

AT AUCKLAND

Appellants: AB (South Africa)
AC (South Africa)

Before: B Dingle (Member)

Representative for the appellants: The appellants represented themselves

Representative for the respondent: No Appearance

Date of hearing: 2 June 2011

Date of decision: 21 June 2011

DECISION

INTRODUCTION

[1] These are appeals under section 194 of the Immigration Act 2009 ("the Act") against a decision of a refugee and protection officer of the Refugee Status Branch ("RSB") of the Department of Labour, declining to grant either refugee status or protected person status to the appellants, citizens of South Africa.

[2] The appellants in this appeal are a mother and her teenage daughter. They will be referred to as the appellant and the appellant's daughter respectively.

[3] The essential issue to be determined in these appeals is whether the appellants' assertions that they will be the victims of persistent criminal offending against which they cannot obtain police protection is made out and, if so, whether the mistreatment they fear in South Africa, constitutes "being persecuted" for the purposes of the Refugee Convention.

[4] Because the appellant's daughter is a minor, the appellant acted as her responsible adult at the hearing, pursuant to section 375 of the Act. The appeals were heard jointly, the evidence of each appellant being considered in respect of their own and the other appellant's appeal.

[5] Given that the same account is relied upon in respect of both the claims to refugee status and the claims to protected person status, it is appropriate to record it first.

THE APPELLANTS' CASE

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

The mother's evidence

[7] The appellant is a white Afrikaans woman who lived all of her life in South Africa until she travelled to New Zealand in 2007. Many of her family members still live in South Africa including her parents, her stepfather, two adult children and several of her siblings. Her mother and stepfather live in a small town where her stepfather runs a business. A sister and a brother also live in the town although they find it difficult to secure permanent employment there. The appellant's two adult children live in other urban centres and they are both employed. The appellant maintains contact with these members of her family, usually through a Facebook account or email.

[8] The appellant held a range of paid employment positions in South Africa between 1990 and 2007, mostly clerical or office assistant work. She experienced one period of unemployment between 1995 and 1999 and it was during this time that her daughter, the other appellant in this appeal, was born. The appellant's last position in South Africa was as a bookkeeper at a small business between 2005 and 2007. The appellant resigned from that work to travel to New Zealand. Although the appellant was largely employed from 1999 until 2007 she experienced some difficulty when she applied for work because she was often told that she could not be employed because she is white. This was a reflection of the "black empowerment" employment policy which directs employers to employ certain proportions of black workers.

[9] The appellant recalls three incidents during her life in which she was the victim of crime or verbal harassment.

[10] In 1984 her house was burgled and a television and a jersey were stolen. The burglary was reported to a white policeman and within a matter of days the perpetrator and the stolen goods were identified.

[11] In approximately 1994, the appellant was travelling in a car with her brother when they narrowly missed colliding with another car driven by a black man. The appellant's brother and the other driver became involved in a physical fight which was eventually broken up by bystanders. The black driver then walked over to the passenger window where the appellant was seated and pulled her hair and said "I'm going to kill you".

[12] In approximately 2000, the appellant had her handbag stolen. She reported it to police so that she could provide a case number to facilitate replacing her passport and bank card. She was attended to by a black police officer who made disparaging comments about her attempt to lay a complaint and suggested that she was wasting police time, that nothing could be done about her handbag and that she should not be concerned about the loss of the handbag. The appellant recalls that he also spoke in Afrikaans using an intentionally-flawed accent in what seemed like an attempt to humiliate the appellant or make her feel self-conscious about speaking Afrikaans. Eventually she was able to file a formal complaint and was given a case number. The appellant contrasted this experience with her earlier experience in 1984 in which she had received a positive response from the police and they had gone on to identify the burglar and to reclaim her burgled goods. The appellant has not had cause to make further complaints to the police since 2000.

[13] In one final incident, the appellant was waiting in a shop queue with her mother when a black woman tried to push in to the queue. When the appellant's mother berated the woman, the woman turned on her, began shouting about having had many children on the direction of Nelson Mandela and the fact that when Nelson Mandela dies black people would kill white people so that South Africa would be a black nation.

[14] The appellant also recalls that in 1985 she was warned by a black woman that that there would be violence by black people against white people in South Africa.

[15] Other than the burglary in 1984 the appellant has never been the victim of criminal offending against her at home, in the workplace or at any other time other than the incidents mentioned.

[16] Notwithstanding that the appellant has not previously been the victim of serious violence, she fears that serious harm will befall her and her daughter should they now return to South Africa. She believes that white South Africans are being targeted for serious violence by black South Africans on the grounds of race. She also believes that white South Africans are at a proportionately higher risk of serious violence than other ethnic population groups including black South Africans. This perception is based on reading newspaper reports and other information found on the internet, some of which has been provided to the RSB and the Tribunal.

[17] The appellant also claims that on return to South Africa she will be unable to obtain employment because of the black empowerment policy. She says that she will not be able to rely on the support of her family and will therefore suffer poverty and an increased vulnerability to serious violence.

[18] As to the appellant daughter, the appellant says that she is at real risk of being raped or seriously physically harmed at school or in the course of travelling to or from school. The appellant recalled one incident at a school after her daughter had left in which a student at the school was stabbed by a black student.

The daughter's evidence

[19] The daughter appeared briefly before the Tribunal to give evidence. She echoed the appellant's fears about being targeted for violent crime because she is white, including at school. She also believes that white people are proportionately more vulnerable to violent crime than other ethnic groups. The daughter states that she is happy in New Zealand and does not wish to move again as she feels settled and safe here.

Further Documents and Submissions

[20] Prior to the hearing, on 23 May 2011, the Tribunal received from the appellants copies of three articles sourced from the internet concerning violent crime in South Africa and one article recording statements from the African National Congress Youth League president

[21] During the hearing the Tribunal referred in general terms to country information which indicated that the white population in South Africa are, according to statistics, at a proportionately lower risk of violent crime. Copies of the specific items of information (detailed in [30] below) were sent to the appellants on 7 June 2011 and they were invited to make comments or submissions by 13 June 2011. No response has been received.

Assessment of credibility

[22] The appellant's evidence is accepted as credible as to her and the daughter's biographical details and the account of her employment and residence history. The Tribunal also accepts her account of the three incidents in which she has been a victim of crime (in 1984, 1995 and 2000). The daughter's evidence is also accepted.

[23] The appellant's personal assertions as to the level of risk of serious harm which she and her daughter will be exposed to should they return to South Africa are not accepted for reasons discussed in detail below.

JURISDICTION

[24] Pursuant to section 198 of the Act, the Tribunal must determine whether to recognise each of the appellants as:

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

THE REFUGEE CONVENTION – THE ISSUES

[25] 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."

[26] 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 Claims to Refugee Status

Country information

[27] The country information recording the level of crime in South Africa paints a bleak picture. The most recent United States Department of State's *Country Reports on Human Rights Practices: South Africa* (April 2011) ("the DOS report") notes that in 2010 there were 294 deaths in police custody and 566 deaths as a result of other police action. The DOS report also records that incidents of vigilante violence and mob killings continued, particularly in rural areas and townships as well as xenophobic attacks on foreign African migrants and violence perpetrated against white farmers.

[28] Within the sphere of criminal offending, violence against women and girls is a significant and persistent issue. The Amnesty International *AI Report: South Africa* (May 2010), under the heading "Violence against women and girls" states the following:

"A new ministry for Women, Youth, Children and People with Disability was announced.

High levels of violence against women and girls continued to be reported, although comparisons with previous years were difficult due to the changed legal framework for recording these crimes. Police figures for the year ending March 2009 indicated a 10.1 per cent increase in sexual offences, including rape, against adults and children, with over 30,000 against women 18 years or older.

In June, the South African Medical Research Council published results of a survey showing that more than two fifths of the men interviewed had been physically violent to an intimate partner.

The ICD reported to Parliament in February that its inspection of 430 police stations showed many were failing to comply with their obligations under the Domestic Violence Act (DVA). There were also a number of substantiated complaints brought against the police, including failing to arrest the perpetrator for non-compliance with a Protection Order, to advise complainants of their options under the DVA and for 'chasing away'~ complainants.

NGOs and support organizations reported that the police had not received adequate or in some cases any training on their obligations under the sexual offences and domestic violence laws. By the end of the year, the authorities had established 17 out of the targeted 50 planned one-stop centres for the provision of treatment, support and access to justice for survivors of gender-based violence. In July, the Minister of Police announced he would review the decision to close the specialized family violence and sexual offences units. Research confirmed that the decision in 2006 to close the units led to a deterioration in services and a reduced rate of arrests and convictions."

[29] The levels of violence against women and girls do not, however, manifest themselves equally across all social, racial and economic spheres. And while this decision does not attempt to analyse the complexity of factors which impact on individual women's particular vulnerabilities to violent crime, it is possible to draw two broad conclusions from the statistics and country information available which are relevant to the situation and characteristics of these appellants.

[30] Firstly, poor black women, African migrant women and other marginalised groups such as lesbian and transgender women are proportionately more vulnerable to violent crimes including sexual violence. See, for example, People Opposing Women Abuse Criminal Injustice, *Violence Against Women in South Africa* (March 2010). In terms of statistics, one study indicates that the white population is recorded as suffering 4.5% of reported rape offending while they comprise 21% of the population (as at the 2001 census). In contrast, African women suffered 90% of all rapes while they comprise 73% of the population. See Tshwaranang Legal Advocacy Centre, the South African Medical Research Council and the Centre for the Study of Violence and Reconciliation *Tracking Justice: The Attrition of Rape Cases through the Criminal Justice System in Gauteng* (2008). Combined with other indications that white women are significantly more likely to make a complaint of sexual offending against them, the statistics reveal a real disparity of the vulnerability of women along racial lines. See Sigworth R, Ngwane C And Pino A "The Gendered Nature of Xenophobia in South Africa", *Centre for the Study of Violence and Reconciliation* (December 2008).

[31] Secondly, the country information indicates that, while offending against women by strangers is by no means uncommon, most sexual offending is

perpetrated by family members or friends of the victim. The 2011 DOS report cites a 2008 study by the South African Police Service and the Centre for the Study of Violence and Reconciliation which found that, in most cases of sexual violence, attackers were friends or family members of the victim, which contributed to a reluctance of victims to press charges.

Application to the facts

[32] For the purposes of refugee determination, "being persecuted" has been described as the sustained or systemic violation of basic or core human rights such as to be demonstrative of a failure of state protection; see *Refugee Appeal No 2039/93* (12 February 1996) and *Refugee Appeal No 74665* [2005] NZAR 60; [2005] INLR 68 at [36] to [125]. Put another way, it has been expressed as comprising serious harm plus the failure of state protection; *Refugee Appeal No 71427* (17 August 2000).

[33] The Refugee Status Appeals Authority has consistently adopted the approach in the decision of *Chan v Minister of Immigration and Ethnic Affairs* (1989) 169 CLR 379 (HCA), which held that a fear of being persecuted will be well-founded when there is a real, as opposed to a remote or speculative, chance of such persecution occurring. This entails an objective assessment as to whether there is a real or substantial basis for the anticipation of being persecuted. Mere speculation will not suffice. As noted by the Tribunal in *AB (Fiji)* [2011] NZIPT 800045, the Tribunal intends to rely upon the jurisprudence developed by the Refugee Status Appeals Authority in determinations of appeals and matters before it – subject, of course, to rulings by superior New Zealand courts, and ongoing developments in international refugee and protection law.

[34] Despite the high crime rate and difficulties with the police indicated in reports such as the DOS report, it is not established that either appellant is at risk of a sustained or systemic denial of basic or core human rights in South Africa. In particular, it is not established that either of them face a real chance of becoming the victim of a serious violent crime that would constitute a sustained or systemic denial of their human rights.

[35] While the high crime rate and incidence of sexual violence in particular is acknowledged, this must be seen in the context of the 2008 study by the South African Police Service and the Centre for the Study of Violence and Reconciliation cited above which states that in most cases the attackers were

'friends' and family members of the victims. The clear implication is that much of the sexual violence in South Africa occurs within a domestic context.

[36] Neither of the appellants faces a real chance of being attacked in such a context. The appellant is a white middle-class woman with a long employment record and a family network. She has always been able to access housing with security features and there is no reason why she would not do so again. The daughter will be living with her mother in the same secure housing.

[37] It is not established that the appellant's circumstances in South Africa would place her at a real, rather than a remote, risk of being subjected to violence. Similarly, nothing in the appellant's daughter's profile indicates that she faces a real chance of suffering serious harm. As with her mother, the chance is speculative only and appropriately described as remote.

[38] It is acknowledged again that both appellants are genuinely fearful of crime in South Africa. However as noted above, the question of whether an appellant's fear is well-founded is properly determined by objective, rather than subjective, criteria.

[39] The first issue framed for consideration is answered in the negative. It is therefore unnecessary to consider the second issue of Convention ground.

Conclusion on Claims to Refugee Status

[40] For the foregoing reasons, the Tribunal finds that neither the appellant nor the appellant's daughter are refugees within the meaning of Article 1A(2) of the Convention. Refugee status is declined to each appellant.

THE CONVENTION AGAINST TORTURE – THE ISSUES

[41] 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

[42] 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.”

[43] The appellants rely on the same evidence in support of their claim under the Torture Convention as they did to support their claims under the Refugee Convention. The Tribunal has already found that the evidence does not establish that the appellants face a well-founded fear of being persecuted in South Africa. For the same reasons, on the basis of the evidence before it, including the country information, the Tribunal is satisfied that the appellants have not established that there are substantial grounds for believing that either of them would be in danger of being subjected to torture if now returned to South Africa.

[44] The appellants are not entitled to be recognised as protected persons under section 130(1) of the Act.

THE ICCPR – THE ISSUES

[45] 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

[46] Pursuant to section 131(6) of the Act, “cruel treatment” means cruel, inhuman or degrading treatment or punishment.

[47] Again, the appellants rely on the same evidence in support of their claims under the ICCPR as they did to support their claims under the Refugee Convention. For the same reasons, having regard to the factual findings

and country information set out in relation to the claim of each appellant to refugee status, the Tribunal finds that the appellants have not established substantial grounds for believing that either of them would be in danger of being subjected to arbitrary deprivation of life or cruel treatment if returned to South Africa.

[48] The appellants are not, therefore, persons requiring protection under the ICCPR and it follows that neither of the appellants is a protected person within the meaning of section 131(1) of the Act.

CONCLUSION

[49] For the foregoing reasons, the Tribunal finds that:

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

[50] The appeals are dismissed.

"B. Dingle"
B Dingle
Member

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