

**REFUGEE STATUS APPEALS**  
**AUTHORITY**  
**NEW ZEALAND**

**REFUGEE APPEAL NO 76205**

**AT AUCKLAND**

**Before:** A N Molloy (Member)

**Counsel for the Appellant:** E Griffin

**Appearing for the Department of Labour:** No Appearance

**Dates of Hearing:** 4 & 5 June 2008

**Date of Decision:** 27 August 2008

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**DECISION**

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[1] The appellant is a national of the Ukraine aged in his late 40s. He claims that he is at risk of being persecuted in the Ukraine because of his Moldovan ethnicity and because of his political opinion. He appeals against the decision of a refugee status officer of the Refugee Status Branch (RSB) of the Department of Labour (DOL), declining his application for refugee status.

[2] The appeal turns in part upon the appellant's credibility and in part upon whether his claim is well-founded. This is assessed following the summary of his account outlined below.

**THE APPELLANT'S CASE**

[3] The appellant is based in the city of Reni in Ukraine where he and his wife brought up their two children, both of whom are now adults. Reni is close to the border of Moldova and has, in the comparatively recent past, been a part of both Romania and the USSR before becoming part of Ukraine.

[4] Because of his ethnic background the appellant speaks Russian with an accent which, together with his family name, identifies him as a non-Ukrainian by birth. This has caused the appellant some difficulties in his everyday life as he has been discriminated against in various ways. For example, he believes that his ethnicity prevented him from gaining entry to a Marine college during the 1970s. It has also had ongoing repercussions for his career which are outlined in more detail below.

[5] The appellant's wife experienced some difficulties in 2006 when she opened a bakery with her sister. The venture was short-lived. The bakery was stocked with goods purchased from a supplier affiliated with the mafia, which held a monopoly in the area. After opening for business, the wife received demands for a monthly premium over and above the price of the bread, and the mafia threatened to raze her premises if this was not paid. When the wife complained to the local police, she was told that they were unable to help. As paying the bribe would have made the enterprise uneconomic, the bakery was closed, without repercussion.

[6] The appellant's current predicament arises out of his employment on merchant ships. He has been placed by a shipping agency called X Agency since the late 1990s. For the last six or seven years, he has continually asked to be assigned a position which properly reflects his qualifications as an engineer. However, his requests have been ignored and he has repeatedly been assigned posts at a low level.

[7] His sense of frustration and resentment was exacerbated by the company's actions in early 2006. About an hour before he was supposed to leave his home town to join his ship, the appellant was provided with new terms of engagement which further downgraded his status and reduced his monthly salary by about 20-25%.

[8] At the time, the appellant felt that, for financial reasons, he had no option but to accept the terms offered. He was supporting two children in their tertiary studies, and he was not confident that he would be able to obtain an alternative posting in the short term with this or any other agency.

[9] So, after giving eight years of service to this company, the appellant found himself to be worse off than ever. He believes he was treated in this manner because of his ethnicity. Higher-ranking positions of responsibility within the agency's office and onboard ship were allocated to Russians and Ukrainians. Minorities such as Moldovans occupy the lowest positions and other minorities,

such as Armenians and Jews, are not employed at all.

[10] The appellant took the matter up with one of the company's executives at the head office in Cyprus. That executive interceded with the agency's branch office in Ukraine on the appellant's behalf. However, this only made matters worse. The branch used the request as an excuse not to offer the appellant any work at all for some time. When the appellant enquired, he was told that there were no vacancies at the level he was seeking.

[11] The appellant eventually conceded defeat. He accepted a placement at the lower grade out of financial necessity and returned to sea between October 2006 and April 2007.

[12] The appellant accepted a further contract commencing in mid-2007. He joined the ship in the United States of America and travelled through Europe, Africa and Asia before arriving in New Zealand in early 2008. The appellant left the ship and applied for refugee status in New Zealand as a result of what happened during that voyage.

[13] The appellant explained that his political sympathies frequently brought him into conflict with officers on the various vessels upon which he had sailed. The officers were usually Russian and tended to be former members of the Soviet Communist party who held very different political views from the appellant. These tensions were aggravated by the environment onboard ship. When conversation turned to politics, as it frequently did, the appellant was inclined to assert his own views at any opportunity. General conversations about Ukrainian political affairs often escalated into arguments.

[14] The volatile environment was exacerbated during the appellant's most recent voyage, in which he was part of a team of five in the engine room. Two of those five were senior engineers who took a particular dislike to the appellant. Throughout the journey they made provocative remarks about the appellant's ethnicity, and levelled unjustified complaints about his standard of work. They continually picked fights which, on occasion, came to blows.

[15] At first these events were not significantly different from what the appellant had endured in the past. As a result, the appellant chose to extend his contract from January 2008 until April 2008. This would have enabled the appellant to earn three months' additional income, and meant he would disembark in Europe within easy access of home.

[16] The environment on board became more volatile in December 2007, coinciding with a change in captain. When the European officer who had been in charge to that point was replaced by a Russian captain, the two senior engineers became more brazen in baiting the appellant.

[17] Around that time the crew learned that a crew member on another ship had fallen overboard in unknown circumstances. The tension in the engine room became so great that the appellant was told that he could suffer the same fate.

[18] The appellant became seriously concerned for his safety as he knew that it would be relatively easy for such a threat to be carried out. His concerns were exacerbated when he became ill shortly afterwards and was bedridden for approximately one week. That had never happened before and he believes that he may have been poisoned.

[19] When the ship berthed in a provincial port in New Zealand in January 2008, the appellant decided that he had to leave. Contact was made with Immigration New Zealand (INZ) and the appellant applied for asylum. He was flown to Auckland where he completed an application for refugee status.

[20] The day after the appellant left the ship, his wife received a telephone call from the manager of X Agency. The manager wanted to find out if the appellant's wife had known in advance that the appellant was going to leave. In fact the wife did not know what the manager was talking about, as the appellant had deliberately refrained from telling her of his problems for fear that she would be unduly worried.

[21] The manager told the appellant's wife that there would be serious consequences for the appellant when he returned to the Ukraine. He did not elaborate upon what the consequences would be, but the appellant believes that his safety is compromised.

[22] Towards the end of April 2008, the appellant's wife received a series of telephone calls from an unidentified man, who asked where the appellant was and when he was coming back to Ukraine. The appellant's wife has been intimidated by these calls and no longer feels safe in her home. The appellant believes that these are connected to one of the senior engineers, who was due to return to Ukraine at around that time, and who had threatened to find the appellant upon his return.

[23] After interviewing the appellant in late February 2008, an officer of the RSB

issued a decision declining the appellant's application for refugee status, dated 31 March 2008. It is from that decision that the appellant appeals.

[24] The appellant claims that the shipping agency for which he worked will engage mafia gang members to harm him because he voiced his discontent about the unfavourable work conditions offered to him and because they will assume that he said negative things about them to the New Zealand immigration authorities for the purposes of his claim for refugee status.

[25] The appellant also claims that the shipping agency will have to reimburse INZ for the cost of repatriating the appellant to the Ukraine if his appeal is unsuccessful. If so, the company will demand that he compensate them. He will be unable to pay. The interest which accrues in respect of the debt will bring about his financial ruin.

[26] In addition, the appellant claims that the colleagues with whom he was placed on his last voyage (the senior engineers) will also seek to have him killed by mafia contacts. They will do so because he is Moldovan, because he holds political views which are in opposition to their own, and because of his willingness to stand up for himself and complain about the treatment he received at the hands of the agency.

#### Material received

[27] Prior to the interview, the Authority was provided with a memorandum of counsel and a supplementary statement in the appellant's name. Both were forwarded under cover of a letter dated 28 May 2008. The appellant signed the statement during the appeal interview on 4 June 2008.

[28] Following the interview, the appellant provided translations of correspondence from his wife to the District Office of Internal Affairs in Reni in 2006 concerning demands made by mafia on her business. These were forwarded under cover of a letter from counsel, dated 11 July 2008.

#### **THE ISSUES**

[29] 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."

[30] In terms of *Refugee Appeal No 70074/96* (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 APPELLANT'S CASE**

### Credibility

[31] Before turning to the issues identified, it is necessary to determine whether the appellant is a credible witness. His evidence as to his biographical detail is consistent and plausible. However, for reasons which follow, the Authority finds that the appellant has embellished and fabricated key aspects of his claim in order to bolster his application for refugee status. The appellant is not a credible witness and his core account, in connection with why he claims he is unable to return to Ukraine, is rejected.

### Failure to disclose alleged key aspects of the claim at an early stage

[32] The Authority does not believe the appellant's claim that he is at risk of being seriously harmed by or at the behest of X Agency or the colleagues with whom he worked.

[33] The appellant did not claim that he had been poisoned by fellow crew members when he first arrived in New Zealand, nor did he state that senior engineers threatened to throw him overboard. He made no reference to being killed or seriously injured if he returned to the Ukraine, nor did he claim that the company for which he worked or the engineers with whom he argued would engage mafia gangs to harm him.

[34] On the contrary, the initial focus of the appellant's claim was upon the discrimination he had experienced and upon the frustration he felt at not being allocated work appropriate to his ability and experience.

[35] For example, when interviewed at the time he first arrived in New Zealand, the appellant was asked who had mistreated him onboard ship. The appellant told the INZ officer in reply that he had not been mistreated. The appellant stated that he wanted to leave the ship because of the unfavourable work conditions imposed upon him. He stated that:

“I was protesting against the small salary. I have given 10 years for this company, no salary change, no respect, no promotions.

... I had enough misery on the ship. I was treated like a cleaner, the job I was doing was miserable it was not based on my qualifications. I served for 10 years with this company, I have not had a rise from the company.”

[36] He repeated similar concerns to the immigration officer who helped him to complete his written application for refugee status. The appellant expressed the concern in the application that he would not get a job in the Ukraine now because he was not a member of either of the two political factions there. However, the application is also notable for the lack of any reference to threats made to the appellant’s personal safety, attempts to poison him, or suggestions that he might be thrown overboard while at sea.

[37] When asked by the Authority to explain the initial omission of aspects of his claim upon which he now places so much emphasis, the appellant claimed that he did not want the captain or crew to learn of anything he said against them in case he was forced to return to his ship.

[38] While that explanation is not in itself implausible, the Authority is satisfied, after taking into account all of the evidence, that it is not true. The real explanation is that these events did not take place, and the appellant has simply added them at a late stage in order to add weight to his claim.

[39] In this context, the Authority notes that the appellant made no attempt to leave the ship when it berthed in Australia prior to coming to New Zealand, even though this was after both the attempt to “poison” him and after he was threatened about being thrown overboard.

[40] When asked to explain his decision not to leave the ship, the appellant prevaricated. He said variously that it was because his circumstances had not reached “boiling point”, despite the fact that this was only a short time before the ship reached New Zealand. He then contradicted himself and said that it was because he was sick at that time. If he was sick, it was at the time he believed himself to have been poisoned, and therefore his situation must have reached “boiling point”.

[41] He then said that he had not left the ship in Australia because, at that time, he did not know that the ship would sail from New Zealand to Africa; he thought it would be sailing from New Zealand to Singapore. That implies that he believed that the 12 day trip to Singapore would have been safe, but a longer journey to Africa may not have been.

[42] The Authority also notes that the first reference made to the threat to throw the appellant overboard appears in the appellant's written statement dated 26 February 2008. According to that document, the threats were made during an earlier voyage, rather than during the appellant's last voyage which ended in New Zealand. That is entirely different from the evidence which he gave before the Authority.

[43] Further, the Authority takes into account the fact that various other key aspects of the appellant's claim were also disclosed at a late stage, in circumstances which indicate that they have simply been fabricated in the hope of strengthening a dishonest claim.

#### Belated disclosure of telephone threats to the appellant's wife

[44] The appellant told the Authority that immediately after he had left his ship in New Zealand, his wife received a telephone call from X Agency, during which she was told that leaving the ship would have "serious consequences" for the appellant.

[45] The Authority does not accept that such a call was made.

[46] First, it is difficult to understand why the agency would seek to have a low-level contractor killed or beaten up for leaving the ship prematurely.

[47] The appellant surmised that the agency would believe that he had been saying unfavourable things about it in connection with his asylum claim, and because he had argued with it about the terms and conditions of his contract.

[48] However, the appellant had been expressing his dissatisfaction about his terms of engagement since around 2001, yet the company had continued to offer him work. When asked why the company had done so, the appellant stated "they didn't really care that much". Indeed, his last voyage was supposedly extended (at the appellant's request) by agreement with two different captains, one European and one Russian.



[49] Even putting such considerations to one side, the most compelling aspect of this part of the appellant's evidence is the fact that he gave entirely different evidence at earlier stages of his refugee determination process.

[50] The appellant told the Authority that he found out about the telephone call from X Agency to his wife approximately a week after he lodged his claim for refugee status, some time in early February 2008.

[51] However, the appellant made no reference to that telephone call in the written statement, dated 26 February 2008, which he provided for the purposes of his interview by the RSB; nor did he refer to the call during the course of that interview.

[52] On the contrary, the appellant confirmed in his written statement that he had been in telephone contact with his wife and daughter since arriving in New Zealand and "there have been no problems yet". Likewise, the appellant told the RSB during his interview that he had received no news from home, and that nothing bad had yet happened.

[53] If the appellant's wife had informed him about a telephone conversation during which an ominous threat had been made, it is inevitable that he would have made reference to that fact in his written statement and during his interview. His failure to do so supports the finding that his belated claim in connection with the telephone call is fabricated.

[54] In all the circumstances of the claim, the Authority also rejects the appellant's evidence that his wife had recently received a number of anonymous telephone calls at the end of April seeking the whereabouts of the appellant and his date of return. When giving evidence before the Authority, the appellant said that the second engineer had threatened to find him when he returned home in April 2008. He stated that the anonymous telephone calls must be something to do with the engineer.

[55] Again, the appellant had never previously disclosed the second engineer's threat to find him on his return home, and the Authority rejects this claim.

[56] In summary, the Authority rejects the appellant's claim that he is at risk of being killed or seriously harmed by agents of X Agency or at the behest of his former colleagues in the Ukraine for the reasons he claims.

[57] The Authority accepts that the appellant is an ethnic Moldovan who is a national of the Ukraine; that he is married with two adult children; that he worked as a merchant seaman; and that he experienced some level of discrimination over the years both within society in general and within the agency for which he worked from the late 1980s. It is also accepted that the appellant's wife experienced some difficulty in business because of the mafia in 2006. The appellant's claim will be assessed on that basis.

#### Country information

[58] Counsel relies upon country information submitted on 20 March 2008 for the purposes of the appellant's interview with the RSB, and stated that there had been no subsequent developments of any significance with respect to conditions in the Ukraine.

[59] In her submissions, counsel referred in general terms to various publications such as the United States Department of State *Country Reports on Human Rights Practices for 2007: Ukraine* (11 March 2008) ("the DOS report"), the United Kingdom Home Office *Country Report: Ukraine* (April 2007); Human Rights Watch *World Report: Ukraine* (2008) and Amnesty International *AI Report: Ukraine* (23 May 2007) ("the AI report"). In summary, these publications refer to a volatile political environment in Ukraine, a record of human rights abuses, torture and corruption within the police and penal system, violation of the rights of detainees and organised crime and corruption.

[60] Counsel cited extracts from the DOS report which allude to harassment and discrimination against ethnic minorities and the lack of effective government enforcement of constitutional prohibition of such practices, some ethnic intolerance in the country and the impunity of those responsible for acts of violence, and references in the AI report to incidents of racist attacks and discrimination.

[61] Having outlined that broad background, the Authority turns to the principal issues.

#### Objectively, on the facts as found, is there a real chance of the appellant being persecuted if returned to Ukraine?

[62] 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).

[63] Discrimination in itself is not sufficient to establish a case for refugee status, nor does every breach of a claimant's human rights amount to being persecuted; *Refugee Appeal No 71404/99* (29 October 1999) [65] to [67].

[64] The Authority has consistently adopted the approach set out in *Chan v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379 (HCA), in which it was held that a well-founded fear of being persecuted is established when there is a real, as opposed to a remote or speculative, chance of such persecution occurring.

[65] The Authority accepts that the appellant may have been discriminated against in the past by X Agency. However, it finds that the discrimination experienced in the past did not rise to the level of serious harm consistent with being persecuted.

[66] It is clear that throughout the duration of his marriage of more than two decades, the appellant and his wife have been fully employed and adequately housed. They have been able to provide their two children with education up to a tertiary level at a prestigious academy in the case of his son, and a university in the case of his daughter.

[67] With respect to the future, the appellant would not be compelled to resume employment with X Agency if he returns to the Ukraine. It is clear that he could have sought work elsewhere in the past, and indeed he professed his intention of doing so if he had returned to Ukraine after his last voyage. Relieved of the financial pressure with which he had been faced in the past, the appellant said that he had considered approaching a Greek-based company in Ukraine, for which his ethnicity would not have been a barrier to obtaining a level of work more commensurate with his qualifications and experience.

[68] With regard to the country information referred to, the appellant stated that he was not a member of any particular political party, and the Authority has found that his claim to be at risk from his employer or his co-workers for his political views, or for any other Convention reason, are not credible. There is no other evidence which indicates that he would be at risk as a result of the political circumstances in the Ukraine.

[69] Likewise, there is no evidence that he is at risk of being detained within the penal system, or that the risk of him falling victim to organised crime, corruption, harassment or violence as a result of his ethnicity is any more than random or speculative. It does not rise to the level of a real chance.

[70] The Authority is not prepared to speculate about whether X Agency would be required to reimburse the New Zealand government for the cost of repatriating the appellant to Ukraine, or whether the appellant would in turn be required to reimburse X Agency. There is no evidence before the Authority as to the terms of the appellant's contract which might require him to do so.

[71] In any event, the Authority finds that even if X Agency did seek to pursue the appellant for a debt of that nature, this would not give rise to a well-founded fear of being persecuted for a Convention reason.

## **CONCLUSION**

[72] Turning to the first principal issue, the Authority finds that objectively, on the facts as found, there is not a real chance of the appellant being persecuted if returned to Ukraine. That being the case, the second principal issue does not need to be considered.

[73] The Authority finds that the appellant is not a refugee within the meaning of Article 1A(2) of the Refugee Convention. Refugee status is declined and the appeal is dismissed.

"A N Molloy"

A N Molloy  
Member