

AT AUCKLAND

Appellants:	AD (South Africa)
Before:	A R Mackey (Chair) V J Shaw (Member)
Counsel for the Appellants:	C Curtis
Counsel for the Respondent:	No Appearance
Date of Hearing:	2 May 2011
Date of Decision:	15 September 2011

DECISION

INTRODUCTION

[1] The appellants are a 20 year-old South African woman and her five month-old son. These appeals were heard contemporaneously with their humanitarian appeal, [2011] NZIPT 500228 which has been determined in their favour.

[2] The mother (who will be referred to as the appellant) came to New Zealand when some five months pregnant to escape from her abusive former boyfriend who had tried to kill her unborn child.

[3] These appeals are against decisions of a refugee status officer of the Refugee Status Branch (RSB) of the Department of Labour declining to grant the appellant and young son refugee status or to recognise them as protected persons. The appellant acts as the responsible adult for the purposes of her son's appeal. He was born here in December 2010 and is a healthy young child.

[4] The Tribunal finds that the appellant and her son are not refugees or protected persons, although they have established risks of being maltreated if they return to South Africa. The primary issues are thus, on their particular facts,

objectively assessed, can the Tribunal conclude the appellants can obtain state protection, to the level that will reduce the risks of maltreatment to below that of a real chance? If so, is there a nexus to a Refugee Convention reason?

THE APPELLANT'S CASE

[5] The appellant was born in Durban to coloured parents. When still a very young child, her mother separated from her father because of the latter's drug abuse and violent behaviour. The mother went to Cape Town, taking with her the appellant and her older half-brother. She later remarried and had a second daughter but her second marriage did not survive.

[6] The appellant remained living with her mother until she was due to start primary school. After a period living with relatives of her stepfather, she went to live permanently with her maternal grandmother in Durban.

[7] When aged 14 years, the appellant became friendly with a youth, AA, some two years older than herself, who lived nearby. At the time she was completing her last year at primary school and AA was at high school. They began dating and AA persuaded her to have a sexual relationship. In January 2005 she learned that she was pregnant.

[8] The appellant decided of her own volition that she was too young to have a baby. After confiding in an aunt, it was arranged that she would have an abortion. When she told AA of her plan, he demanded that she have the baby. However, she insisted that it was her own choice and that to have the baby would require her to give up everything, including her goal of completing high school.

[9] Apart from her aunt, who arranged and paid for the abortion to be carried out in a public hospital, the appellant did not tell any of her family about the abortion. Her family are Roman Catholic and her grandmother in particular is especially religious.

[10] After the abortion, AA accused her of being selfish and not thinking of him. He threatened to tell everybody that she had had an abortion. The following day when she went to school, she learned that other girls were talking about her having had an abortion, a rumour that she resolutely declined to confirm.

[11] Over the following months, the appellant attempted to end her relationship with AA but he became increasingly obsessive and abusive in his attentions. He

had left school but was not working; the appellant understood he was selling drugs in the neighbourhood for a local drug dealer and was reputed to have joined or had close connections with a well-known urban gang, "The ABCs". He would wait for her each morning on the street to accompany her to school. During school intervals he would regularly be waiting at the school fence, either alone or with several of his friends, and would demand that she come to talk with him. If she failed to do so, he would send other students to tell her to come and even entered the school and searched for her himself. After school he would be waiting and insist on accompanying her to the library where she usually went to complete her homework while waiting for her grandmother to return from work. He and his friends were so disruptive that eventually she was told by the security guard that she would not be allowed in the library.

[12] Frequently, AA would abuse the appellant in front of his friends, saying that she was good for nothing, dirty and had had an abortion. As the June examinations approached, she determined to break up finally with him. His response, when she insisted that she did not want to be with him, was to first claim he loved her and, when this did not meet with a positive response, to become angry, claiming to not understand why she wanted to break up with him. He would then fall back on his repeated taunt that she had killed his baby and was a murderer. He also took to standing outside the apartment where the appellant lived with her grandmother and screaming for her to come out.

[13] The appellant's grandmother said she could not cope with AA's harassment and required that the appellant move to her father's home some 20 minutes' walk away, in the hope that this might make AA desist. However, AA and his friends simply congregated in the park opposite and when the appellant persisted in ignoring him, they would throw stones at her father's house.

[14] The appellant at this time was turning 16 years old and her grandmother organised a party for her at her home on a Saturday afternoon. AA and his friends were observed standing at the street-corner drinking. When the appellant went down the stairs from her grandmother's apartment to say goodbye to friends, he approached and started demanding to know why he had not been invited to her party, grabbing her arms and attempting to kiss her. As she struggled to get away, AA hit her on the back and pushed her to the ground. Responding to his daughter's crying, the appellant's father confronted AA but, fearful for her father, who was not in good health, the appellant managed to pull her father away and persuade him to go back inside with her. As they made to do so, AA threw a brick

which caught the father on the head causing a serious gash.

[15] The father had to go to hospital to get his wound attended to and the appellant accompanied him. The hospital notified the police who initially came to the hospital. The appellant begged her father not to press charges as she was afraid that AA would retaliate against her. Her father insisted on doing so. AA was arrested, only to be immediately bailed from the police by the drug dealer and gang associate for whom he was working. Her father and grandmother were astounded at his speedy release as it was well known that the normal procedure was that an arrestee was held over the weekend and then to appear before a judge on Monday before bail would be granted. The appellant's father attempted, over many weeks, to obtain an explanation from the police as to AA's release and the progress of the case, but he was always told that the sergeant in charge of the matter was unavailable. For reasons that the appellant and her father do not understand, no prosecution ever resulted.

[16] The appellant next saw AA when he was waiting for her at school. She asked how he had been able to get bail and he boasted that he had "friends in high places". He resumed his usual activity of waiting for the appellant in the park near her father's house, then repeatedly knocking on the door, throwing stones at the windows and calling out for her.

[17] Once her examinations were finished, it was decided the appellant should go to stay with a cousin in Johannesburg. The initial plan was she would stay only for the holidays but once there, it was agreed that the appellant would stay for the year. In January 2007, she transferred to a new high school in Johannesburg.

[18] Towards the end of the year, when the appellant was preparing for her examinations, she was waiting at the bus stop, with other patrons, on her way home from school when suddenly she was approached by AA walking in the street. This was the first time she had seen him throughout 2007. He came up to her, grabbed her by the wrist, pulled her head towards him and kissed her. He demanded to know why she had run away from him, asserting that they were going to be together and she would have his baby. She retorted that there was something really wrong with him, that he was to leave her alone and that she would rather die than be with him. He responded that there was nothing wrong with him, that he acted that way because she had killed his baby and if she would rather die, he "could arrange it with his friends". He claimed to know where she was living with her cousin and said he would ring her on her cousin's telephone. As she walked away from the bus stop, he again forcibly kissed her but she kept

on walking towards a nearby shopping mall where she knew there would be other people.

[19] There had been three women waiting at the bus stop who had witnessed the encounter. None took steps to intervene, despite it being obvious from her demeanour that she was distressed and trying to get away from AA. She was angry that they had appeared to have assumed that this was a lover's tiff. She shouted angrily at them, asking that if he had killed her in front of them, would they still have done nothing.

[20] Her cousin's home was part of a larger "gated" complex with a security officer at the gate so there was no possibility of AA approaching. Over the following days, the cousin's partner drove the appellant to school to sit her examinations. On one occasion, when he was not available to do so, the appellant opted to miss the examination rather than risk another encounter with AA.

[21] Once the examinations were over, she went to live with her mother and younger sister in Cape Town. Her mother found her a holiday job working in a shoe shop in the central city and the appellant enrolled in a high school.

[22] Towards the end of 2008, the appellant commenced a relationship with a man, BB, some 10 years her senior. He was studying nursing at a marine medicine academy and helped out at a friend's electronics shop situated not far from the shoe shop where the appellant worked at weekends. BB impressed her as a responsible and respectful man who had goals. Initially she concealed the friendship from her mother, fearing her disapproval because of the age gap. When her mother did eventually meet BB, she warmed to him and thereafter the appellant was able to openly date BB. He would often collect her from her mother's home.

[23] Towards the end of 2009, the appellant started to receive telephone calls from AA who, she assumed, must have obtained her number through one of her Durban friends. He said he knew she was in Cape Town and was with someone else, that he was coming "to sort him out" and he had friends in The ABCs gang there who would assist him. She denied she was in Cape Town and arranged to change her mobile telephone number.

[24] Around late February 2010, the appellant learned she was pregnant to BB. She was shocked as she had been using contraceptives. She resolved to keep

the baby as she felt she was now old enough to manage, had completed high school and had a full-time job in a café. She told BB of her pregnancy and he insisted that she be properly checked by a doctor to confirm the pregnancy. Her mother was reluctant for the appellant and BB to live together without first marrying and BB was agreeable to this.

[25] In early 2010, the appellant's younger sister was accosted by AA and several associates, at the train station on her way home from school, demanding to know the appellant's whereabouts. He threatened that he would find her and that he knew about her boyfriend. The sister was similarly harassed over several more days until she was too afraid to go to school.

[26] The appellant's mother decided to lodge a complaint with the police and one evening the mother, the appellant and her sister went to the local police station and explained to two police officers what had been happening. It was suggested that restraining orders be issued against AA in respect of the appellant and her sister. The appellant had been reluctant to lay a complaint with the police as she feared that a restraining order afforded her little safety and was more likely to act as a provocation. However, she agreed to the complaint to please her mother. She was angered when the two officers queried whether she was actually just seeing two men at the same time and whether this was the real problem. Copies of the restraining orders were given to her and her sister and her sister's copy was later given to her sister's school.

[27] The appellant is not aware if the police managed to serve the order on AA. She was able to provide his Durban home address but could only suggest two neighbourhoods where he might be staying in Cape Town, one of which was the base of The ABCs gang.

[28] From this time, the appellant decided it would not be safe to remain with her mother and sister. She arranged to stay with a work friend instead. She also began to think that she might need to leave South Africa as she was running out of family with whom she and her child could live in safety away from AA and his gang associates. As a consequence, she initiated steps to apply for a passport.

[29] The appellant had not disclosed to BB her past association with AA as she was concerned he might think badly of her, particularly because of AA's gang connection. Nor did she tell him about the restraining order.

[30] The appellant's decision to leave South Africa was prompted by an incident

in late July 2010. She was at work at the café when she received a telephone call from BB who was in a highly agitated state. She could barely make out what he was saying, but it was to the effect that he had been approached by a group of coloured men and told to stay away from her. She suggested that they meet after lunch but he refused to meet her at their normal meeting place outside the café. Nor did he want her to come to his nearby workplace. He then switched off his telephone.

[31] When she finished work at 3pm, the appellant tried to telephone BB but he was still not answering his telephone. She decided to try to find him. She had just set off from the café when she noticed AA across the road. She kept on walking, pretending that she had not seen him but he called out and approached her. He grabbed her by the wrists and she struggled to get away from him. A nearby stall-holder asked if she was all right and AA immediately threatened him that he would get his friends to come and "sort him out". He told the appellant he was going to kill her baby, as she had killed his baby. He spoke derogatively about her having a baby with a black man and boasted that he could kill her boyfriend. When the appellant tried to tell him about the restraining order, he was derisive.

[32] In her efforts to get away, the appellant tripped and fell into the gutter between the pavement and a parked car. Once down, AA started to kick her violently in the stomach. She desperately tried to curl up into a ball to protect her unborn child. She sustained at least six forceful kicks to her stomach or chest. AA only ceased the assault when several nearby stall-holders approached and threatened to call the police. As she managed to walk away, AA again threatened to kill her boyfriend and her baby.

[33] The appellant experienced abdominal pains but a medical examination shortly afterwards confirmed that the foetus appeared to be unharmed.

[34] She did not dare to return to her work at the café and determined to leave South Africa as soon as possible as she was fearful that AA alone, or with his gang associates, would act further on his threat to kill her unborn child. She did not complain to the police. She also dismissed moving again within South Africa as AA had persistently tracked her down over several years, living with family was too risky and she had only very limited other options because of her pregnancy.

[35] She had a woman friend studying in Grahamstown whom she approached for help. This friend and her family had lived for a period in New Zealand. The friend suggested the appellant come here. She also made a financial contribution

to the cost of the airfare, as did her mother and the manager of the shoe shop where the appellant worked at weekends.

[36] The day before her departure from South Africa on 7 August 2010, the appellant finally received a telephone call from BB who was now in Johannesburg. She learned that his agitation on the morning of the assault had been because he had been approached and assaulted at his workplace by a group of coloured men who told him they had been sent by the appellant's boyfriend. They warned him to stay away from the appellant or they would shoot him, and also stated that her boyfriend would take care of the appellant who had "killed his child". One of the men had put a gun to his side. The appellant told BB she was leaving South Africa, but not her destination.

[37] Since being in New Zealand, the appellant has maintained contact with her mother who has also passed messages to and from BB who remains in Johannesburg. She assumes other family members such as her sister and grandmother have not been told she is in New Zealand for their own protection. BB is now telephoning her around twice a month and they also text each other. He has been sent photographs of his son. He has not had any contact with AA or his associates.

[38] The appellant's mother, reporting what she had been told by her own mother in Durban, has told the appellant that AA had been back in Durban and involved in shootings in his home neighbourhood. He had also been heard to boast of having killed her unborn child. This had been very distressing for the appellant's grandmother.

Submissions

[39] Counsel filed submissions, dated 21 February 2011, along with country information and was given leave to file additional submissions after the hearing addressing further country material obtained by the Tribunal, which she did.

Credibility

[40] It is accepted that the appellant has given a truthful account of all her experiences in South Africa, including with her former boyfriend, AA, and his associates.

JURISDICTION

[41] Section 198(1) of the Immigration Act 2009 requires the Tribunal to conduct an inquiry into whether to recognise the appellant as:

- (a) a refugee under the Refugee Convention (section 129); and
- (b) a protected person under the Convention Against Torture (“CAT”) (section 130); and
- (c) a protected person under the International Covenant on Civil and Political Rights (“ICCPR”) (section 131).

THE REFUGEE CONVENTION – THE ISSUES

[42] 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).”

[43] 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.”

[44] As explained in earlier decisions of this Tribunal, including *AA (Iran)* [2010] NZIPT 800056 (22 December 2010), the Tribunal intends to rely on the jurisprudence developed in the determinations of the RSAA over the period 1991 to 2010, subject only to the rulings of superior New Zealand courts, jurisprudential changes resulting from the 2009 Act, and ongoing developments in international refugee and protection law.

[45] 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

Interpretation of well-founded fear

[46] The RSAA, whose jurisprudence is adopted by the Tribunal in this regard, for many years interpreted the term “being persecuted” in the “inclusion clause” (Article 1A(2) of the Refugee Convention) as the sustained or systemic violation of basic human rights demonstrative of a failure of state protection. In other words, the core norms on international human rights law are relied upon to define the forms of serious harm which may fall within the scope of “being persecuted”. This is fully explained in *Refugee Appeal No 74665/03* (7 July 2004) at [36]-[90].

[47] As noted in the issues set out above, an assessment of the “well-founded fear” element of the refugee definition has, at its core reference point, not the facts subjectively perceived by the claimant, but the objective facts as found by the decision-maker. This explanation of the objective standard required was summarised in *Refugee Appeal No 76044* (11 September 2008) at [57], which states:

“THE RISK ISSUE

“A WELL-FOUNDED FEAR”

The legal test

[57] In the Authority’s jurisprudence the well-founded standard has been understood as mandating the establishment of a real chance of being persecuted. See for example *Refugee Appeal No. 72668/01* [2002] NZAR 649 at paras [111] to [154]. The standard is an entirely objective one. The trepidation of the refugee claimant, no matter how genuine or intense, does not alter or affect the legal standard and is irrelevant to the well-foundedness issue. Any subjective fear of harm, while relevant to the question whether the claimant is unable or unwilling to avail him or herself of the protection of the country of nationality, is of no relevance to whether the anticipation of being persecuted is well-founded. See *Refugee Appeal No. 75692* [2007] NZAR 307 at paras [76] to [90] and the *Michigan Guidelines on Well-Founded Fear* (2005) 26 Mich. J. Int’l L. 491.”

[48] For specific case law on gender-related persecution, reference should be made to *Refugee Appeal No 2039/93 Re MN* (12 February 1996) at pp14-16, 19-40 and *Refugee Appeal No 71427/99* [2000] NZAR545; [2000] INLR608 at [43] to

[82] and [111] to [120]. More recently, the RSAA addressed the issues of being persecuted and state protection (as well as issues relating to women as a particular social group) in *Refugee Appeal No 76044* (11 September 2008) where, between [62] and [63], it is stated:

“Being persecuted” and State protection

[62] As noted in *Refugee Appeal No. 74665/03* at para [51], central to the definition of the term “refugee” is the concept of state protection. Consequently the phrase “being persecuted” must be interpreted within the wider framework of the failure of state protection. Both in New Zealand and in the United Kingdom it is settled that the determination whether the particular facts establish a well-founded risk of being persecuted requires identification of the serious harm faced in the country of origin and an assessment of the state’s ability and willingness to respond effectively to that risk. “Being persecuted” is therefore to be seen as the construct of two separate but essential elements, namely the risk of serious harm **and** a failure of state protection. This has been expressed in the formula Persecution = Serious Harm + The Failure of State Protection: *R v Immigration Appeal Tribunal; Ex parte Shah* [1999] 2 AC 629 (HL) at 653F.

[63] As to the standard of state protection, the Authority in *Refugee Appeal No. 71427/99* at para [66] held that the issue is whether the protection available from the state will reduce the risk of serious harm to below the level of well-foundedness, or, as it is understood in New Zealand, to below the level of a real chance of serious harm. This is a more exacting standard than that which is applied in the United Kingdom subsequent to *Horvath v Secretary of State for the Home Department* [2001] 1 AC 489 (HL) but has the distinct advantage of securing compliance with the *non-refoulement* obligation in Article 33 of the Convention: *Refugee Appeal No. 74665/03* (7 July 2004); [2005] NZAR 60; [2005] INLR 68 at [54].

[49] Also in *Refugee Appeal No 76044*, the Authority went on to set out at [64] that the refugee decision does not require that the state itself be the agent of harm. Persecution at the hands of “private” or non-state agents of persecution equally falls within the definition.

Serious harm

[50] The Tribunal now turns to the assessment of the “serious harm” element noted above, particularly in the context of “private” or “domestic” actors.

[51] When the appellant first met and formed a relationship with AA he was aged around 17 years and she around 14 years. From her description of his behaviour, he appears to have developed an obsession with her. From early on he displayed an inordinately possessive and controlling attitude as evidenced by his need to accompany her to school, waiting at the school fence during the daily breaks and demanding she come to talk to him, and accompanying her home again. When she tried to end the relationship, he simply ignored her wishes and resorting to stalking and harassing her, including endlessly shouting for her from outside her

grandmother's home and then from outside her father's home when she moved to live with him to spare her grandmother further stress. The obsession continued over five years. Despite her significant relocations around South Africa, he tracked the appellant to Johannesburg, then to Cape Town. It is most likely he managed this through his knowledge of her family and exploiting his contacts, and those of his gang associates, amongst her friends.

[52] In the early days, he was not especially violent towards the appellant, preferring emotional manipulation. The appellant described his habit of grabbing and pinning down her hands when talking to her and she noticed that he seemed to find pleasure seeing her looking afraid of him.

[53] AA's accusations that she had murdered his baby were fuelled by his resentment, drug and alcohol assisted, that she had defied him. This resentment he nurtured and it was to become lethal once he realised she had another boyfriend (BB) to whom she was pregnant. He arranged for his gang associates around the country to intimidate the boyfriend by holding a gun to his side and threatening to kill him if he did not stay away from the appellant. After the appellant fell to the ground trying to escape him during an altercation in the street near her workplace in central Cape Town, he set about kicking her violently in the stomach, making clear it was his intention to kill her unborn child. Fortunately other people in the street intervened or she may well have lost her child.

Factual findings on serious harm

[54] The Tribunal considers that AA and his criminal gang associates represent a serious ongoing risk to the appellant and her child. His jealous possessive personality, violent disposition, past threats, the attempt to kill the unborn child, along with his manipulation of criminal gang associates, mean that there is a real chance that this man would have no inhibition about killing the appellant, her child and any man with whom she may form a relationship. He could do this either directly or by arranging the killings through his criminal contacts.

[55] As the serious harm element of "being persecuted" has now been established, the Tribunal must now consider, on the facts as found, whether the South African state can provide meaningful protection to the appellant so as to reduce the chance of future harm to her and her child to below that of a real chance.

[56] To assess whether the appellant can obtain meaningful state protection, it is

necessary to review country information in relation to domestic violence in South Africa and then to set against that, the South African government's initiatives and programmes that endeavour to address such violence against women. After that review, the factual position of this appellant, in accessing police and other government protection, must be noted before concluding whether or not the second element, required in the concept of "being persecuted" is available or not. The Tribunal, as noted above, is guided by the findings in *Ex parte Shah* by the House of Lords and the accepted New Zealand jurisprudence as set out in *Refugee Appeal No 71427/99* at [62] to [66] and *Refugee Appeal No 74665/03*, also noted above.

Domestic violence in South Africa

[57] Despite post-apartheid South Africa's formal commitment to eliminating discrimination against women and promoting gender equality, and the implementation of much progressive legislation, there has been little practical inroad achieved in reducing South Africa's high levels of violence against women. Various studies of the nature and causes of the violence and the challenges this represents for all levels of society make sobering reading.

[58] Reports consulted by the Tribunal include *A State of Sexual Tyranny; The Prevalence, Nature and Causes of Sexual Violence in South Africa* (November 2008) and 'Anyone Can be a Rapist ...' *An Overview of Sexual Violence in South Africa* (November 2009), both from the Centre for the Study of Violence and Reconciliation, "Worth their while?; Pursuing a rape complaint through the criminal justice system" *SA Crime Quarterly* No 32 (June 2010) and *Understanding Men's Health and Use of Violence; Interface of Rape and HIV in South Africa* Medical Research Council Policy Brief (June 2009).

[59] The contents are too extensive to briefly summarise, but they underlie the findings of the Committee on the Elimination of Discrimination Against Women (CEDAW) in its most recent 4 February 2011 report on South Africa:

"Stereotypes and harmful practices

20. The Committee is concerned about the persistence of patriarchal attitudes and deep-rooted stereotypes concerning women's roles and responsibilities that discriminate against women and perpetuate their subordination within the family and society. It notes that such discriminatory attitudes and stereotypes constitute serious obstacles to women's enjoyment of their human rights and the fulfilment of the rights enshrined in the Convention. The Committee is thus concerned by the insufficient, effective and comprehensive actions to modify or eliminate stereotypes and negative traditional values and practices in South Africa. The Committee also

expresses serious concern about the persistence of entrenched harmful cultural norms and practices, including *Ukuthwala* (forced marriages of women and girls to older men through abduction), polygamy and the killing of “witches”. The Committee also expresses its concern at the continuing stereotypical portrayal of women in the media, which encourages discrimination and undermines the equality of women and men; and

24. While noting that based on a multi-sectoral approach at the operational level a number of policy, legislative, administrative, victims empowerment and other measures have been put in place to combat violence against women in the country, the Committee expresses its serious concern at the inordinately high prevalence of sexual violence against women and girls and widespread domestic violence. The Committee is also concerned that such violence appears to be socially normalized, legitimized and accompanied by a culture of silence and impunity. It is further concerned at the low levels of prosecutions and convictions; and at reports indicating that some police officers fine rape perpetrators in lieu of reporting the cases. The committee regrets the lack of information on the impact of the measures and programmes in place to reduce incidences of all forms of violence against women and girls. The Committee is also concerned that social support services, including shelters, are inadequate due to appropriate budgetary allocations.”

[60] Studies of South African men have revealed the nature of male attitudinal norms which contribute to the prevalence of violence against women. The recent South African Medical Council study used a cross-sectional two stage random sample conducted in three districts in the Eastern Cape and KwaZulu Natal Provinces. It found that rape of a woman had been perpetuated by 27.6% of the men interviewed. Rape of a current or ex-girlfriend was disclosed by 14.3% of men and many men had raped more than once with 8.9% raping together with one or more other men. In all, 42.4% of men interviewed had been physically violent to a partner with 14.0% having been so during the previous year. The study concluded that the violence was too common and too deeply embedded in ideas about South African manhood, predicted on marked gender hierarchy and sexual entitlement, for the problem to be predominately addressed through strategies of apprehension and prosecution of perpetrators.

[61] As for the capacity of the police and criminal justice system to provide protection, the study of the attrition of rape complaints in Gauteng found that 45% of cases never proceed beyond the police to the courts. Of those that did reach the courts, one in five cases was withdrawn within five weeks, trials commenced in less than one in five cases and only 6.2% of cases resulted in a conviction. If the case involved an adult, as opposed to a child complainant, the overall conviction rate was even lower at 4.7%. Key contributing factors identified were poor police and administrative practices and prejudicial attitudes towards rape victims.

[62] Amongst the various cultural and institutional reasons for why many South African women are reluctant to report sexual violence to the police, the study A

State of Sexual Tyranny, at page 23, notes the role of police corruption in undermining women's confidence that a perpetrator will be punished.

"Reporting and levels of sexual violence

...

Second, there are many barriers to reporting sexual violence, which impact to a greater or lesser degree on victims of sexual violence in all countries. These include: feelings of shame and self-blame; societal attitudes and discrimination against those who have been victims of sexual violence; community taboos around sexual violence; reluctant about or threats against reporting a family member or intimate partner, discriminatory police attitudes, and the secondary victimisation experienced by sexual-assault victims in the criminal justice system. Citing a range of sources, Jewkes and Abrahams (2002:1 232) note that:

Many women will only try to report to the police incidents which fall within popular notions of 'rape' because of fear of not being believed. These fears are confirmed by police assertions that many women lie about rape. As a result these types of incident are more likely to result in a docket being opened, in other words to become rape 'cases'. There are a range of other barriers to reporting to the police including problems of physical access to police, fear of retaliation by the perpetrator and fear of the legal processes including experiencing rudeness and poor treatment by the police. Many women do not go to the police because they anticipate that ultimately their action will not lead to the perpetrator being punished. Few rape cases go to court ... and ... result in conviction and custodial sentences. Corruption in the form of perpetrators paying to 'lose' dockets is widely acknowledged as a problem in the system, in Umtata a docket will be 'lost' for R20... In Southern Johannesburg, one in twenty dockets were estimated to be 'lost' in a fraudulent manner. This report also outlined a range of other corrupt practices described by police who were interviewed, which when they become known would dissuade women from reporting cases. These included police, prosecutors and other court officials being paid to destroy the case, taking the suspect to the complainant to tell them to accept money and drop the case, asking for payment to complete the investigation and having sex with the rape survivor to 'check if she was raped.'

[63] Of particular relevance in the context of this appeal, are the observations at pages 86 and 87 of the same report, on the development in South Africa's poor urban areas of contemporary male youth cultures, strongly defined by male peer groups, and which are antithetical to the well-being of women.

"Young people now grew up in a cultural space created by modernity and apartheid in which parental and cultural authority was undermined, while the concentration of young people in the urban areas brought to the fore the emergence of "youth cultures" strongly defined by male peer groups. These initially emerged in a cultural space created by the apartheid politics of rape in South Africa, which gave primacy to anxieties about the rape of white women, while the violence done to black women [by white or black men] was "utterly neglected", no doubt facilitating the emergence of social practices among young men that expand their own domain of "entitlement" and which were antithetical to the well-being of women.

In this context, where young men frequently had little hope of being able to command the type of resources that would enable them to finance marriage and a home, the emphasis traditional societies placed on linking participation in sex to marriage has been jettisoned, thereby dramatically expanding the domain in which

young men can claim sexual entitlement. Wood and Jewkes, for instance, talk about the town of Umtata, and the nearby township of Ngangelizwe, in Eastern Cape. Umtata is a town:

...without industry, where there are few job opportunities or recreational facilities for young people. Unemployment and its ramifications are widespread. Ngangelizwe police report escalating levels among local youth of illegal fire-arm possession, alcohol abuse, as well as hard-drug use and dealing (cocaine and Mandrax). Young men whose families are without the means to further their education have few options, and frequently drop out of school to 'hang around' the streets of Ngangelizwe and central town, begging for money, harassing schoolgirls and other township residents, and committing petty crimes. ... [E]lders complain that their children are 'out of control', disrespectful and idle. In this context, poverty, mind-numbing boredom and the lack of opportunities or prospects for advancement contribute to young people investing substantial personal efforts in the few arenas where entertainment and success are achievable, most notably their sexual relationships.

In this context, many young men are ruthless in enforcing their concept of entitlement to sex.

If a girl accepted a male 'proposal' to love, she would be expected to have sex whenever he wanted it in return for presents, money, being visited frequently and taken out to parties and films. Thus, sexual refusal on the part of girls, which contradicted this 'contract' as well as challenging dominant ideas about (male) sexual entitlement in relationships and female sexual availability, was an important catalyst for assault and was seen (by some men) to legitimise the 'taking' of sex, by force if necessary.

These attitudes and expectations do not only play themselves out on a one-to-one level within relationships. One of the dynamics driving sexual coercion and other violence is the anxiety many men have that they will lose face in the eyes of their peer groups and community members if they are seen not to be able to exercise control over women in this way."

[64] The appellant fears that her ex-boyfriend will kill her and her child by another man. Around 1,400 South African women annually are recorded as killed by a partner. A study of the 3798 female homicides in 1999, showed 1349 were committed by a partner. Only 37% of the female homicides resulted in convictions, with the figure even less if the woman was killed by a partner: South African NGO Shadow Report, submitted to the CEDAW committee at its session 17 January – 4 February 2011.

Meaningful state protection?

[65] The UNHCR report of March 2010 *Guidance Note on Refugee Claims Relating to Victims of Organised Gangs* relevantly sets out, at 27 and 28:

"27. An assessment of the available of State protection will require detailed and reliable country of origin information, including information about existing programmes, to address the gang phenomenon and their effectiveness.

As with all other elements of refugee status determination, it is important to analyse the individual circumstances of each case. A State is not expected to guarantee the highest possible standard of protection to all its citizens all the time, but protection needs to be real and effective.

28. Factors that may be indicative of available State protection and may help adjudicators analyse claims include: efforts to reform and expand the criminal justice system; attempts to end the practice of social cleansing; and the establishment of witness protection programmes. Conversely, the following actors are indicative of a lack of effective State protection: lack of measures to ensure security to individuals at risk of harm by gangs; a general unwillingness on the part of the public to seek police or governmental assistance because doing so may be perceived as futile or likely to increase risk of harm by gangs; a prevalence of corruption, impunity and serious crimes, such as extrajudicial killings, drugs and human trafficking, implicating government officials, police and security forces.”

[66] The US *Country Reports on Human Rights Practices* (US Department of State) 2010 report on South Africa states in the opening paragraphs:

“South Africa is a multiparty parliamentary democracy in which constitutional power is shared between the president and the parliament. A progressive constitution, written after the end of apartheid and enshrining human rights, is the source of authority for the political system. The country has a population of approximately 50 million. In April 2009 the country held a largely free and fair national election in which the ruling African National Congress (ANC) won 65.9 percent of the vote and 264 of 400 seats in the National Assembly, which then elected ANC President Jacob Zuma as the country's president. Security forces reported to civilian authorities.

Principal human rights problems included police use of lethal and excessive force, including torture, against suspects and detainees, which resulted in deaths and injuries; vigilante and mob violence; prison overcrowding and abuse of prisoners, including beatings and rape by prison guards; arbitrary arrest; lengthy delays in trials and prolonged pretrial detention; forcible dispersal of demonstrations; pervasive violence against women and children; societal discrimination against women, persons with disabilities, and the lesbian, gay, bisexual, and transgender (LGBT) community; trafficking in persons; violence resulting from racial and ethnic tensions and conflicts with foreigners; and child labor, including forced child labor and child prostitution.”

[67] That report, under section 6 “Discrimination, societal abuses and trafficking in persons”, provides:

“The constitution and law prohibit discrimination on the grounds of race, disability, ethnic or social origin, color, age, culture, language, sex, pregnancy, sexual orientation, or marital status. However, entrenched attitudes and practices often resulted in the denial of these rights in practice.”

[68] The report, at page 23, relevantly notes, in relation to domestic violence:

“Domestic violence was pervasive and included physical, sexual, emotional, and verbal abuse, as well as harassment and stalking by former partners. The law facilitates the serving of protection orders on abusers, requires the police to take victims to a place of safety, and allows police to seize firearms at the scene and to arrest abusers without a warrant. Violating a protection order is punishable by a

prison sentence of up to five years, or 20 years if additional criminal charges are brought. Penalties for domestic violence include fines and sentences of between two and five years' imprisonment.

According to NGOs, about one in four women were in an abusive relationship, but few reported it. A June 2009 report released by the Medical Research Council found that more than two-fifths of men interviewed in KwaZulu-Natal and Eastern Cape provinces had been physically violent toward an intimate partner. TCC counselors also alleged that doctors, police officers, and judges often treated abused women poorly.

The government financed 39 shelters for abused women, but more were needed, particularly in rural areas. The government continued to conduct domestic violence awareness campaigns. In honor of Women's Month, the government hosted numerous events focused on empowering women in business, government, health, sports, and the arts."

[69] In this case of particular relevance is the fact that South African law provides that violating a protection order is punishable by lengthy prison sentences.

[70] In this appellant's unique situation, it is understandable that, after being constantly abused and stalked by AA for several years, and then being violently attacked in the street in Cape Town, the appellant should wish to leave South Africa completely to be rid of him and his gang associates. The reality of her situation, however, must be looked at. The appellant, and her sister, had obtained protection orders from the local police in Cape Town against AA. There is no direct evidence that these orders were not served upon AA. However, the appellant gave evidence that she had told him of their existence. She had certainly provided the police with his Durban address and the whereabouts of his gang headquarters. After the Cape Town street attack therefore, the appellant was clearly in the situation where she knew there had been a violation of the protection order. While she took immediate steps to ascertain her unborn baby was safe, the fact is that she did not report the incident to the police immediately after that. This could readily have been done in Cape Town, even if the appellant considered the policemen had taken a somewhat casual attitude towards the complaints made by her, her mother and sister.

[71] The reality is, therefore, on the facts of this case, the appellant has not taken readily available steps to access potential domestic remedies that were available to her in South Africa. The remedies for violating a protection order, if established, do show they are punishable by lengthy prison sentences. In this case, the police, from whom she had obtained, in the recent past, a protection order, simply were not given an opportunity to act on a violation of that order. On this set of facts, therefore, the issue of whether or not the South African state

could have, or indeed could in the future, provide meaningful state protection to the appellant, simply has not been tested. For this reason, therefore, the Tribunal cannot be conclusive on the issue of whether or not there would be a failure of state protection. The second element required to establish a well-founded fear of “being persecuted”, on these particular facts, cannot be found.

[72] Accordingly, for the above reasons, the appellant, and her son, cannot be found to be refugees within the meaning of Article 1A(2) of the Refugee Convention.

[73] The above conclusion is reached on the particular facts of this case where the issue of state protection had been partially accessed but untested, in the ultimate, when possibly readily available steps could have been taken.

Convention reason

[74] The remaining issue as to whether there is a nexus from the fear of being persecuted to one or more of the five Refugee Convention reasons, in these circumstances, thus becomes irrelevant. While it is thus unnecessary to be conclusive on this issue, the Tribunal is satisfied that a Convention nexus in this case would not have been established as almost entirely the reasons for the harm were based on the obsessive possessiveness of AA and the associated criminality carried out by both him and his gang associates. These are not Convention reasons.

CONCLUSION ON CLAIM FOR REFUGEE STATUS

[75] For the foregoing reasons, the Tribunal finds that while the appellant and her son have well-founded fears of serious harm if they return to South Africa, the Tribunal cannot be conclusive that there would be a failure of state protection, in their predicament on their return, for the reasons explained.

[76] The appellants, therefore, are not refugees within Article 1A(2) of the Refugee Convention.

THE CONVENTION AGAINST TORTURE (CAT) – THE ISSUES

[77] Section 130 of the Act states:

“130 Recognition as protected person under Convention Against Torture

- (1) 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.
- (2) Despite subsection (1), a person must not be recognised as a protected person in New Zealand under the Convention Against Torture if he or she is able to access meaningful domestic protection in his or her country or countries of nationality or former habitual residence.
- (3) For the purposes of determining whether there are substantial grounds for belief under subsection (1), the refugee and protection officer concerned must take into account all relevant considerations, including, if applicable, the existence in the country concerned of a consistent pattern of gross, flagrant, or mass violations of human rights.
- (4) A person who has been recognised as a protected person under subsection (1) cannot be deported from New Zealand except in the circumstances set out in section 164(4).
- (5) In this section, **torture** has the same meaning as in the Convention Against Torture.”

[78] Here, the issue for the Tribunal is whether there are substantial grounds for believing the appellants would be in danger of being subjected to torture if deported from New Zealand to their country of nationality, or a nominated third country.

ASSESSMENT OF THE CLAIM UNDER CAT

[79] Section 130(5) of the Act provides that torture has the same meaning as in CAT, Article 1(1) of which states:

- “1. ... torture means 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.”

[80] The claim for protection under CAT is based on the same factual analysis

and consideration of country information as has been carried out, in depth, above in relation to the refugee appeal. The Tribunal is satisfied that there are substantial grounds for believing both the appellant and her son would be in danger of being subjected to serious harm that could be tantamount to cruel, Inhuman or degrading treatment. However, that treatment firstly would not be at the hands of officials of the South African state and secondly, on the facts, it is not possible to conclude, as required by section 130(2) of the Act, that the appellant and her son would not be able to access meaningful domestic protection in South Africa. That possibility is untested.

CONCLUSION ON CLAIM UNDER CAT

[81] The Tribunal finds that the appellants should not be recognised as protected persons in New Zealand under CAT, as they have not established all the provisions required for recognition set out under sections 130(1) and (2) of the Act.

THE ICCPR – THE ISSUES

[82] Section 131 of the Act provides:

- “(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.
- (2) Despite subsection (1), a person must not be recognised as a protected person in New Zealand under the Covenant on Civil and Political Rights if he or she is able to access meaningful domestic protection in his or her country or countries of nationality or former habitual residence.
- (3) For the purposes of determining whether there are substantial grounds for belief under subsection (1), the refugee and protection officer concerned must take into account all relevant considerations, including, if applicable, the existence in the country concerned of a consistent pattern of gross, flagrant, or mass violations of human rights.
- (4) A person who has been recognised as a protected person under subsection (1) cannot be deported from New Zealand except in the circumstances set out in section 164(4).
- (5) For the purposes of this section,—
 - (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:

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

[83] The issues arising, particularly under section 131(1) and 131(2) are now considered.

ASSESSMENT OF THE CLAIM UNDER THE ICCPR

[84] Again, the same fact analysis and consideration of country information as has been assessed in detail above in relation to the refugee appeal, is applicable to this claim for recognition under the ICCPR provisions. Similar conclusions reached in respect of the CAT claim are reached. While the Tribunal is satisfied that there are substantial grounds for believing both appellants would be in danger of begin subjected to some form of cruel treatment, the Tribunal is also satisfied, on the particular facts, that the issue of the ability to obtain meaningful state protection is untested and thus conclusions in that regard would be speculative. The provisions of section 131(2) of the Act, accordingly, are not established.

CONCLUSION ON CLAIM UNDER THE ICCPR

[85] The Tribunal finds that the appellants should not be recognised as protected persons in New Zealand under the ICCPR provisions as they are not found to be able to meet all of the requirements of section 131.

CONCLUSION

[86] For the foregoing reasons, the Tribunal finds that the appellants:

- (a) are not refugees within the meaning of the Refugee Convention;
- (b) are not protected persons within the meaning of the Convention Against Torture;
- (c) are not protected persons within the meaning of the International Covenant on Civil and Political Rights.

[87] The appeals are dismissed on all grounds.

"A R Mackey"
A R Mackey
Chairman

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