

AT WELLINGTON

Appellant:	AC (Zimbabwe)
Before:	A R Mackey (Chair) M A Poole (Member)
Counsel for the appellant:	R Woods & S Alford
Counsel for the respondent:	No Appearance
Date of hearing:	27 June 2011
Date of decision:	25 July 2011

DECISION

INTRODUCTION

[1] This is an appeal against the decision of a refugee status officer of the Refugee Status Branch (RSB) of the Department of Labour, declining to grant either refugee status or protected person status to the appellant, a national of Zimbabwe.

[2] [withheld].

[3] [withheld].

[4] As the same factual matrix is relied upon as the basis for both the refugee and protected persons appeals it is appropriate to set these out in the statement of the appellant's case that follows.

THE APPELLANT'S CASE

[5] The account which follows is that given by the appellant in his statement

and the hearing of the appeal. It is assessed later.

[6] [withheld].

[7] [withheld].

[8] [withheld].

[9] [withheld].

[10] [withheld].

[11] [withheld].

[12] [withheld].

[13] [withheld].

[14] [withheld].

[15] [withheld].

[16] [withheld].

[17] [withheld].

[18] [withheld].

[19] [withheld].

[20] [withheld].

[21] [withheld].

[22] [withheld].

Time in New Zealand

[23] [withheld].

[24] [withheld].

[25] [withheld].

Contact with the Zimbabwean Embassy in Canberra

[26] [withheld].

Publicity

[27] [withheld].

Evidence of [the appellant's uncle]

[28] [withheld].

[29] [withheld].

[30] [withheld].

[31] [withheld].

[32] [withheld].

[33] [withheld].

[34] [withheld].

[35] [withheld].

[36] [withheld].

[37] [withheld].

[38] [withheld].

[39] [withheld].

[40] [withheld].

Documentation

[41] Mr Woods provided a considerable amount of country information to the Tribunal along with his letters of 13 and 22 June 2011.

[42] He referred the Tribunal to relevant assessments of risks on return to Zimbabwe for MDC members/supporters in earlier decisions of the Refugee Status Appeals Authority (RSAA) including *Refugee Appeal No 73997* (9 March 2006) at

[36]-[38] and *Refugee Appeal No 73931-73933* (21 February 2005). He also referred to the most recent United Kingdom, *Country Guidance*, determination in *EM & Others (Returnees) Zimbabwe CG [2011] UKUT 98 (IAC)* and earlier *Country Guidance* determinations from the United Kingdom which are referred to in the *EM & Others* decision.

[43] All of the above material has been taken into account.

[44] Counsel had advised the Tribunal that they had not been able to locate evidence that claiming refugee status offshore was a criminal offence in Zimbabwe and submitted that given the breakdown of the rule of law in Zimbabwe, failure to find a specific criminal offence should not be relied on as a basis for saying it did not happen.

ASSESSMENT OF THE APPEALS

[45] Initially, it is necessary to reach credibility conclusions in relation to the appellant and his uncle. Following that the “facts as found” can be established. Because the same factual matrix is relied on in both the refugee and protected persons claims that follow, these established facts can then be noted in the assessment of all three.

[46] The Tribunal is satisfied that the appellant gave frank and honest answers to the questioning. [withheld].

[47] His evidence was largely supported by consistent evidence from his uncle, [withheld], which we also accept as truthful.

The Appellant’s Current Profile

[48] The Tribunal therefore accepts that the appellant is a 29-year-old single Zimbabwean citizen from the high density suburban area of Harare who was a former member and supporter of the MDC over the period 1997-2006 when he came to New Zealand.

[49] [withheld].

[50] [withheld].

[51] [withheld]

[52] [withheld]. This led to reports about him being published in newspapers

and in online internet reports not only in New Zealand but also in Zimbabwe and the United Kingdom. Beyond this the Zimbabwean Embassy in Canberra was in direct contact with him and urged him to return to Zimbabwe rather than face conviction on charges in New Zealand which would be an embarrassment to the Zimbabwe state. The appellant refused to return and in the discussion with the Zimbabwean Embassy official advised that he had applied to obtain refugee status in New Zealand. While telling the official of the claim could, to those well-informed on matters of international protection law be seen as ill-advised, the Tribunal is satisfied this was not done by the appellant with bad faith, or to “boot strap” his claim. Giving the benefit of any doubt, it was done innocently on the spur of the moment before he could obtain full, sound legal advice.

[53] His profile, including the news report and the widespread knowledge of these in Harare, was confirmed by his uncle, (and in the media reports supplied to the Tribunal after the hearing).

[54] The appellant predicts that he will be at substantive risk of serious maltreatment on return. This will be either at the hands of the police and government authorities who will know of [withheld] and that, coupled with his previous MDC membership and support, will lead to him being interrogated and suffering torture or other serious maltreatment on his return either after detention at the airport or shortly thereafter. In the alternative, if he is able to return to either his home district, or the family’s traditional home of [withheld], he will be at substantial risk of maltreatment and possibly death at the hands of active Zanu-PF supporters and members. They view him as a person who betrayed [withheld] and Zanu-PF by his MDC support and someone who has brought “disgrace” upon the Zimbabwean state by [withheld].

Country Information

[55] It is now two years since the formation of the power-sharing government between President Mugabe’s Zanu-PF and the MDC led by Prime Minister Morgan Tsvangirai. Despite the power-sharing arrangements there has been no end to the human rights abuses and disrespect for the rule of law. Politically motivated violence and the lack of accountability for abuses remains a serious problem in Zimbabwe. See Human Rights Watch *“Perpetual Fear, Impunity and Cycles of Violence in Zimbabwe”* – Introductory Statement (8 March 2011):

“Members of the security forces, the former ruling party, the Zimbabwe African National Union – Patriotic Front (Zanu-PF), and groups allied to Zanu-PF continue to commit human rights violations, including arbitrary arrests and

abductions, beatings torture and killings of members and supporters of the former opposition party, the Movement for Democratic Change (MDC), and those critical of the Zanu-PF and its officials”.

[56] This report in its summary goes on to state that:

“There has been little or no accountability for these [violations arbitrary arrests etc as set out above].

Crimes. Cases of political violence that have been filed by victims or their relatives have been largely ignored by the police, or have been stalled in the courts. The government has failed to respond to calls for local non-governmental organisations for the government to investigate these abuses. Ending impunity for past and ongoing abuses is essential if Zimbabwe is to end violence and firmly establish the rule of law.

There has been little or no accountability for these crimes. Cases of political violence that have been filed by victims or their relatives have been largely ignored by the police, or have stalled in the courts. The government has failed to respond to calls by local nongovernmental organizations for the government to investigate these abuses. Ending impunity for past and ongoing abuses is essential if Zimbabwe is to end violence and firmly establish the rule of law.

The power-sharing government comprised of ZANU-PF and the two factions of the MDC, claimed a commitment to human rights reform, but has shown no political will to address longstanding impunity for human rights abuses. With a referendum and elections planned for this year, the lack of accountability and justice for past abuses raises the spectre of further violence, and poses a significant obstacle to the holding of free, fair, and credible elections.

For more than a decade, elections in Zimbabwe have been marked by widespread human rights violations committed by the security forces and supporters and allies of ZANU-PF, such as “youth militia” and war veterans. Thousands of MDC supporters, officials, and human rights activists have been targets of abuses with little or no accountability, encouraging further attacks.”

[57] The same report goes on to note that leaders of the security forces continue to publicly declare support for the Zanu-PF and have not been disciplined, removed from their posts or charged when they have committed criminal offences. There is a compromised judiciary and highly partisan police force whose members have also been implicated in abuses that leave little room for justice for victims of abuses.

[58] The *Zimbabwe Human Rights NGO Forum Reports* of 10 February 2011 and 6 March 2011, (“Statement On The Outbreak Of Violence Selective Application Of The Law and Background to Political Violence in Zimbabwe”) describes continuing violence, especially in Harare, peaked again in 2010 and that:

“Zanu-PF youth are moving around assaulting perceived and known MDC supporters. This has resulted in violent clashes between the MDC and Zanu-PF youth in areas such as Harare...”

[59] In the same report, “Background to Political Violence in Zimbabwe”, the editorial on the second page states that in 2010 there were:

“More than 2,000 violations recorded by human rights organisations that were monitoring the outreach process ranging from assault, intimidation, arbitrary arrests and detentions, abductions and violation of freedom of expression, association and assembly.”

[60] With the threat of an election a new wave of violence was reported in both urban and rural areas. The abuses are reported as being conspicuously serious, widespread, persistent, deliberate and systematic.

[61] In a report of *Zimonline* (11 March 2011), “Zim govt in danger: Tsvangirai”, it reports that the Zimbabwe unity government is in danger of collapsing and that Tsvangirai called for a “clean divorce” in the event of an irretrievable breakdown between his party and that of President Mugabe. This report also states:

“Scores of other leaders and activists of the MDC-T and its civil society allies are either being held in jail or facing charges that the former opposition party says are trumped up and an attempt to destroy its structures ahead of a key constitution referendum later this year and elections that should follow the plebiscite.”

[62] The Tribunal has also noted the very extensive country guidance determination in *E M & Others* from the Upper Tribunal (Immigration and Asylum Chamber) in the United Kingdom, presided over by Blake J. This determination concluded that, at the end of January 2011:

“As a general matter, there is significantly less politically motivated violence in Zimbabwe, compared with the situation considered by the AIT in *RN* [in 2008] in particular the evidence does not show that, as a general matter, the return of a failed asylum-seeker from the United Kingdom, having no significant MDC profile, would result in that person facing a real risk of having to demonstrate loyalty to the ZANU-PF.

The position is however, likely to be otherwise in the case of a person without ZANU-PF connections, returning from the United Kingdom after significant absence to a rural area of Zimbabwe...such a person may well find it difficult to avoid adverse attention, amounting to serious ill-treatment, from ZANU-PF authority figures and those they control...

A returnee to Harare will in general face no significant difficulties, if going to a low density or medium density area. Whilst the socio-economic situation in high density areas is more challenging, in general a person without ZANU-PF connections will not face significant problems there (including a “loyalty test”), unless he or she has a significant MDC profile, which might cause him or her to feature on a list of those targeted for harassment or would otherwise engage in political activities likely to attract the adverse attention of ZANU-PF.”

THE REFUGEE CONVENTION – THE ISSUES

[63] Section 129 of the Act provides:

“129 Recognition as refugee

- (1) 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.
- (2) A person who has been recognised as a refugee under subsection (1) cannot be deported from New Zealand except in the circumstances set out in section 164(3).”

[64] The Inclusion Clause in 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.”

[65] The Tribunal has adopted the jurisprudence of the RSAA where applicable. The principal issues to be addressed in refugee status claims for recognition have been established for many years, going back to *Refugee Appeal No 70074* (17 September 1996). Those 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?

Conclusion on Refugee Status Issues

[66] Assessed on the totality of the appellant’s accepted evidence, in particular, noting the personal profile that has been established, even if somewhat perversely, through the publication of information [withheld] against him in New Zealand, there is a real chance of this appellant being persecuted on return to Zimbabwe. [withheld] There are significant individual and personal factors that cause the Tribunal to give any benefit of the doubt to the appellant in this case. These are made up from assessments, made in the round, of his family background, his well-known name, well-known and reasonably high-profile association of [withheld] and a group of his associates within Zanu-PF, and more recently since he has been in New Zealand, the unfortunate and perverse

notoriety that he has visited upon himself [withheld]. To this must be added the knowledge held by the Zimbabwean government and its officials in Canberra, in particular, that the appellant has lodged a claim for asylum in New Zealand. Regardless of whether this is technically an offence in Zimbabwe the combination of the “embarrassment to the state” [withheld], together with the rest of his profile including his MDC membership, establish a well-founded fear of being persecuted on return to Zimbabwe.

[67] The first issue is therefore answered in the positive.

[68] Issue two is also answered in the positive. The real chance of being persecuted is substantively for reason of the appellant’s demonstrated political opinion.

[69] The appellant is therefore found to be a refugee within the meaning of Article 1A(2) of the Refugee Convention.

THE CONVENTION AGAINST TORTURE – THE ISSUES

[70] 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.”

Assessment of the Claim under the Convention Against Torture

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

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

[72] The appellant is recognised as a refugee. It follows he cannot be deported from New Zealand. This country’s *non refoulement* obligation arises at international law pursuant to Articles 32 and 33 of the Refugee Convention, and is expressly brought within domestic law by section 129(2) of the Act. The limited

exceptions (section 164(3)) have no application here.

[73] The Tribunal must determine the appellant's claim on the basis of his present circumstances. As he is presently not at risk of being deported from New Zealand he does not require recognition as a protected person under section 130(1) of the Act. This finding is also consistent with the terms of section 137(4) of the Act.

[74] The reality is, therefore, the appellant has the protection of another country (New Zealand) and does not require recognition as a protected person.

Conclusion on Claim under Convention Against Torture

[75] For the foregoing reasons the appellant is not a protected person within the meaning of the Convention Against Torture and section 130 of the Act.

THE ICCPR – THE ISSUES

[76] 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."

Assessment of the Claim under the ICCPR

[77] The same analysis applies to this limb of the claim. The appellant being recognised as a refugee cannot be deported from New Zealand. The *non refoulement* obligation arises at international law under Articles 32 and 33 of the Refugee Convention and is brought within the country's domestic law by section 164 of the Act. The limited exceptions (sections 164(3) and (4)) have no application.

[78] As the appellant is safe from being returned to Zimbabwe, there are no substantial grounds for believing he is in danger of being subjected to cruel treatment. He is not a person to whom New Zealand owes protection obligations under the ICCPR and section 131 of the Act.

Conclusion on Claim under ICCPR

[79] For the foregoing reasons the appellant is not a protected person within the

meaning of the ICCPR and section 131 of the Act.

CONCLUSION

[80] 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; and
- (c) is not a protected person within the meaning of the Covenant on Civil and Political Rights.

[81] The appeal is allowed.

"A R Mackey"
A R Mackey
Chair

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