V95/03227 [1995] RRTA 1613 (7 July 1995)

REFUGEE REVIEW TRIBUNAL

DECISION AND REASONS FOR DECISION

RRT Reference: V95/03227

Country of Reference: Mozambique

Tribunal: DR RORY HUDSON, Member

Date: 7 July 1995

Place: MELBOURNE

Decision: The Tribunal finds that the applicant is not a refugee.
The Tribunal finds that the applicant is not entitled to a protection visa.

In accordance with section 431 of the *Migration Act 1958* (C'th) (as amended), the published version of this decision does not contain any statement which may identify the applicant or any relative or other dependant of the applicant.

This matter concerns a decision made by a delegate of the Minister for Immigration and Ethnic Affairs ("the Minister") that the applicant is not a refugee as provided for under the *Migration Act 1958* ("the Act").

The applicant sought recognition of refugee status by application for a protection visa lodged with the Department of Immigration and Ethnic Affairs ("the Department") on 4 April 1995. The decision was made on 13 April 1995. The applicant was notified by letter of the same date and applied for review of the decision on 26 April 1995.

The applicant was represented by Mr Ross Logan of Legal Aid Western Australia.

The nature of this decision

This is a decision taken *de novo* on the merits of the case: that is to say, the Tribunal is not principally interested in the reasoning of the delegate, but in the substantive issue of whether or not the applicant is a refugee. The Tribunal may find that there is no error in the delegate's reasoning but may nevertheless consider the applicant to be a refugee, e.g. because new information has come to light, or because conditions in the country of origin have changed since the time of the delegate's decision, or because the Tribunal gives different weight to the evidence. Alternatively, the Tribunal may consider the delegate's reasoning defective but may nevertheless agree that the applicant is not a refugee for other reasons.

Notwithstanding this, it is important for the Tribunal to consider the delegate's reasons, which are set out in a formal Statement of Reasons for the Decision. Section 418(2) of the Act requires the Secretary of the Department, in each case where an applicant appeals to the Tribunal against a negative decision of a delegate, to provide the Tribunal with a copy of that statement. Presumably Parliament, in approving s.418(2), intended that the Tribunal should study the statement with a view to considering whether the delegate's reasons are or are not cogent reasons why the applicant should not be granted refugee status - this, of course, does not preclude the Tribunal from also considering other material which was not before the delegate, or from assigning different weights to the evidence. If the Tribunal was intended by Parliament to have regard, among other matters, to the delegate's reasons, it is difficult to suppose that it was intended that the Tribunal must refrain from commenting upon them. It is appropriate to comment on a delegate's reasons in various circumstances, particularly where the Tribunal feels it necessary to explain why those reasons do not support the conclusion that an applicant is not a refugee. I therefore propose to comment on the delegate's reasoning wherever I consider that this will assist in explaining the factors which have influenced my decision and the factors which have not, and why.

This is also a determinative decision: that is to say, it is not a mere recommendation but is conclusive as to the question of refugee status, subject only to appeal to the courts on a question of law and to the power of the Minister under s. 417(1) of the Act to substitute a more favourable decision if he or she believes this to be in the public interest.

Definition of "refugee"

So far as is relevant to the present application, Article 1A(2) of the Refugees Convention defines a refugee as "any 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".

"Persecution"

Before turning to the details of the present application, I consider it advisable to set out what I understand by "persecution" in the context of the above Convention definition of "refugee".

The concept of persecution was discussed by the High Court in the leading case of *Chan Yee Kin v. Minister for Immigration and Ethnic Affairs [1989] HCA 62;* (1989) 169 CLR 379. In that case, it was held that the following are instances of persecution: interrogation, detention or exile (Mason CJ at 390); a threat to life or freedom (Dawson J at 399); significant deprivation of liberty (Gaudron J at 416); being shot or tortured (McHugh J at 429). Persecution does not require deprivation of liberty (McHugh J at 430), and a single act of oppression may suffice (McHugh J at 430).

While there is, therefore, no doubt that the above phenomena constitute persecution, the view of the High Court as to which other forms of maltreatment constitute persecution is less clear. Mason CJ said (at 388):

.....some forms of selective or discriminatory treatment by a State of its citizens do not amount to persecution.....the Convention necessarily contemplates that there is a real chance that the applicant will suffer some serious punishment or penalty or some significant detriment or disadvantage if he returns.....The denial of fundamental rights or freedoms otherwise enjoyed by nationals of the country concerned may constitute such harm, although I would not wish to express an opinion on the question whether any deprivation of a freedom traditionally guaranteed in a democratic society would constitute persecution if undertaken for a Convention reason.
And McHugh J said (at 429-31):
.....not every threat of harm to a person or interference with his or her rights for reasons of race, religion, nationality, membership of a particular social group or political opinion constitutes "being persecuted". The notion of persecution involves selective harassment.....[P]ersecution.....has historically taken many forms of social, political and economic discrimination. Hence, the denial of access to employment, to the professions and to education or the imposition of restrictions on the freedoms traditionally guaranteed in a democratic society such as freedom of speech, assembly, worship or movement may constitute such persecution if imposed for a Convention reason.

It appears from these passages that the view of the High Court is that in some cases, infringement of social, political and economic rights will constitute persecution in Convention terms, while in other cases it will not. The Court did not set out any guidelines by which it could be determined which such infringements are to be considered persecution and which are not, other than the reference by Mason CJ to "some serious punishment or penalty or some significant detriment or disadvantage".

In *Minister of State for Immigration, Local Government and Ethnic Affairs v. Che Guang Xiang* (unreported, No. WAG61 of 1994), the Full Federal Court said in a joint judgment:

Denial of fundamental rights or freedoms, or imposition of disadvantage by executive act, interrogation or detention for the purpose of intimidating the expression of political opinion will constitute persecution.....To establish whether there was a real, as opposed to a fanciful, chance that Che would be subject to harassment, detention, interrogation, discrimination or be marked for disadvantage in future employment opportunities by reason of expression of political dissent, it was necessary to look at the totality of Che's circumstances.

Insofar as this passage suggests that infringement of social, economic or political rights will, rather than may, constitute persecution, it may appear to go beyond what the High Court stated in *Chan*. However, the Federal Court was, of course, bound by *Chan*; furthermore, it expressly cited *Chan* as authority for its decision; it did not claim to be extending or questioning the concept of persecution enunciated in *Chan*; and it did not refer to any jurisprudence or policy considerations which might suggest that it was reconsidering the concept of persecution. I am therefore persuaded that the Federal Court in *Che* was not, after all, intending to modify or extend the concept of persecution endorsed by the High Court, but was simply restating the *Chan* test. The reference in *Che* to the phenomena of denial of fundamental rights or freedoms, imposition of disadvantage by executive act, interrogation or detention for the purpose of intimidation, harassment, detention, discrimination and marking for future

employment disadvantage must be read as a reference to these phenomena in circumstances where they satisfy the criteria referred to by Mason CJ in *Chan* of amounting to a serious punishment or penalty or a significant detriment or disadvantage. Where these criteria are satisfied, then, there is persecution; but where they are not, there is no persecution.

The question thus remains, for the decision-maker on refugee status, which phenomena are to be considered as amounting to a serious punishment or penalty or a significant detriment or disadvantage. I think that in the refugee status determination process it is important that so far as possible decision-makers adhere to objective concepts capable of universal application and susceptible to the jurisprudence of international bodies, so that uniformity can be applied and applicants are able to have a better idea of whether their claims are likely to succeed, rather than being kept in a state of anxiety.

To this end, I note that the Council of Europe has expressed the view that persecution should be defined as the breach of a core norm of international human rights law. As this branch of law is the subject of constantly developing jurisprudence on the part of the Human Rights Committee of the United Nations, specialist international bodies such as the Committee for the Elimination of Discrimination Against Women, the Committee for the Elimination of All Forms of Racial Discrimination, the Committee on the Rights of the Child, the Committee Against Torture, the European Human Rights Commission and the International Labour Organisation, as well as domestic courts, and as there is now a core of human rights instruments which have been acceded to by the overwhelming majority of nations, this seems to me to be an appropriate view. Australia is, of course, among the nations that have acceded to almost all the major international human rights instruments, and has been at the forefront of the move to make human rights an issue in both international and domestic affairs. See P.H. Bailey, *Human Rights: Australia in an International Context* (Butterworths, 1990). The importance attached by Australia to the protection of human rights is evidenced by Federal legislation such as the *Human Rights and Equal Opportunity Commission Act 1986*, the *Race Discrimination Act 1975* and the *Sex Discrimination Act 1984*.

In *Premalal v. Minister for Immigration, Local Government and Ethnic Affairs [1993] FCA 82;* (1993) 41 FCR 117 at 138 Einfeld J said:

It is therefore appropriate, in reviewing refugee status decisions of this kind, to take into account the best available examples of objectivity in this field, namely the various international human rights principles and conventions to which Australia is a party. As far back as 1948, the High Court affirmed the principle that the judiciary should interpret legislation and policy wherever possible consistent with international conventions ratified by Australia: Chow Hung Ching v. The King [1948] HCA 37; (1948) 77 CLR 449 at 477. President Kirby of the New South Wales Court of Appeal said in a recent speech entitled "The Australian Use of International Human Rights Norms: from Bangalore to Balliol - a View from the Antipodes" at p.20 (Judicial Colloquium, Balliol College, Oxford University, England, 21-24 September 1992):
"Deriving authority for fundamental principles (both of the common law and of international human rights norms) by reference to international treaties is now occurring increasingly in the Australian courts."

Recently the High Court has unambiguously affirmed this principle in Mabo v. Queensland (No. 2) [1992] HCA 23; (1992) 175 CLR 1, Australian Capital Television Pty Ltd v. Commonwealth [1992] HCA 45; (1992) 177 CLR 106, Nationwide News Pty Ltd v. Wills [1992] HCA 46; (1992) 177 CLR 1, and Dietrich v. The Queen [1992] HCA 57; (1992) 177 CLR 292. French J and I separately discussed and applied these principles, in light of authority, in Minister for Foreign Affairs and Trade v. Magno (1992) 37 FCR 298.
Nowhere are considerations of international instruments of human rights more important than in the area of refugees. Australia ratified the 1951 Geneva Convention.....relating to the status of refugees and its protocol on the basis of "the principle that human beings shall enjoy the fundamental rights and freedoms without discrimination" (Department of Foreign Affairs and Trade, Treaty Series no. 5 of 1954, preamble). The content of these rights, although not only or particularly applying to refugees, is comprehensively dealt with in the International Covenant on Civil and Political Rights.....which Australia ratified by legislation in 1981 (the Human Rights Commission Act 1981 (Cth)).

I consider that the approach of defining the concept of persecution in refugee law in terms of human rights is one which is appropriate, sensible and consistent with the approach adopted by Australian courts on refugee issues.

Such an approach has been adopted by Professor Hathaway in his important book *The Law of Refugee Status* (Butterworths, 1991) at pp. 101-112. He considers that persecution is most appropriately defined as the sustained or systemic failure of state protection in relation to one of the core entitlements which has been recognized by the international community. He takes those entitlements to be the rights affirmed in what is sometimes known as the International Bill of Rights, namely the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights. He considers persecution to be -

. Any breach of those rights from which no derogation is permitted even in times of compelling national emergency, namely freedom from arbitrary deprivation of life, protection against torture or cruel, inhuman or degrading punishment or treatment, freedom from slavery, the prohibition on criminal prosecution for *ex post facto* offences, the right to recognition as a person in law, and freedom of thought, conscience and religion.

. A discriminatory or non-emergency abrogation of rights which are derogable only in case of a national emergency, namely freedom from arbitrary arrest or detention, the right to equal protection for all, the right in criminal proceedings to a fair and public hearing and to be presumed innocent unless guilt is proved, the protection of personal and family privacy and integrity, the right to internal movement and choice of residence, the freedom to leave and return to one's country, liberty of opinion, expression, assembly and association, the right to form and join trade unions, and the ability to partake in government, access public employment without discrimination, and vote in periodic and genuine elections.

. The failure to implement any of the following rights, if this failure is discriminatory or not grounded in the absolute lack of resources: the right to work, including just and

favourable conditions of employment, remuneration and rest; entitlement to food, clothing, housing, medical care, social security and basic education; protection of the family, particularly children and mothers; the freedom to engage in and benefit from cultural, scientific, literary and artistic expression.

Professor Hathaway notes that the right to own and be free from arbitrary deprivation of property, and the right to be protected against unemployment, are not normally sufficient, if violated, to show persecution. He also distinguishes economic hardship and financial grievances, such as inferior services or wages, demotion at work, and impediments to career progress, from persecution. This seems to me to be consistent with the judgments of the Federal Court in *Ji Kil Soon v. Minister for Immigration, Local Government and Ethnic Affairs and the Refugee Review Tribunal* (unreported, No. G110 of 1994) and *Li Shi Ping and another v. Minister for Immigration, Local Government and Ethnic Affairs* (1995 35 ALD 557. In the former case, Tamberlin J held that discrimination in employment, including failure to gain promotion, together with surveillance, did not necessarily amount to persecution, though being forced to engage in demeaning work well below the level of a person's qualifications, so as to substantially deny the right to work, could do so. In the latter case, Drummond J held that if a person is denied employment in the public sector and in practice it is virtually impossible to find employment in the private sector, then this amounts to a denial of the right to earn a living and constitutes persecution.

I find Professor Hathaway's account of persecution entirely appropriate as a criterion to be applied in the light of *Chan*, and I adopt it accordingly. Thus I consider that infringements of human rights and freedoms of the kinds listed above will normally constitute persecution, while other infringements of human rights and freedoms will normally not. I say "normally" because I recognize that there may be exceptions in particular circumstances.

"Well-founded"

Chan establishes that a fear of persecution will be well-founded if there is a real chance that persecution will occur: see Mason CJ at 389; Dawson J at 398; Toohey J at 407; McHugh J at 429. A real chance is one that is substantial, not remote (Mason CJ at 389); not remote, regardless of whether it is less or more than 50% (Dawson J at 398); not remote or insubstantial (Toohey J at 407); not far-fetched (McHugh J at 429). A fear of persecution may be well-founded even though there is only a 10% chance of its occurring (McHugh J at 429).

The present applicant

The applicant is a citizen of Mozambique. He arrived in Australia on 7 March 1995 as a stowaway on board a ship. He is an unmarried youth with no dependants.

Claims

The applicant claims to have been born in 1979 and thus to be about fifteen years old. He has not given a precise date of birth. His claims are significantly different in their original form from claims made to the Tribunal after the delegate's decision was

made. For the sake of clarity, it is preferable to set out the two sets of claims separately.

Original claims

The applicant was born in Machamba, near Quelimane, Mozambique, and lived there with his parents and younger brother until about 1992. He said, however, that "Machamba" is not the name of any particular town or area, but merely a generic name for "any area in the bush in Mozambique where people settle and try to survive".

According to what the applicant told Compliance or Customs officers when apprehended on 7/3/95, his father had died three months previously (i.e. about December 1994) and his mother was also dead. According to his application form, however, his father had been killed while serving in the army when he was about ten years old (i.e. in about 1989) and his mother was still alive. In any case, the family had no proper housing or food and the applicant never went to school as there were no schools in the area. In about 1992, the applicant ran away to Maputo. Thereafter he lived on the streets of Maputo as a homeless youth. He roamed the streets begging for food and money. At night he slept at the marketplace. The police, however, used to often come to the market at night and harass the homeless youths who were sleeping there. Sometimes, the youths were arrested. The applicant, however, always managed to escape arrest by running away.

In February 1995, the applicant left Maputo and travelled to Richards Bay, South Africa, walking across the border without a passport and then taking a lift. For a short time he did some casual work for a white man in Richards Bay, then met a certain M, another Mozambican in similar circumstances (see *Decision no. V95/03226*). The two youths boarded a vessel at night in heavy rain without being detected. They had no idea where it was going. The applicant was discovered after M left his hiding-place in search of food. The master of the vessel informed Australian Immigration authorities of the presence of the applicant and M when the vessel arrived at Kwinana on 7 March 1995. The applicant was taken into custody and completed an application for a protection visa. He claimed to be part of "that social group, who after the war in Mozambique are homeless, have no education, no resources & no hope for the future". He said that if he were returned he would again be on the streets begging for food and the police would persecute him.

Later claims

Although the application for review by the Tribunal did not add anything new to the original claims, a statutory declaration made by the applicant on 13 June 1995 added substantial new information which had not appeared previously. The following claims are those that appear in that declaration and in the applicant's oral evidence to the Tribunal.

When the applicant was about 7 years old, i.e. in about 1986, guerillas from the RENAMO insurgent movement came to his village and shot both his parents. The applicant and other children from the village were taken away by the guerillas to an army camp in the jungle, where they were trained to work on a farm and to serve as

RENAMO soldiers. They were taken on patrol to various villages, where they were forced to shoot villagers. The children from these villages were taken away as the applicant had been. The applicant did as he was told because he feared that if he did not, he would himself be shot. Indeed, this happened to one child who refused to obey orders and tried to run away.

After some three years, however, the applicant did make an escape while the RENAMO soldiers were asleep. He walked through the jungle carrying a water bottle, and eventually arrived in Quelimane. Here he met a truck driver who helped him, gave him food and drove him to Maputo. He lived at the markets at Maputo for three years, begging for food, and never telling anybody he had been involved with RENAMO, as he feared that the police would kill him if they found out. He hid during the day; at night he had problems with the police and soldiers, as stated originally, because people were not allowed to sleep at the market.

After three years in Maputo, the applicant decided to run away, and he walked across the border into South Africa. He did not want to stay there, because the local Zulu people regarded Mozambicans as intruders and sometimes bashed or stabbed them. In South Africa he met M, and the two stowed away on a boat to Australia. When he arrived, he was afraid to tell the Immigration authorities about RENAMO because he was afraid that the information might get back to the Mozambique Government and because he could not understand the interpreter used by the Department.

He fears returning to Mozambique because, he says, the authorities will persecute him if they find out he was involved with RENAMO; also, RENAMO might persecute him for running away from them three years ago.

Witness

This case was unusual in that the interpreter, Mr X, gave evidence on behalf of the applicant. I realize that this may be considered somewhat irregular, but I believe that given the circumstances fairness to the applicant required that Mr X's evidence should be admitted. Mr X was the only person available who could speak the particular dialect, Maxuabo, spoken by the applicant. At the same time, he claimed to have knowledge of the terms used by RENAMO guerillas and of related matters. I considered that it would not have been fair either to exclude this evidence or to preclude Mr X from providing interpreting services for the applicant. I explained to him that it was essential for him, when interpreting the applicant's evidence, to put aside his personal feelings about the case and confine himself to providing an accurate translation of whatever the applicant said.

Mr X testified that the applicant had difficulty in communicating in Portuguese, the language which the Department's interpreter had used. He said that the applicant used the kind of terminology that was used by guerillas, and said it was apparent from what he said that he had been captured by RENAMO during the civil war. The applicant had been very fearful of talking about his time with RENAMO, as he was afraid this information might somehow get back to the Government of Mozambique.

Mr X, himself a Mozambican, had had much contact with Mozambican refugees, including children whose parents had been killed by RENAMO and who themselves

had been captured by this group. He said their stories were very similar to the later story told by the applicant.

Assessment

Credibility

Obviously, credibility is an important issue in the present application. The inconsistency between the two versions of the applicant's story is clear. Other problems of internal consistency also remain: what the applicant said to Compliance/Customs differs from what he said in his application form; in relation to the statutory declaration to the Tribunal, the dates and time periods given clearly do not add up.

However, in assessing this application it is important to keep in mind the age and lack of education of the applicant. It would not be reasonable to expect a child of the applicant's age to have a good memory for dates; a wide margin of appreciation should be allowed. The applicant also cannot be expected to have an understanding of the concept of a refugee or of what might be relevant to a determination under the Convention. Finally, it would be natural to expect that the applicant would be fearful of the Australian authorities and might invent a story, or withhold information, out of such fear.

I am also prepared to accept Mr X's evidence as showing that the applicant did experience difficulties with the interpreter who was provided for him by the Department. This is borne out by the tape of the Departmental interview. I accept that this affected, to some extent, the statement of his claims prior to his statutory declaration to the Tribunal. Mr X's evidence tends to confirm that the applicant was indeed involved with RENAMO.

I give weight to evidence of the conduct of RENAMO during the civil war and of their treatment of captured children (*New Internationalist*, issue on Mozambique, February 1989; N. Boothby, A. Sultan and P. Upton, "Children of Mozambique: The Cost of Survival", report for the US Committee for Refugees, November 1991; O. Roesch, "Renamo and the Peasantry in Southern Mozambique: A View from Gaza Province", CJAS/RCEA, vol. 26 no. 3, 1992; O. Roesch, "Mozambique Unravels? The Retreat to Tradition", *Southern Africa Report*, May 1992; K.B. Wilson, "Cults of Violence and Counter-Violence in Mozambique", *Journal of Southern Africa Studies*, vol. 18 no. 3, September 1992); this information is consistent with the applicant's account of his abduction and subsequent treatment by RENAMO.

Finally, I give weight to a report by a psychiatrist, Dr P, who interviewed the applicant and expressed the view that he was not embellishing his account of events (an account which, said Dr P, was consistent with his statutory declaration) nor feigning psychiatric symptoms.

Notwithstanding some doubts, I therefore accept what the applicant put to the Tribunal as being a more or less accurate account of events.

Subjective fear

It is clear that the applicant is afraid of being returned to Mozambique. His subjective fear of persecution should not be questioned. This leaves the question, however, of whether it is objectively well-founded and based on a Convention reason.

Convention basis

The Convention ground which was said to apply in the present case was that of membership of a particular social group. At first it was said that the social group was that of homeless youths in Mozambique. Later, this was amended to "homeless youths in Mozambique who were taken captive by the RENAMO guerilla movement during the civil war". It is appropriate for the Tribunal to consider both of these categories in the light of the relevant Australian caselaw. That caselaw is found principally in *Morato v. Minister for Immigration, Local Government and Ethnic Affairs [1992] FCA 637;* (1994) 29 ALD 455; *Kashayev v. Minister for Immigration and Ethnic Affairs and Another* [1994] 33 ALD 337; *Minister for Immigration & Ethnic Affairs v. Respondent "A", Respondent "B" and Janet Wood, the Refugee Review Tribunal* (unreported, Full Federal Court, No. NG887 of 1994); and *Kuldip Ram v. The Minister for Immigration and Ethnic Affairs and the Refugee Review Tribunal* (unreported, Full Federal Court, No. SG17 of 1995).

(a) Homeless youths

I would be prepared to accept that homeless youths in Mozambique constitute a particular social group for the purposes of the Convention. It seems to me that they would be a "cognisable or recognisable group within a society, a group that has some real common element", a group that "shares some interest in common" (per Lockhart J in *Morato* at 466), a group with "a common unifying element binding the members together" (per Burchett J in *Kuldip Ram* at 8).

(b) Homeless youths who have been taken captive by RENAMO

In the light of the caselaw I am unable to accept that this is a description of a particular social group for the purposes of the Convention. It would be difficult, in my view, to say that these youths are a cognisable or recognisable group. I am unable to see how they could be distinguished from homeless youths in general. Indeed, Mr Logan, when endeavouring to explain how the applicant had survived on the streets in Maputo without exposure as a RENAMO soldier, said:

During that period the authorities considered the applicant to be one of the many homeless youths. There was no reason for him to come specifically to their attention.

Further, the Full Federal Court made the point in *Respondent "A"* that a social group cannot be constituted purely on the basis of what a person has done - a point that also emerges from *Kashayev*. While in *Kuldip Ram* Burchett J declined to accept this as a hard and fast rule, pointing to the qualification expressed by Black CJ in *Morato* at 459, that qualification was expressed by the Chief Justice to relate to those who have become, by virtue of their common activity, a "cognisable element within the society". I think this cannot be said to be the case with the unfortunate children of Mozambique who were once captured by RENAMO.

It is perhaps arguable that if the applicant were persecuted by reason of his past association with RENAMO, the ground would be political opinion. However, I would not accept this. The applicant was not motivated by any political opinion - he served with RENAMO only under duress. Further, the situation of the thousands of children who were abducted by RENAMO is evidently well known to the Mozambique Government. That government knows that the children did not serve out of any political opinion but because they were kidnapped and forced to participate in RENAMO atrocities. Therefore there is no reason to suppose that the Mozambique Government would impute a political opinion to the applicant on the ground of his having served unwillingly with RENAMO.

The objective element

To the extent to which the applicant's case is based solely on homelessness, I am unable to find any evidence to suggest that homeless youths in Mozambique are subject to persecution at the present time. The reports of Amnesty International, Human Rights Watch and the United States Department of State make no mention of any such persecution. The applicant agreed that the problems he faced in Maputo stemmed from the fact that he was sleeping at the market, which was illegal. I agree with the delegate's conclusion:

From the information given by the applicant it would appear the police were arresting people for sleeping at the market rather than targeting [sic] homeless youths.

While it should be noted that an applicant for refugee status is not required to show that he or she will be singled out for persecution (see J. Crawford and P. Hyndman, "Three Heresies in the Application of the Refugee Convention", *International Journal of Refugee Law*, vol. 1 no. 2, 1989; *Periannan Murugasu v. Minister for Immigration and Ethnic Affairs*, unreported, Federal Court of Australia, Wilcox J, No. NSWG254 of 1987, at 13; *Gunaleela and others v. Minister for Immigration and Ethnic Affairs and others* (1987) 74 ALR 263 at 284), and thus the reference to targetting is inappropriate, nevertheless the main point remains that the applicant's problem appears to have been that he was sleeping at the market illegally, not that he was homeless. In the absence of any evidence of persecution of the homeless in Mozambique, I find that there is no real chance of persecution of the applicant on the basis that he is homeless.

I shall now consider the prospect of persecution for the applicant due to his involvement with RENAMO, in case I am wrong in not accepting that those who have been so involved constitute a particular social group.

The Tribunal has been unable to find any material which indicates that people (whether they are children or otherwise) who have been involved with RENAMO are now persecuted in Mozambique as a result. In October 1992 there was an agreement between RENAMO and the governing FRELIMO party to end the 16-year-old civil war, and a great improvement in the human rights situation followed (Amnesty International Report 1994). The Government released all political prisoners and there were few reports of new political arrests (ibid.). Mozambique's first multi-party election was held in 1994 (Human Rights Watch World Report 1995). RENAMO participated in this election and was able to campaign freely in areas under

Government control (US State Department, *Country Reports on Human Rights Practices for 1994*).

I consider that there is no way in which the Government of Mozambique could come to know that the applicant had been serving with RENAMO. He was able to remain in Maputo for three years without this becoming known. Although the applicant said that he had hidden from the authorities, I do not accept this part of his evidence, since he said he was at the market begging, which is hardly a way of avoiding detection.

Even if this were to be discovered, then apart from the above evidence that RENAMO operatives are not in danger in Mozambique at the present time, I note from the US State Department Reports that the Government of Mozambique is well aware of the existence of RENAMO child soldiers and, while not doing anything to help these unfortunate children, is also not, so far as appears, doing anything to punish them:

The Government has not made children's rights and welfare a priority. It has made little attempt to reintegrate into society the large numbers of child soldiers that served in the military and RENAMO forces or alleviate the plight of the increasing numbers of urban street children, many of whom were orphaned by the war. During the year [1994], RENAMO began allowing the ICRC [International Committee of the Red Cross] and other NGO's [non-government organizations] greater access to children in its custody, some of whom had been forced to be soldiers. Of the 3,500 children who had been in RENAMO custody, approximately 500 had served as soldiers. At year's end, all but a minority of problem cases (where parents were no longer alive or could not take their children back) had been resolved, and the ICRC announced plans to close its operation.

Based on this information the Tribunal finds there is no real chance that the Government of Mozambique would persecute the applicant because of his previous service with RENAMO.

The above passage also indicates that RENAMO is not seeking to keep the children who have been forced to serve with it. The Human Rights Watch World Report 1995 confirms that RENAMO has admitted its recruitment of child soldiers and has begun to "fully assist" in permitting these children to leave its bases.

The applicant admitted that he had not encountered any problems from RENAMO while he had been living in Maputo, over a period of three years. He said that this was because RENAMO is not in control in Maputo. This is consistent with the information available to the Tribunal that there are many areas of Mozambique, including the capital Maputo, where RENAMO is not in control. In these areas I am confident that RENAMO would be unable to harm the applicant, even if it wished to do so.

For these reasons the Tribunal takes the view that there is no real chance that the RENAMO forces will persecute the applicant if he returns to Mozambique.

On behalf of the applicant, Mr Logan submitted:

Elections on 17 October 1994 indicate....that both political parties still have substantial support throughout Mozambique. It must be conceded that there is a real

chance that violence will again worsen in Mozambique and that the applicant will face the risk of recapture and persecution from the RENAMO group, including being put to death for having escaped, or detention, interrogation and persecution from FRELIMO for having been a RENAMO boy soldier.

However, no basis was shown for the supposition that violence would worsen in Mozambique, and this hypothesis goes against the evidence available to the Tribunal, as does the suggestion that FRELIMO is persecuting RENAMO boy soldiers and RENAMO is persecuting those who escaped from their camps. While I accept that, as recently pointed out by the Full Federal Court (*Wu Shan Liang v. Minister for Immigration and Ethnic Affairs*, unreported, No. NG434 of 1994), in assessing the prospect of persecution one is necessarily required to speculate, nevertheless, speculation must proceed on some rational and evidentiary basis. A real chance of persecution cannot be shown merely by asserting, in the face of contrary evidence, that something might happen. The evidence available to me does not satisfy me that there is a real chance that in the foreseeable future the political situation in Mozambique will change to the extent that the information cited above will no longer be accurate. Therefore, I am unable to accept the argument put by Mr Logan.

Mr Logan referred me to a decision of my own (*No. V94/02895*) in which I found that an applicant from Ghana who had fled from tribal conflict was a refugee because there was a real chance of future eruption of such violence, even though the violence was not ongoing at the time of the decision. However, that decision differed on its facts, because in that case there was a good deal of evidence upon which a prediction of further ethnic violence could be based, a prediction which was subsequently proved correct; further, in the event of such violence the effect upon the applicant would have been direct. In the present case, the evidence establishes little more than mistrust between RENAMO and the FRELIMO Government, and even if armed conflict did re-erupt, it remains to be seen why the applicant would suffer persecution as part of it.

Cumulative grounds

I have considered the applicant's claims cumulatively as well as individually but am of the opinion that even taken cumulatively those claims do not show a real chance of persecution for a Convention reason.

Application of Article 1F

It may be observed that if the Tribunal had found the applicant to have a well-founded fear of persecution for a Convention reason, the further question would arise whether he would nevertheless be excluded from the application of the Convention because of the application of Article 1F. This article excludes those who have committed crimes against humanity, serious non-political crimes, or acts contrary to the purposes and principles of the United Nations. It is arguable that the applicant has committed such crimes and acts while serving with RENAMO. On the other hand, it is arguable, as Mr Logan submitted, that Article 1F should not apply to him because of his age at the time and the fact that he acted under duress. In view of the conclusion I have reached on other grounds, however, it is not necessary to decide this point.

General remarks

It seems to me that the applicant's essential problem with returning to Mozambique is simply that he is homeless, illiterate, uneducated and with no family or other support available to him there. His plight is indeed desperate and is one which must evoke the greatest sympathy. In many ways, people in this situation face worse prospects upon return to their home countries than some Convention refugees. They may indeed be considered refugees in the popular and colloquial use of the term. But their problems are problems with which the Convention was never intended or designed to deal, and it is unrealistic to expect the Convention to serve as the appropriate vehicle for resolving all the numerous problems, real and extremely serious though they may be, that face millions of people all around the world. The Convention is specifically a human rights instrument aimed at protecting those who face serious human rights violations for certain specific reasons. The present applicant's problems are of a different nature and their solution must lie elsewhere. I do hope, however, that his tragic predicament will be fully recognized and that he will be treated with genuine compassion and concern in whatever decisions are taken regarding his future in this country.

Conclusion

The Tribunal finds that the applicant does not face a real chance of persecution in Mozambique at the present time for any Convention reason, and concludes that his fear of persecution, though real, is not well-founded. He is therefore not a Convention refugee. The Tribunal affirms the decision of the delegate.