IMMIGRATION AND PROTECTION TRIBUNAL NEW ZEALAND **[2011] NZIPT 800142**

AT AUCKLAND

Appellant:	**AD (Zimbabwe)**
Before:	B L Burson (Chair) S A Aitchison (Member)
Counsel for the Appellant:	I Uca
Counsel for the Respondent:	No Appearance
Date of Hearing:	8 August 2011
Date of Decision:	31 August 2011

DECISION

INTRODUCTION

[1] This is an appeal under section 195(2) of the Immigration Act 2009 ("the 2009 Act") against the decision of a refugee and protection officer of the Refugee Status Branch (RSB) of the Department of Labour, declining to grant either refugee or protected person status to the appellant, a citizen of Zimbabwe.

[2] This is the second time that the appellant has appealed against a decline of a claim to refugee status in New Zealand. Accordingly, the appellant must first establish that the Tribunal has jurisdiction to hear this appeal. Section 449(4) of the 2009 Act requires the Tribunal to determine the jurisdictional question in accordance with the relevant provisions of the Immigration Act 1987. This issue will be considered first.

[3] If, however, the Tribunal is satisfied that it has jurisdiction to hear the appellant's second refugee claim, section 449(4) of the 2009 Act requires the Tribunal to determine not only whether the appellant is entitled to be recognised as a refugee, but also to determine whether or not the appellant is entitled to be

recognised as a protected person on the grounds set out in either section 130 or section 131 of the 2009 Act.

[4] As the appellant has been living unlawfully in New Zealand for some time, she is statutorily barred from lodging a humanitarian appeal in respect of her liability for deportation from New Zealand. Consequently, the Tribunal has no statutory power to consider any wider humanitarian concerns raised by the case.

THE JURISDICTIONAL QUESTION IN RELATION TO THE REFUGEE CLAIM

The Relevant Test

[5] The test for the jurisdictional question in respect of this appeal is set out in section 129J of the 1987 Act which provides:

> "(1) A refugee status officer may not consider a claim for refugee status by a person who has already had a claim for refugee status finally determined in New Zealand unless the officer is satisfied that, since that determination, circumstances in the claimant's home country have changed to such an extent that the further claim is based on significantly different grounds to the previous claim.
>
> (2) In any such subsequent claim, the claimant may not challenge any finding of credibility or fact made in relation to a previous claim, and the officer may rely on any such finding."

[6] Under section 129P(1) of the 1987 Act, it is the responsibility of the appellant to establish the claim and to ensure that all information, evidence and submissions that the appellant wishes to have considered in support of the appeal are provided to the Tribunal before it makes its decision.

[7] The approach to the test under section 129J of the 1987 Act has been set out by the Refugee Status Appeals Authority (RSAA) in *Refugee Appeal No 75139* (18 November 2004) which requires an assessment of the first claim against the basis of the second claim. The RSAA also held that section 129J of the 1987 Act recognises that both *'sur place'* claims grounded in both the claimant's activities abroad and also a 'dramatic intensification' of pre-existing factors can provide the changed circumstances required by the jurisdictional threshold: see *Refugee Appeal No 75139* (18 November 2004) at [5].

[8] In cases such as the present one, where the appellant chose not to rely on a particular characteristic in support of a first claim but does so for the second claim, the aperture through which assessment of that characteristic can occur in

the context of a second or subsequent claim narrows. In such circumstances, the claimant must show a dramatic intensification in conditions in relation to those characteristics.

Assessment of the Jurisdictional Question

[9] The Tribunal's ability to make a considered assessment of the jurisdictional question has been hampered by the failure of counsel to provide any submissions or supporting country information to the Tribunal prior to the hearing. The Tribunal therefore provided counsel with a bundle of country information which appeared relevant to the issues raised by the RSB, at the commencement of the hearing. The hearing was adjourned to allow counsel time to consider this material and make submissions on the jurisdictional issue and to outline the basis of the appellant's refugee and protected person claims. Counsel duly considered this material and made submissions.

The appellant's first claim

[10] The appellant's first claim was based on political grounds relating to her family's claimed involvement in the Movement for Democratic Change (MDC). She claimed her father was a ward chairman in her area and that a half-sister was a youth activist. After her half-sister went missing in early 2000, following her attendance at a MDC rally, the appellant was repeatedly visited by youth militia aligned to the ruling Zimbabwe African National Union-Patriotic Front (ZANU-PF) who questioned her about the whereabouts of her half-sister. The appellant claimed that she was detained on a number of occasions for up to a week during which she was beaten. She further claimed that in 2005 she was detained for one week by the police when working as a street hawker. Her fruit and vegetable stall was destroyed on account of her being a MDC member, her not having the appropriate licence and being suspected of selling foreign currency.

[11] The appellant further claimed that another sister, who had fled to the United Kingdom in the mid-2000s as a result of the police interest in the family, had been elected a MDC representative in the United Kingdom. Following this sister's return to Zimbabwe in late 2006, the authorities detained the appellant, enquiring about this sister's whereabouts. The appellant claimed she was assisted by the MDC to flee to South Africa in early 2007.

[12] The appellant also claimed that she was denied medical treatment for her HIV because she had failed to provide a ZANU-PF card.

[13] Finally, the appellant claimed that she would encounter discrimination as an ethnic Ndebele and that she was in danger of mistreatment because she had been away from Zimbabwe for a number of years and, as a consequence, she would be considered a traitor.

The appellant's second claim

[14] The basis of the second claim is contained in the statement by the appellant dated 13 January 2011. The appellant admits that she did not tell the truth in her first application for refugee status and had in fact been living in South Africa between 1993 and 2006. She confirms that she was diagnosed with HIV in 2006.

[15] Although the appellant maintains that she was a supporter of the MDC, the main focus of the second claim, according to counsel's oral submissions, is that she fears she will be the victim of gender-based violence in Zimbabwe and, in particular, the risk to her as a woman without a male protector. She claims that she will be at risk of discrimination against her because she is HIV-positive. She also fears she will be at risk on return because she has been out of the country since 1993 and will be regarded as a traitor. The appellant also, again, pointed to her Ndebele ethnicity and the discrimination against them by the majority Shona people.

[16] Counsel emphasised that these factors, along with the fact that the appellant's parents have now also been diagnosed as HIV-positive, have caused a deterioration in the appellant's mental condition such that she will be unable to cope in Zimbabwe.

The claims compared

[17] While the appellant's first claim was based primarily on her claimed involvement in the MDC, it also drew upon her ethnicity and status as an HIV sufferer. The second claim is now based on her gender along with her ethnicity and status as an HIV sufferer. However, the appellant has always had the same gender and ethnicity and was HIV-positive at the time of her first refugee claim. To cross the jurisdictional threshold she must therefore establish a dramatic intensification in conditions in relation to at least one of these characteristics.

[18] In relation to her claim to be at risk of gender-based violence, when questioned by the Tribunal to determine the basis of her claim, it was clear that the appellant was relying on general conditions in Zimbabwe. Although no country

information has been filed by the appellant, the Tribunal is aware that a joint study by the International Organisation for Migration (IOM), the United Nations Population Fund (UNFPA) and the United Nations Children's Fund (UNICEF) *Helping Victims of Gender Based Violence in Zimbabwe* (10 November 2009), (The Inter-Agency GBV report) found that women and girls in Zimbabwe are increasingly vulnerable to sexual violence and abuse because of the social, political and economic instability in the country. Furthermore, the *Freedom World Report 2010: Zimbabwe* Freedom House (2 May 2010) reports at page 6 that sexual abuse is widespread, including the use of rape as a political weapon. The report also refers to "a recent upsurge in gender based violence". It is unclear whether this is talking specifically about domestic violence.

Conclusion on Jurisdictional Question in Relation to Refugee Claim

[19] Bearing in mind the need for a gender sensitive application of the refugee Convention, the Tribunal finds, albeit by a narrow margin, that the above country information sufficiently establishes a dramatic intensification of conditions in relation to gender-based violence since the determination of the appellant's first claim in November 2007 so as to satisfy the jurisdictional criteria.

[20] For these reasons the Tribunal determines that the jurisdictional threshold has been crossed. It is not necessary to consider the remaining grounds upon which the appellant relied to establish jurisdiction.

THE APPELLANT'S CASE

[21] What follows is a summary of the evidence given by the appellant in support of her second claim. An assessment follows thereafter.

[22] The appellant was born in the early 1970s in X, Zimbabwe. Her mother is an ethnic Kalanga. Her father is from the Ndebele tribe. Both are ethnic minorities in Zimbabwe. Her parents separated in 1990 but remained living in the family home which they owned until 2006. At this time, the parents were unable to afford living in the urban centre of X and each returned to their home village.

[23] At this time, the appellant's mother returned to her home village of Y, situated approximately 100 kilometres away, where she remains. She lives in Y with two of the appellant's nephews, aged approximately 22 and 15. Her mother has her extended family network in this village but supports herself by remittances

sent back from South Africa by a daughter (the appellant's half-sister), who is the mother of the nephews, and remittances sent back by the appellant. The appellant's father relocated to his home village of Z. He has now remarried.

[24] The appellant confirmed that in 2008 both her parents were diagnosed as being HIV-positive. They have registered with the local authorities and have been receiving anti-retroviral medication in the form of Cotrimoxozole. The father also received treatment for tuberculosis. The appellant remains in semi-regular contact with them. When she last spoke to her father approximately two weeks ago, he was coughing quite heavily. She last spoke to her mother approximately a month ago. Her mother seemed to be in good spirits but was still sick.

[25] The appellant has two direct siblings. Her sister AA lives in New Zealand. She has a brother who is living unlawfully in South Africa. In 2009, he was deported from South Africa to Zimbabwe for being in South Africa illegally. He remained in Zimbabwe for approximately one month where he looked after the appellant's mother before returning again to South Africa. The appellant has a number of half-brothers and half-sisters. She has one half-brother whom she has never met. She has only occasional contact with her half-sisters.

[26] The appellant has two daughters, both of whom now live in Johannesburg. Both have young children of their own. A former partner is in South Africa.

[27] The appellant told the Tribunal that Shona people were always discriminating against the Ndebele people. On one occasion when she applied for a position as a cleaner, she was denied the job because her employer was Shona and did not want to employ an Ndebele person. She told the Tribunal that most of the people working in the hospital were Shona. However, the appellant conceded that she did manage to gain employment in Zimbabwe. She was employed by a Kalanga employer as a cashier for a short time in 1991. However, she left that job because of sexual harassment by this man. She then obtained part-time work for three days a week in the X hospital doing ironing and laundry work. She only left this employment in the advanced stages of her pregnancy with her first child.

[28] The appellant left Zimbabwe for South Africa in 1993 to gain more secure employment. She remained in Johannesburg where she worked illegally until 2006, returning from time to time to Zimbabwe for short periods to visit family. She also returned to Zimbabwe for longer periods of time related to her health problems, including a period of eight months in 2004 in order to get treatment for tuberculosis which led to her eventual diagnosis of being HIV-positive in 2006.

Documents and submissions

[29] On the morning of the second appeal hearing, the Tribunal received a copy of the appellant's birth certificate; a copy of an appointment letter for the Infectious Diseases Clinic dated 25 July 2011 from Auckland District Health Board and two letters of support from a rest home where the appellant has been working.

[30] As mentioned, no submissions were filed before the hearing. During the hearing the Tribunal provided to counsel the following items of country information:

(a) I Banda *Zimbabwe: Children crossing borders in search of HIV treatment* Gale Group: Global Information Network (25 August 2010);

(b) R Mawere "MSF Hands Over Aids Programmes to Govt" *The Standard* (2 July 2011);

(c) *Making a Difference: Sub Saharan Africa Regional Results Report 2011* "The Global Fund to fight AIDS, Tuberculosis and Malaria", p21; and

(d) World Health Organisation *HIV Fact Sheet: Zimbabwe* (2005).

[31] Despite the Tribunal allowing counsel a period of two days to file further country information supporting the case, no information was filed in that time, nor indeed has any been filed with the Tribunal at any time prior to the issuing of this decision. On 11 August 2011, the Tribunal did receive, from counsel, two letters from a district medical officer relating to the appellant's mother and father being "chronically ill patients" and a police clearance certificate for her, dated 7 July 2011, issued by the Zimbabwe Criminal Investigation Department. In her covering letter, counsel indicated she has no instructions from the appellant regarding these documents and would not be filing any submissions.

Assessment of Credibility and Finding of Fact

[32] The Tribunal notes that the RSAA made no positive finding regarding the appellant's nationality in its determination of the first refugee appeal. After dismissal of that appeal, the appellant and her sister AA jointly appealed to the Removal Review Authority (RRA). After reviewing the evidence, including evidence from the South African authorities, the RRA found that AA had obtained a valid South African passport, but that there was no evidence to establish that the appellant had also acquired South African citizenship. See: *Removal Appeal Nos*

46817 and 46818 (28 June 2008) at [39]-[49]. The Tribunal notes that no further evidence has been provided to undermine the finding of the RRA as to the appellant's nationality and the Tribunal therefore relies on those findings (see section 231 of the 2009 Act) and accepts the appellant is a national of Zimbabwe.

[33] However, the appellant was found not to be credible in respect of her first refugee claim to have been a member of the MDC and to have encountered the various problems she claimed. The appellant now admits that her first refugee claim was based on lies. Indeed, the appellant told the Tribunal that she effectively resided in South Africa between 1993 and 2006, after which she came directly from South Africa to New Zealand.

[34] As a result of this admission, the Tribunal does not accept she was anything other than a passive supporter of the MDC who undertook no political activity of any kind in Zimbabwe. She has not encountered any problems with the authorities because of her passive support for the MDC of which the authorities are unaware.

[35] The Tribunal notes that the appellant has always claimed to be Ndebele and indeed spoke fluent Ndebele via the interpreter. The Tribunal therefore accepts that the appellant is a woman from the Ndebele tribe who was diagnosed as HIV-positive in 2006. The appellant has also been consistent about her family circumstances insofar as they relate to the whereabouts of family members. The appellant's sister remains here in New Zealand. The Tribunal accepts that her brother is now in South Africa. It accepts that her parents have separated, are both HIV-positive and live in their respective home villages.

THE CLAIM FOR REFUGEE STATUS

The Issues

[36] Section 129(1) of the 2009 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."

[37] 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."

[38] 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?

[39] It is relevant to note that section 226 of the 2009 Act provides:

> "It is the responsibility of an appellant or affected person to establish his or her case or claim, and the appellant or affected person must ensure that all information, evidence, and submissions that he or she wishes to have considered in support of the appeal or matter are provided to the Tribunal before it makes its decision on the appeal or matter."

[40] Further, the Tribunal may rely on any finding of credibility or fact by the Tribunal or any appeals body in any previous appeal or matter involving the person and the person may not challenge any finding of credibility or fact so relied upon. See, section 231 of the 2009 Act.

Assessment of the Claim to Refugee Status

[41] 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 2039/93* (12 February 1996). 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.

Country information

[42] Although no country information has been filed in support of the appeal, the Tribunal is aware of and accepts that gender-based violence is a significant problem in Zimbabwean society. The report by the Immigration and Refugee Board of Canada *Zimbabwe: Domestic Violence and Sexual Violence: State Protection and Availability of Support Services (2005 – August 2010)*

ZWE103562.E (17 August 2010) paints a bleak picture of the prevalence of domestic violence in Zimbabwe. The report notes a survey conducted in 2005-2006 which found that, of 4,658 married or previously married Zimbabwean women between the ages of 15 and 49 years, 47.1 per cent had experienced a form of physical, sexual or emotional violence by a husband or partner. Of these, 25 per cent had been the victims of sexual violence. The survey found that domestic violence in Zimbabwe occurred amongst people of all socio-economic and cultural backgrounds. Zimbabwe's Gender and Women's Affairs Minister stated that over 60 per cent of murders in Zimbabwe were linked to domestic violence.

[43] Although a Domestic Violence Act was signed into law in February 2007, recent country information points to the continuing problem of gender-based violence in Zimbabwe. The Inter-Agency GBV Report comprises the results of assessments conducted in four districts, including Harare, in June 2009. Interviews were conducted with men, women and adolescent boys and girls regarding the prevalence and features of gender-based violence in Zimbabwe. At page 10, the report notes that focus groups in all field sites visited by the assessment team demonstrated that sexual violence is a major problem for women and girls as well as boys. There are frequent cases of girls under 12 years being raped and girls are at particular risk when taking care of domestic chores such as collecting water or fire wood or walking to and from school. The focus groups consulted by the assessment team all pointed to poverty, hunger, and the general lack of options for income generation in the current poor state of the Zimbabwean economy, as reasons for the prevalence of sexual exploitation in the form of transactional sex for survival and forced prostitution. The report notes that many instances of gender-based violence are not reported to the authorities out of fear of being blamed, and fear of intimidation and victimisation by the perpetrator. Trafficking was also highlighted as a problem, with women being trafficked to South Africa and to Mozambique.

[44] In terms of access to support services, the Inter-Agency GBV Report notes, at page 16, that although most police stations the team visited during the mission had a victim friendly unit, interviews suggested that there had not been widespread training amongst the police on general GBV issues and an appropriate approach to sexual violence.

[45] The Tribunal accepts that gender-based violence and exploitation is a serious problem in Zimbabwe. However, while bleak, on the information available

to the Tribunal the incidence of gender-based violence does not establish that simply by reason of her gender, or by combination of her gender and ethnicity, the appellant faces a risk of being the victim of gender-based violence at the real chance level. When asked by the Tribunal to explain why she feared being a victim of such violence in Zimbabwe, the appellant could recount no contemporary event, recalling only problems that her grandmother and father encountered during the colonial era. She could not recount any instance where she knew of an Ndebele women being a victim of violence on this basis alone.

[46] Although the appellant sought to portray herself as a woman alone, she is not alone. She has both her parents and members of her extended family in Zimbabwe. While the Tribunal is prepared to accept the assertion by the appellant that her father has been diagnosed as HIV-positive, the country information does not show that this has any significance in the context of a claim of gender-based violence. Nor does any country information show that her not being in a relationship with a man in Zimbabwe increases the risk to above the real chance threshold. At its core, the risk that the appellant will suffer gender-based violence is an assumed risk which does not constitute a well-founded fear of being persecuted: see Refugee *Appeal No 72668: Ruling on Legal Issues* (5 April 2002), at [131]; *Minister for Immigration and Ethnic Affairs v Guo* (1997) 191 CLR 559, 572. The risk is speculative only.

[47] As regards her suffering discrimination on account of her HIV-positive status, counsel referred to the United States Department of State *Country Report on Human Rights Practises: Zimbabwe* (8 April 2011) which, at section 6, notes:

> "The government has a national HIV/AIDS policy that prohibits discrimination against persons with HIV/AIDS, and the law prohibits discrimination against workers with HIV/AIDS in the private sector and parastatals. Despite these provisions, societal discrimination against persons affected by HIV/AIDS remained a problem. Although there was an active information campaign by international and local NGOs, the Ministry of Health and Child Welfare, and the National AIDS Council to destigmatize HIV/AIDS, ostracism and condemnation of those affected by HIV/AIDS continued."

[48] This is accepted. However, the country information does not establish the particular form such discrimination takes beyond ostracism and stigmatisation, which do not, *per se*, amount to being persecuted. Being persecuted requires something more than discrimination: see Hathaway (*op cit*) at 103-104; UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status*, para 54; *Refugee Appeal No 71404/99* (29 October 1999) at [66]-[67]; *Refugee Appeal No 71427/99* [2000] NZAR 545; [2000] INLR 608 at [54].

[49] The appellant also claims that she will face discrimination in accessing necessary anti-retroviral and other medication required to manage her HIV and any related illnesses. The appellant now admits she lied about the difficulties she claimed to have encountered on political grounds. Insofar as the appellant now claims she will face such discrimination on account of a low-level passive support for the MDC, and her status as a Ndebele woman, no evidence has been filed to show that persons of these characteristics are being denied this medication on a discriminatory basis. Nor does the country information suggest it.

[50] The appellant told the Tribunal that she was not denied treatment in the past, despite her ethnicity. Her father, who is HIV-positive and who is from the same ethnic background, continues to receive treatment for HIV and related illnesses. It is also unlikely that *Medicine Sans Frontiers* (MSF) would hand over its HIV programme to the Zimbabwean government if there was systemic discrimination by the government against minorities in terms of accessing available health care and treatment. Moreover the report by I Banda, "Zimbabwe: Children Crossing Borders in Search of HIV Treatment" *Gale Group: Global Information Network* (25 August 2010), details HIV treatment in the area she is from and makes no mention of any such discrimination.

[51] For these reasons the Tribunal finds that there is no real chance that the appellant will be persecuted by being denied otherwise-available medical care or treatment on a discriminatory basis. Similarly, to the extent that the appellant might encounter discrimination in other areas because of her ethnicity, this has not caused her serious harm in the past. She has, by her own account, been able to find employment and has had adequate housing. There is no reason to believe the position would be any different for her now and in the future. The risk that any discrimination she may encounter will lead to her being persecuted is entirely speculative.

[52] As for a risk of mistreatment on return at the airport in Harare on account of her being outside Zimbabwe for a number of years, the Immigration and Refugee Board of Canada report *Zimbabwe: Treatment of people returned to Zimbabwe on their arrival at Harare Airport, including whether citizens are interrogated (2008 – August 2010) ZWE103563.E* (17 August 2010) notes correspondence with the Executive Director of a South Africa-based Zimbabwe exiles forum, a group formed in 2003 of expatriate lawyers who document human rights abuses in Zimbabwe. The letter stated:

> "The Central Intelligence Organisation and other security forces take a keen interest in those who have been deported to Zimbabwe. This is not only the case regarding those arriving at the airport but those who use the road as well. In particular, those who have failed in their asylum applications are invariably interrogated by security agents stationed at the airport, or those that deal with those deported from for example Botswana and South Africa when deportees arrive at various stations eg Plumtree or Beitbridge. At Harare International Airport, the practice is much more rigorous as it is the main international airport serving the country. There are rooms to which individuals are taken for interrogation. The practice continues in spite of the existence of an inclusive government as the security sector is largely in the hands of ZANU(PF)."

[53] The Tribunal therefore accepts that the appellant may well be questioned on arrival in Zimbabwe. However, she has been engaged in no political activity in Zimbabwe, South Africa or New Zealand. She is simply one of the countless Zimbabweans who left for overseas seeking economic betterment or medical treatment. No country information has been filed to establish that being an Ndebele woman absent from the country for a number of years exposes her to a risk of serious harm at the airport or afterwards at the real chance level.

[54] As for the submission that the appellant may not be able to cope with life back in Zimbabwe due to deterioration in her mental condition, this simply provides no basis for a refugee claim. Insofar as this submission raises a humanitarian concern, as indicated at the outset, the appellant is outside the time-limit for bringing an appeal against liability for deportation (see section 194(5) and (6) of the 2009 Act) and the Tribunal has no jurisdiction to extend that time limit. In any event, the Tribunal observes that no medical evidence has been filed to establish the appellant's current state of health.

[55] For these reasons, the Tribunal finds that the appellant does not have a well-founded fear of being persecuted in Zimbabwe. The first principal issue is answered in the negative. The need to consider the second does not, therefore, arise.

THE CONVENTION AGAINST TORTURE

The Issues

[56] Section 130(1) of the 2009 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."

[57] Section 130(5) of the 2009 Act provides that torture has the same meaning as in the Convention against Torture, article 1(1) of which states that torture is:

> "… any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions."

Assessment of the Claim under the Convention Against Torture

[58] When asked by the Tribunal to clarify the basis of the appellant's claim for protected person status counsel submitted orally that the appellant was at risk of torture on the basis of her being a woman alone and Ndebele. However, the Tribunal pointed out to counsel that the definition of torture under the 2009 Act is tied to the more narrow definition of torture under Article 1 of the Convention Against Torture which requires the infliction of severe mental suffering or pain by or with the acquiescence of a public official for specified purposes. When asked by the Tribunal to clarify the basis upon which the appellant's characteristics brought her within this more narrow definition counsel conceded they did not and withdrew the submission.

[59] What remains is the assertion that she will be at risk of torture at the airport. For the reasons already given in respect of the refugee claim, the Tribunal accepts she may face questioning on arrival, but she possesses no characteristics which individually, or taken cumulatively, give rise to substantial grounds for believing the appellant would be in danger of being tortured as defined in the 2009 Act.

THE CLAIM UNDER THE ICCPR

The Issues

[60] Section 131(1) of the Act provides that:

> "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."

[61] Under section 131(6) of the 2009 Act, "cruel treatment" means cruel,

inhuman or degrading treatment or punishment but, by virtue of section 131(5):

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

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

Assessment of Claim under ICCPR

[62] The appellant relies on no matters additional to those relied on in the refugee claim in respect of her claim to be a protected person under the ICCPR. For the reasons already given in respect of the refugee claim as to those matters, the Tribunal finds there are no substantial grounds for believing the appellant would be in danger of cruel treatment as defined in the 2009 Act.

CONCLUSION

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

(a) is not 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.

[64] The appeal is dismissed.

"B L Burson"

B L Burson
Chair

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B L Burson
Chair