effects of trauma associated with her past experiences. While her evidence was intelligent and generally consistent, the delivery had a robotic quality, and her demeanour was that of a listless, numb and disconnected person. This presentation was consistent with CC's portrayal of her sister as someone to whom she is unable to communicate or establish any real relationship with. The appellant describes lying awake at night and being haunted by memories of her past and fears for her future. She accepts that she would benefit from talking to a psychologist or counsellor.

[49] The Tribunal accepts that KK has used threats of violence against the appellant and her current husband, to seek to force the appellant to marry him. The appellant constantly moved addresses to avoid him and spent a month in South Africa in August 2011 in an attempt to evade him. When he found her there, she managed to escape from him on their return to Malawi. The threats have continued since the appellant has left Malawi and her husband has been beaten in 2013, 2014, and March 2015, in an attempt to force him to divorce the appellant and for the appellant to marry KK. The appellant's sister, AA, has also been threatened with death in September 2013 by KK to disclose the whereabouts of the appellant.

The Refugee Convention

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

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

[51] Article 1A(2) of the Refugee Convention provides that a refugee is a person who:

"... owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it."

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

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

Assessment of the Claim to Refugee Status

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

[54] In determining what is meant by “well-founded” in Article 1A(2) of the Convention, the Tribunal adopts the approach in *Chan v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379 (HCA), where it was held that a fear of being persecuted is established as well-founded when there is a real, as opposed to a remote or speculative, chance of it occurring. The standard is entirely objective – see *Refugee Appeal No 76044* (11 September 2008) at [57].

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

[55] In order to assess the risk of harm objectively, it is helpful to refer to country information on the Malawi cultural practice of *chokolo*.

[56] The Sena tribe in southern Malawi practices widow inheritance, locally known as *chokolo*. In this practice, when a husband dies, his brother, cousin, or nephew inherits the surviving wife; see C Nthowela “To Investigate the Risk Perception of Rural Adult Population in Chikhwawa District, T A Maseya, on Wife Inheritance as a Driver to HIV Transmission” (Stellenbosch University, March 2012); Malawi Human Rights Commission *Cultural Practices and their Impact on the Enjoyment of Human Rights, Particularly the Rights of Women and Children in Malawi* (2005) (“Human Rights Commission report”); Leitner Centre for International Law and Justice “We Will Still Live: Confronting Stigma and

Discrimination Against Women Living with HIV/AIDS in Malawi” (2007) (“Leitner Centre report”).

[57] This practice is employed in the context of a patrilineal tribal system; see *Monitoring Regional Integration in Southern Africa Yearbook Volume 2* (2002) Gamsberg Macmillan, at p218. The system is described as follows:

- (a) the man’s village is the matrimonial home;
- (b) inheritance passes through the male line;
- (c) women do not own property in their own right;
- (d) widows inherit property through their children (*Kumwana nkhuwuryero*);
- (e) payment of bride price (*lobola*) means that the man owns everything (children and property);
- (f) wives are inheritable (*chokolo*);
- (g) unlike a widower, if a widow remarries, she forfeits her inheritance;
- (h) women can only inherit ‘womanly thoughts’ (kitchen utensils and clothes); and
- (i) upon the death of the husband, there is no distribution of property if his widow remains in the matrimonial home – this is meant to protect the widow and children from any disturbance after his death, though this is not always observed.

[58] Owing to their subordinate status, women are assumed to have no property rights. M J Tembo, in her thesis *Gender Based Structural Violence in Relation to the Traditional Practice of Wife Inheritance – The Case Of Malawi – An Empirical Study of the Violence Experienced By Widows Involved in Wife Inheritance Practice*, at page 4, explains:

“[T]he widow continues to perform wifely duties to the inheritor in her deceased husband’s village. Thus the widow remains with her husband’s property but without any control over it. Where she chooses not to marry the levirate and leave, she loses her access to her late husband’s property and her children. If she opts to stay but not marry the levirate, then her actions are closely monitored and restricted up to the point that she cannot use some of the property without the consent of the deceased husband’s relatives (White et al 2002). These acts seem to limit the free will of the widow thereby limiting her freedom in decisions that concern her life.”

[59] According to the United States Department of State *Country Reports on Human Rights Practices: Malawi* (27 February 2014), although under the law women have the right to full and equal protection, widows are often victims of discriminatory and illegal inheritance practices, where most of the estate is taken by the deceased husband's family.

[60] In the context of this patrilineal system, widows experience violence including rape, common assault, economic deprivation, dispossession, verbal and psychological abuse. A study by White *et al* (2002) showed that one of the most prevalent and entrenched forms of violence against women in Malawi relates to widowhood, and the justice system fails to respond to this violence; Tembo pp19-20.

[61] The custom of *chokolo* provides that a male relative of the deceased husband must perform a death ritual, *kupita kufa*, which requires him to sleep with the woman whose husband or son has just died, to put to rest the spirit of the deceased. A meeting of the relatives of the deceased husband is organised to determine which man is to sleep with the woman. In most cases, the chosen man will be the one who will eventually inherit the woman as his wife. A "sexual cleanser" may be hired if there is no relative willing to perform the cleansing; Human Rights Commission report.

[62] *Kulowa kufa* means "bad omen" and implies escaping death. It is believed that, when one dies, "the village is engulfed by a dark cloud and to cleanse the village the widow, has to sleep with the deceased's brother"; M Seyani "Kulowa Kufa evolved not abolished" *The Nation* (3 January 2014).

[63] According to the Human Rights Commission report, the *kulowa kufa* process lasts for three days, and comprises the following activities:

"On the initial day, the cleanser was supposed to have sex with the widow/chief mourner for three rounds. They rested on the second day and finish off on the third day, with one or two rounds. The cleanser had to whisper to the widow/chief mourner, "*ndikupita kufa kwanga*" while having sex. A sexual cleanser was hired if there was no relative who was willing to perform the cleansing and he was paid some fee....

The cleansing was finally marked by *kupita kufa by nyalumbi* (the one who buried the deceased). He is supposed to sleep with his own wife, for at least one round after the cleanser had done his job. The *nyalumbi* is usually given some food (chicken and maize flour) by the bereaved family in appreciation.

It should be noted that close relatives have to abstain from sex while *kupita kufa* is in progress. The chief is communicated to about these developments. After *kupita kufa*, relatives are free to share utensils with the widow/chief mourner and to

resume sex in their respective homes. The process has to be repeated if it has not met the set conditions.

People in the area believed that if the process was not done, the widow/chief mourner would suffer from *tsempho/mukho*, which was an illness that included perpetual coughing, swelling of the body, and perpetual diarrhea. Further, anybody else would also suffer similarly if they defied the requirements of *kupita kufa*.”

[64] According to Tembo, it is believed that if the spirit of the deceased is not appeased, calamity might fall on the family. This may include the death of another member of the clan, diseases or other misfortunes. The burden of getting rid of these misfortunes is placed on the wife of the deceased. In this case, the wife is forced to follow the tradition so that misfortunes should not fall on the family. If the woman refuses to go through with the tradition of being cleansed and inherited, she risks facing consequences from the family of her husband; Tembo, pp4-5.

[65] In similar terms, L Tauzi in “Factors that Contribute to HIV Prevalence in Nsanje District in Malawi” (University of Malawi, July 2006), reports at p80:

“When death occurs it is believed that more people will die if death rites are not followed. The death rites include death cleansing and widow/widower inheritance.”

[66] Widows have little autonomy in the implementation of this practice, where a meeting is held with relatives of the deceased husband, who choose a man to sleep with the woman and a man to eventually inherit the woman as his wife; Human Rights Commission report. A woman is not allowed to participate in the choice of her levirate (heir or provider); P Lomba “Widow Cleansing in Malawi” (2014) 4(1) *American International Journal of Contemporary Research*.

[67] Tauzi, at page 91, states that:

“Even [in] the decision-making process regarding wife inheritance, women do not have an upper hand. It is men who decide on whether it is a relative who should inherit the deceased wife or she should be released to go back to her maternal home. The widows have the choice of who to remarry only after they are released.”

[68] According to the Human Rights Commission, women enter into such marriages because the husband’s family force them to. Common forms of coercion include losing their property and children or suffering illness leading to death if they refuse. Sometimes chiefs and elders take part in forcing women into *chokolo*. In cases where a bereaved woman refuses to be inherited, she may be able to stay in the matrimonial home if she does not associate with men outside her husband’s family. If found to associate with any relative of her husband, she is forced to marry that relative.

[69] *The New York Times* reported in “AIDS Now Compels Africa to Challenge Widows’ ‘Cleansing’” (11 May 2005) the account of several women hiding from their late husband’s family. One explained that she was powerless, however, as “they hunted her down” and insisted that if she refused to exorcise her dead husband’s spirit she would be blamed every time a villager died.

[70] Some reports suggest that a woman can decline to be inherited. Tauzi states that some widows refuse to be inherited. But this choice appears to be exercised only once “death cleansing” has already taken place. The Malawi National Commission for UNESCO *Inventory of Malawi’s Intangible Cultural Heritage, Volume 1* (2011) at p65 reports that where a bereaved woman falls pregnant before any *chokolo* formalities are finalised, even by a relative of the deceased husband, damages are paid for “trespassing on a sacred place”, usually in the form of a goat. After this, the woman can be forgiven and allowed to stay on in the patrimonial home. If a woman wants to marry someone outside her husband’s family, she must leave the village and pay the bride price. Children have to be returned to the husband’s family.

[71] Seodi White, a lawyer and human rights activist in Malawi, is reported by R Curnow and J Watts in the article “Lawyer Fights ‘Widow Sex’ Tradition in Malawi” *CNN* (21 March 2013) as stating that the practice is not forced upon widows. Rather, it has become so much part of the culture that widows themselves call for it. White claims “even the widows, they’ve told me ‘I don’t want to die, I don’t want a curse to come to my husband’. They cry to be cleansed”.

[72] The Leitner Centre report cites a source as saying that people are refusing *chokolo* more and more and it is accepted. However, the Leitner Centre report states that, while some communities may be lessening harmful cultural practices such as *chokolo*, many of the practices continue privately and that, while originally the practice was a way of providing economic support for a widow, the practice is now often a pretext for in-laws to seize the deceased man’s property.

[73] Tembo states that most women enter into marriages these days because their husband’s families force them with threats that they will lose their property and children; p4.

[74] In terms of the practice’s prevalence, the Human Rights Commission reports that marriages of *kulowa kufa* are fewer than in the past. However, although in general decline, it is still “quite widespread” in three districts in the north, which were the subject of the study. Nthowela’s study found that “37% of

the respondents indicated that they had been involved in the practice of wife inheritance”, suggesting that more than one in three women is still subjected to it. The practice is sustained in spite of advocates for its abolition (in particular, given its significant contribution to the spread of HIV/AIDS). Many women interviewed by the Commission stated that, on being inherited, some of the inheritors became so abusive that women were forced to leave of their own accord without any property or means.

Application to the facts

[75] While there are some variations to the practice, and it appears some women may be able to refuse to be inherited, as a minimum they appear to be required to participate in death cleansing, involving forced sexual relations, in violation of the right to be free from cruel, inhuman and degrading treatment, in violation of Article 7 of the 1966 *International Covenant on Civil and Political Rights* (“the ICCPR”). If a widow chooses not to be inherited, she will forfeit any right to property and her children. These practices, while illegal, are tolerated by authorities, and women have little redress.

[76] There is no doubt that deprivation of property, in the form of a house or other property essential to the realisation of other rights (such as the right to an adequate standard of living or the right to housing), can result in severe economic deprivation in violation of Articles 11 and 26 of the 1966 *International Covenant on Economic, Social and Cultural Rights* (“the ICESCR”). There is also no question that a forced separation between a mother and her children constitutes serious harm within the meaning of the concept of persecution. The rights to freedom from arbitrary interference with privacy and the family as set out in Article 17 of the ICCPR, and equality before the law, as contained in Articles 14 and 26 of the ICCPR, have obvious application.

[77] It is relevant to the inquiry that the appellant was not born into the Sena tribe, she was married into it. She is from the Ngoni tribe and, unlike women within the Sena tribe, who ascribe to the practice, she rejects the cultural practice in its entirety. This assertion of independence is not only in contradiction to the cultural practice of *chokolo*, but to the Sena patrilineal system as a whole, where women are the property of men and are not entitled to exercise any independent decision-making in terms of fundamental aspects of their lives, such as the choice of a marriage partner, care of their children or living arrangements.

[78] It appears that, for several years, the appellant managed to evade the clasp of KK and his relatives by moving address and refusing to follow him when he found her and demanded that she do so. Her son, though being moved from abode to abode, from one relative to the next, and being placed in a boarding school at a distant location, has also remained free from KK's control. However, through KK's attempts to force the appellant to marry him, the appellant has experienced a significant degree of psychological harm through threats and violence to her and her current husband. Overlaying this is her paralysing fear, engendered by this history, that she will be forced to marry KK and experience a repeat of the violence she lived through while married to his late brother.

[79] KK has not relented in his attempts to force the appellant into a marriage with him, and there is a real chance that he will be spurred on by the spiritual dimension of *chokolo*, attributing a recent death of his son and a downturn in his business to the belief that the spirit of his brother has not been appeased. As such, there is a real chance that KK will continue to attempt to force the appellant to marry him.

[80] The Tribunal finds that the means used by KK and his agents to force the appellant into submission (including acts of physical and psychological violence) alone, would constitute violation of the right to be free from cruel, inhuman or degrading treatment or punishment ("CIDT") in accordance with Article 7 of the ICCPR. The range of actions encompassed in the notion of CIDT include physical and psychological harm; see Human Rights Committee *General Comment No 20*, UN Doc HRI/GEN/1/Rev 1 at 30 (1994). Added to this is the likelihood that the appellant will, eventually, become a victim of a forced marriage to KK, constituting serious harm, in violation of the right to marry, and not to be forced to marry, in accordance with Article 23(3) of the ICCPR, Article 16(1)(b) of the *Convention on the Elimination of all forms of Discrimination Against Women* and Article 10 of the ICESCR. There is general acceptance by refugee determination bodies that the risk of forced marriage amounts to serious harm and persecution; see, for example, *MZXFJ v Minister for Immigration* [2006] FMCA 1465 (10 October 2006) at [42] (Aust); *AM v BM (Trafficked Women) Albania CG* [2010] UKUT 80 (18 March 2010).

[81] Finally, within the context of such a forced marriage and given the past physical mistreatment of the appellant by KK, the Tribunal finds that there is a real chance that she will face a similar degree of physical violence that she has experienced in her first marriage, in violation of her right to be free from cruel,

inhuman and degrading treatment or punishment, in accordance with Article 7 of the ICCPR.

[82] The Tribunal finds that there is a real chance of the appellant being persecuted if returned to Malawi.

Is there a Convention reason for the persecution?

[83] With respect to the second issue, the risk of the appellant being persecuted is contributed to by the Convention grounds of political opinion and membership of a particular social group, namely women. Either suffices.

Conclusion on Claim to Refugee Status

[84] Having answered the principal issues set out above in the affirmative, the appellant is entitled to be recognised as a refugee.

The Convention Against Torture

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

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

Conclusion on Claim under Convention Against Torture

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

The ICCPR

[87] Section 131 of the Act provides that:

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

arbitrary deprivation of life or cruel treatment if deported from New Zealand.

...

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

Conclusion on Claim under ICCPR

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

CONCLUSION

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

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

[90] The appeal is allowed.

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