

1100903 [2011] RRTA 323 (3 May 2011)

DECISION RECORD

RRT CASE NUMBER:	1100903
DIAC REFERENCE(S):	CLF2010/129628
COUNTRY OF REFERENCE:	Romania
TRIBUNAL MEMBER:	Paul Fisher
DATE:	3 May 2011
PLACE OF DECISION:	Melbourne
DECISION:	The Tribunal affirms the decision not to grant the applicant a Protection (Class XA) visa.

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration and Citizenship to refuse to grant the applicant a Protection (Class XA) visa under s.65 of the *Migration Act 1958* (the Act).
2. The applicant, who claims to be a dual citizen of Romania and Moldova, arrived in Australia on [date deleted under s.431(2) of the *Migration Act 1958* as this information may identify the applicant] August 2010 and applied to the Department of Immigration and Citizenship for a Protection (Class XA) visa [in] September 2010. The delegate decided to refuse to grant the visa [in] December 2010 and notified the applicant of the decision and his review rights by letter [on the same date].
3. The delegate refused the visa application on the basis that the applicant is not a person to whom Australia has protection obligations under the Refugees Convention
4. The applicant applied to the Tribunal [in] February 2011 for review of the delegate's decision.
5. The Tribunal finds that the delegate's decision is an RRT-reviewable decision under s.411(1)(c) of the Act. The Tribunal finds that the applicant has made a valid application for review under s.412 of the Act.

RELEVANT LAW

6. Under s.65(1) a visa may be granted only if the decision maker is satisfied that the prescribed criteria for the visa have been satisfied. In general, the relevant criteria for the grant of a protection visa are those in force when the visa application was lodged although some statutory qualifications enacted since then may also be relevant.
7. Section 36(2)(a) of the Act provides that a criterion for a protection visa is that the applicant for the visa is a non-citizen in Australia to whom the Minister is satisfied Australia has protection obligations under the 1951 Convention Relating to the Status of Refugees as amended by the 1967 Protocol Relating to the Status of Refugees (together, the Refugees Convention, or the Convention).
8. Further criteria for the grant of a Protection (Class XA) visa are set out in Part 866 of Schedule 2 to the Migration Regulations 1994.

Definition of 'refugee'

9. Australia is a party to the Refugees Convention and generally speaking, has protection obligations to people who are refugees as defined in Article 1 of the Convention. Article 1A(2) relevantly 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; or who, not having a nationality and being

outside the country of his former habitual residence, is unable or, owing to such fear, is unwilling to return to it.

10. The High Court has considered this definition in a number of cases, notably *Chan Yee Kin v MIEA* (1989) 169 CLR 379, *Applicant A v MIEA* (1997) 190 CLR 225, *MIEA v Guo* (1997) 191 CLR 559, *Chen Shi Hai v MIMA* (2000) 201 CLR 293, *MIMA v Haji Ibrahim* (2000) 204 CLR 1, *MIMA v Khawar* (2002) 210 CLR 1, *MIMA v Respondents S152/2003* (2004) 222 CLR 1 and *Applicant S v MIMA* (2004) 217 CLR 387.
11. Sections 91R and 91S of the Act qualify some aspects of Article 1A(2) for the purposes of the application of the Act and the regulations to a particular person.
12. There are four key elements to the Convention definition. First, an applicant must be outside his or her country.
13. Second, an applicant must fear persecution. Under s.91R(1) of the Act persecution must involve “serious harm” to the applicant (s.91R(1)(b)), and systematic and discriminatory conduct (s.91R(1)(c)). The expression “serious harm” includes, for example, a threat to life or liberty, significant physical harassment or ill-treatment, or significant economic hardship or denial of access to basic services or denial of capacity to earn a livelihood, where such hardship or denial threatens the applicant’s capacity to subsist: s.91R(2) of the Act. The High Court has explained that persecution may be directed against a person as an individual or as a member of a group. The persecution must have an official quality, in the sense that it is official, or officially tolerated or uncontrollable by the authorities of the country of nationality. However, the threat of harm need not be the product of government policy; it may be enough that the government has failed or is unable to protect the applicant from persecution.
14. Further, persecution implies an element of motivation on the part of those who persecute for the infliction of harm. People are persecuted for something perceived about them or attributed to them by their persecutors. However the motivation need not be one of enmity, malignity or other antipathy towards the victim on the part of the persecutor.
15. Third, the persecution which the applicant fears must be for one or more of the reasons enumerated in the Convention definition - race, religion, nationality, membership of a particular social group or political opinion. The phrase “for reasons of” serves to identify the motivation for the infliction of the persecution. The persecution feared need not be *solely* attributable to a Convention reason. However, persecution for multiple motivations will not satisfy the relevant test unless a Convention reason or reasons constitute at least the essential and significant motivation for the persecution feared: s.91R(1)(a) of the Act.
16. Fourth, an applicant’s fear of persecution for a Convention reason must be a “well-founded” fear. This adds an objective requirement to the requirement that an applicant must in fact hold such a fear. A person has a “well-founded fear” of persecution under the Convention if they have genuine fear founded upon a “real chance” of persecution for a Convention stipulated reason. A fear is well-founded where there is a real substantial basis for it but not if it is merely assumed or based on mere speculation. A “real chance” is one that is not remote or insubstantial or a far-fetched possibility. A person can have a well-founded fear of persecution even though the possibility of the persecution occurring is well below 50 per cent.

17. In addition, an applicant must be unable, or unwilling because of his or her fear, to avail himself or herself of the protection of his or her country or countries of nationality or, if stateless, unable, or unwilling because of his or her fear, to return to his or her country of former habitual residence.
18. Whether an applicant is a person to whom Australia has protection obligations is to be assessed upon the facts as they exist when the decision is made and requires a consideration of the matter in relation to the reasonably foreseeable future.

CLAIMS AND EVIDENCE

19. The Tribunal has before it the Department's file relating to the applicant. The Tribunal also has had regard to the material referred to in the delegate's decision, and other material available to it from a range of sources.

Background

20. The applicant is a [age deleted: s.431(2)] dual national of Romania and Moldova. His background and protection claims are summarised in the decision of the delegate as follows:

The applicant's claims are documented on file CLF20101129628, folios 10-11 and can be summarised as follows:

- He has been targeted by the Romanian mafia and forced to pay "protection" money - 5000 Lei per month
- If he fails to pay "protection" he will be "put in hospital"
- The police are a part of the mafia which has the support of the authorities

The applicant was interviewed in relation to this application [in] December 2010. During the interview, the applicant substantially added to his claims as follows:

- He used to live and work in [Village 1], Romania, where he was offered a job logging
- He worked there for three years before the company started defaulting on payment for their work
- He reported this to the local police who did nothing so he and a friend went to Bucharest to report the company
- An inspection authorised by officials in Bucharest discovered that the logging was in fact illegal
- In the meantime he relocated to Moldova and began work as a taxi driver
- He then began working for [a company] using his own mini-bus
- He received a call from an unknown person from [Village 1], Romania who informed him that three men from the illegal logging company had been prosecuted because of him "whistle-blowing" and that he should pay compensation for this
- He refused and soon after he was beaten up by two Romanians one night
- He went to the police the next day as he had received a broken cheekbone but nothing was done
- He received another call and was told to pay up or else his family would also be harmed
- He began paying 5000 Lei per month and continued doing this for two years - his salary

was 12000 Lei per month

- He complained about the amount and his "protection" fee went up to 6000 Lei
- A friend bought his mini-bus and he relocated his family to his mother's village while he departed to Australia
- The Romanian mafia has connections all over Europe and there are Romanians everywhere
- He didn't come to Australia for money - he has assets worth at least \$250000 - he came here for protection

In support of his claim, the applicant provided the following:

- Translated police statement (and original) describing an incident [in] August 2008 whereby the applicant was seriously assaulted by unidentified individuals
- A photo of the applicant with a black eye and bruising on his face

21. The Tribunal notes that the applicant also provided the Department with links to the [website deleted: s.431(2)] said to contain information relevant to his claims, but that the information on the site was not in English: see [link deleted: s.431(2)] .
22. The application was refused for two discrete reasons. Firstly, the delegate found that as a Romanian citizen and therefore a European Union resident, the applicant has the right to enter and reside in other EU countries for the purposes of s.36(3) of the Act, and that in respect of at least some countries including Finland and Spain, the applicant would not face a well-founded fear of either persecution for the purposes of s.36(4) nor refoulement to a country where he would face such a risk for the purposes of s.36(5). The delegate also rejected the applicant's protection claims on the basis that he did not accept either that the applicant had in fact been targeted by the Romanian mafia, or that the claimed risk of persecution had any Convention basis.

Review Application

23. The applicant appeared before the Tribunal [in] February 2011 to give evidence and present arguments. The Tribunal hearing was conducted with the assistance of an interpreter in the Romanian and English languages.
24. The applicant was represented in relation to the review by his registered migration agent, who was also present at the hearing.
25. After explaining its role, the purpose of the hearing, and the relevant legislative provisions, the Tribunal indicated that the matters in issue for it were
 - whether there is any *Convention* basis for the harm the applicant fears; and
 - whether, even if there is a Convention basis for the harm feared, you would face a real chance of serious harm in the Western European countries you are entitled, as an EU citizen, to reside in, as opposed to just a remote possibility of such harm
26. The applicant identified himself and produced his passport as confirmation of his identity.
27. The applicant then noted that he cannot go to the police for assistance in Romania or Moldova because they are not in the business of justice. Given the whole picture, he is in a

position which nobody can help him resolve. He has additional information on a computer disc, but it is not in English.

28. Asked what the information is, the applicant explained that [in] April 2009, there was a mini-revolution in Moldova. He was operating a mini-bus he owned, and he transported some of the demonstrators. A number of people were killed during the demonstration. The computer disc shows that the police beat people up and illustrates their corruption generally. Given his situation, the police should be able to help him and provide some measure of justice, but if you don't have money you don't resolve anything.
29. Asked whether he was saying that he was at risk of persecution by the Moldovan authorities because of having driven people to the demonstration, the applicant indicated that he was.
30. The Tribunal noted that the applicant had remained in Moldova for more than one year after this incident before coming to Australia. He agreed that this was the case, but said it was nevertheless still possible that he would have problems arising from that incident. However, that is not the main reason why he is scared to return.
31. The Tribunal asked why, if the corruption is so serious, the people associated with the logging company were ever convicted. The applicant replied that this is only what he was told; that three individuals were caught and brought to justice. He doesn't actually know if it is true or not. This was the reason the mafia people gave him when they demanded money from him, but it may have been just a pretext.
32. Asked to recount the history of why he had left Romania and Moldova, the applicant provided the following explanation.
33. He originally moved to Romania from Moldova as he wanted to live in Romania because it was more developed. He became a Romanian citizen in 1995. Life there proved to be somewhat better than in Moldova, and before he started working for a logging company he had no problems there. He and his wife had been working in markets, but then while his wife continued with that work, he switched to logging in about 2002, and he did this for about two years and eight months.
34. The problems began because the logging company was failing to pay the salaries of some employees. The applicant and another man threatened to lodge a complaint, but still they weren't paid. They went to the local police station and told the police they were not being paid, but there was no reaction; apparently the police and the logging company were in cahoots. When it became apparent that the local authorities would take no action, the applicant and his friend travelled to Bucharest, and lodged a written complaint, with the relevant government department.
35. About two weeks later, someone from the government department went to inspect the worksite, and as this person was a county level bureaucrat instead of a village level one, it was a much bigger deal and would have required much more money to hush up. People from the village became hostile to the applicant because many of them were employed by the logging business, and they resented this outside interference, and so the applicant had no choice but to leave the village. He and his wife returned to Moldova in 2005.
36. In Moldova, the applicant started work immediately, purchasing a taxi and paying a licence fee to the [mayoral office]. At this stage he was simply a self-employed contractor, but he

later became an official employee of the [employer deleted: s.431(2)], when he sold his taxi and purchased a minibus. He began performed work for [employer deleted: s.431(2)] under contract to the administrators of a public bus route and he thinks that this is how the mafia located him, because he was now on the public payroll, and he believes that they obtained his details from the Moldovan government.

37. It was about two months after he commenced in this role that the mafia first contacted him. Firstly someone rang him claiming to be an acquaintance from the village in Romania where he had lived, and suggesting that they catch up. When they met, the man informed him that a number of people had been gaoled, and that the applicant's actions had caused a lot of problems and cost people a lot of money. The applicant was told he would have to compensate them for the harm caused. The man was aware that the applicant was operating a mini-bus route, and demanded he pay 5000 lei per month. The applicant initially refused the man's demands, and he left.
38. Some time after this, two men stopped him by his staircase. They didn't say anything to him; they just bashed him and left. The applicant went to the police and reported the incident, but there was little they could do. They said to let them know if the men contacted him again.
39. The applicant realised that the demand for money and the bashing were connected, and was worried that if he didn't pay things would get worse, and he was also concerned for the safety of his family. The applicant began paying the money demanded, which was collected in cash when someone visited him one per month at his workplace. This continued until the applicant decided that he had to escape from the situation altogether, and came to Australia, at which point he sold one of his minicabs and left the other with a friend who took over the running of the business, which was intended to generate some ongoing income for his family's expenses.
40. Since the applicant left Moldova, there have been occasions when people have come to his former home asking for him, and his friend, who was left in charge of the minibus business, has been told that if the applicant does not return the friend will have to pay the money being demanded.
41. The men who are after him know it is the applicant's minibus. They were told that he had left Moldova but will be returning, but quite a period of time has now elapsed, and the applicant's friend is scared. He hasn't acceded to the men's demands for payment, but he is scared nevertheless. The applicant sees no option other than to sell the minibus, because now everybody knows that he has ongoing problems with these standover men, and nobody wants to operate the bus on his behalf.
42. The Tribunal noted that more than six months had elapsed since he left Moldova, during which period no harm appeared to have come to the man left holding the minibus. The applicant agreed that this was the case, but insisted that the man is scared, as these people keep insisting that he pay. The applicant reiterated that he thinks he should sell the bus.
43. Asked whether he thinks the men know where he has gone, the applicant replied that he doesn't think so, as he hasn't told anyone except his wife.
44. The applicant was asked whether he ever considered offering a large sum to clear the 'debt' entirely. He replied that he thinks that the debt will never be cleared; for these men it is a business.

45. The Tribunal noted that the applicant had submitted some internet addresses from the [website deleted: s431(2)] to the Department, but that the website seemed to be in Romanian, and that if applicants want such information to be taken into account it is normally their responsibility to provide English translations.
46. Asked the relevance of the internet articles, the applicant explained that they relate to illegal logging in the region where he used to work, which is known for such activities. The village is called [Village 1] in the Maramureş region. It is not a very affluent region, but those involved in illegal logging are rich; you can see this from the cars they drive. There is a lot of forest in this region, mainly in the Maramureş county, but some of the illegal logging also goes on in neighbouring counties. The nearby town of [Town 2] contains a nest of mafiosi. The applicant obtained this information to support his claims.
47. The applicant was asked whether he has had any contact with his family since coming here to Australia. He replied that he is in contact with his wife. She has gone to live with his mother in the village. Asked whether she has been contacted or threatened in his absence, the applicant replied that she has not, but that she has been in hiding in the village where his mother lives.
48. Asked how his family is surviving financially, the applicant explained that his remaining minibus is still producing an income.
49. The applicant was asked whose idea it had been for him to come to Australia. He replied that he had thought hard about where to go. He considered that Europe was out of the question, as there is a network of Mafiosi there. He thought about going to the United States, but has heard that it is a very dangerous place with lots of shootings, whereas he wanted a quiet life. He reads a lot on the internet, and had noted that there are many nationalities living in Australia in peace and quiet and decency. Now, having lived here for six months, he cannot believe how all these different groups are able to live together in peace; he can't believe it is possible, and never thought it would exist.
50. Asked about his current circumstances, the applicant indicated that he is working as a [tradesman], and lives with a Moldovan friend he known from his homeland, who is a permanent resident here. Asked whether he came to Melbourne because of this man he agreed that was the case; he is the only person the applicant knew in Australia.
51. The applicant was asked why he could not relocate in Europe. He replied that there are Romanians everywhere. If he sold everything and moved elsewhere in Europe he fears he would eventually be found. Asked whether he is aware of any other example of Romanians being tracked down by the mafia to support this claim, the applicant conceded he was not.
52. The Tribunal noted that where a person has the right to enter and reside in another country, there was no reasonableness test associated with the relocation. The only exceptions occurred if a person was at risk of Convention persecution in that country, or if they faced refoulement to a country where they would face Convention persecution.
53. The applicant replied that he understands this now, but that he came here because of his own specific problems, and hadn't known what the Convention involved at that time.
54. Asked whether there was anything else he wished to add, the applicant replied that given the ongoing threats to the man looking after his minibus, he has no choice but to sell it. He is

afraid to return home, and if he can obtain help from the Tribunal it would be good, but if not he will have to find another solution to his problem, as back home everyone is corrupt.

Country Information

Romania

55. The applicant's claims accord with geographical references to Romania. The *googlemaps* website indicates that the village of [Village 1] is located in the mountainous northern Romanian region of Muramareş, approximately 15 km away from [Town 2].
56. The applicant's claims about the Romanian forest administration structure and the occurrence of illegal logging in [Town 2] find support in the following report by WWF published in March 2005, entitled *Illegal Logging in Romania*, and accessed from <http://www.forestconsulting.net/Downloads/Publications/finalromaniaillegallogging.pdf> and including the following:

1.3. Forest management in Romania

The Forest Code stipulates the main characteristics of Romanian forest management: functional repartition by forest zones, maintenance of natural composition in forests, utilization of natural regeneration, maintenance of a high-level rotation age for native forest species, utilization of adequate treatments to maintain the ecological balance, evolution towards multi-use forests.

a. State forests management institutions

The National Forest Administration- Romsilva - (NFA), who manages all state owned forests, is a legal entity established in 1990, with 41 County branches. The present day situation is regulated by the Forest Code (law 26/1996) and by the GD 1.105/2003 which stipulate that the management of State Forest is assured by NFA. NFA Romsilva is a specific forestry structure of public service, under the State Authority for Forests. NFA-Romsilva has financial autonomy and manages the State Forest through its Regional Branches. NFA-Romsilva includes the Forest Research and Management Planning Institute (FRMPI), it performs the State forest inventory and undertakes forest management on private or community owned forests on contractual basis. The current organizational structure of NFA Romsilva is approved by its Administrative Council and consists of 41 County Forest Directorates. The management is assured by the Administrative Council and a General Director. The Administrative Council of NFA undertakes strategic decisions, whilst the General Manager is performing the day-to-day management.

County Forest Directorates – territorial structures - are responsible for supervising all forest districts activities in their area of authority. A Manager manages County Forest Directorates' day-to-day activities and the Steering Committee decides management strategies. County Forest Directorates have legal entity status delegated by NFA in certain area of responsibilities:

- supervising forest districts activities,
- organizing standing wood and log auctions,
- contracting the wood logging activities and signing the harvesting contracts,
- controlling wood harvesting activities (wood harvesting, felling reports, sanitation felling)
- participating to the revision of forest management plans.

Forest Districts – are the management units directly dealing with forest management, and are managed by the Head of the Forest District. Forest district do not have legal entity status, and

is represented in all contractual issues by the County Forest Directorate. Forest districts are implementing the forest policy and norms according to management plans, undertaking specific management tasks as following:

- ensuring forest regeneration
- preventing and stopping illegal activities
- supervising and controlling the wood harvesting and transportation activities
- establishing and implementing operation plans mentioned in the forest management plans
- monitoring forest health
- game management, harvesting non timber forest products
- marking trees to be extracted during the harvesting process, with a numbered hammer-marker, both for state forests and private owned forests.

....

4. Estimates on the level of illegally harvested wood at the national level in Romania

There is strong anecdotal evidence that illegal logging is a major issue in Romania. There is common knowledge in the population about illegal logging related violations. By describing the nature of illegal logging above WWF has utilised information obtained from direct interviews and reports from the population. However there are no systematic reports on the scale of illegal logging in Romania to date. There are only very few fragments of information available on past reports.

Starting with 1990, the volume of illegal cutting rose significantly, according to the Ministry of Agriculture, Forests and Rural Development¹. Few official reports however exist to date on illegal logging in Romania; only some references can be found in scientific abstracts. For instance, a report on the economic sustainability of small-scale forestry by the Forest Economics Laboratory and ENGREF/ INRA deduced that harvests in Romania's private forests were legal only in 60% of situations, based on interviews with inhabitants of 7 communities.

Examples of anecdotal illegal activities:

Borsa State Forest Districts

- In summer 2004 a volume of 14000 m³ was illegally cut

57. On 3 August 2007, the UNHCR published a report entitled *Romania: Extent of organized criminal activities, including references to a "gypsy mafia"; area of operation of organized crime; police response and availability of protection, including witness protection*, which can be accessed from <http://www.unhcr.org/refworld/publisher/IRBC.html> and includes the following:

Extent of organized crime

The German Magazine, *Der Spiegel*, characterizes Romania as "dominated by [m]afia and corruption" (10 Apr. 2006, see also Global Integrity 2007, 2). In 2006, the European Commission (EC) delayed its decision on Romania's bid to become a member of the European Union (EU) and asked the country to address corruption and organized crime (*The Daily Telegraph* 17 May 2006; *The Wall Street Journal* 17 May 2006; see also EC 25 Oct. 2005, 4, 13-15). On 1 January 2007, Romania became a member of the EU (BBC 1 Jan. 2007) following what a United Nations (UN) official said was "significant progress" in addressing corruption and organized crime (Rompres 5 May 2006).

58. RRT Research response ROU35438 of 1 October 2009 includes the following:

6. What steps are the Romanian authorities taking to address official corruption?

Romania joined the European Union on 1 January 2007. In order to fulfil the accession requirements set by the EU, the Romanian government undertook measures throughout 2006 to eradicate corruption. Romania's anti-corruption efforts during this time are outlined in Freedom House's annual 'Freedom in the World' report on Romania for 2008:

In 2006, anticorruption agencies were reorganized and granted greater authority to investigate corruption at the highest levels, including in Parliament. The quantity and quality of high-level corruption probes increased significantly, and a number of officials, judges, and police officers were arrested and convicted. However, the June 2007 EU progress report noted a pattern of weak or suspended sentences in high-level corruption cases, blunting the effects of the stepped-up prosecutions. In July 2006, the government approved legislation to establish a National Agency for Integrity, tasked with vetting public officials' assets. It began operations in December 2007, but its future was uncertain after one of its chief proponents, Justice Minister Monica Macovei, was dismissed by the prime minister in April. In October, Agriculture Minister Decebal Traian Remes resigned after being caught on video arranging a bribe, and Macovei's replacement as justice minister, Tudor Chiuariu, resigned in December after allegedly abusing his position in a real estate deal. Romania was ranked 69 out of 180 countries surveyed in Transparency International's 2007 Corruption Perceptions Index, the worst ranking in the EU (Freedom House 2008, 'Freedom in the World – Romania', 2 July).

...

An article in *The New York Times* dated 22 July 2009 highlights the European Commission report, claiming that despite some reform efforts, Romania is still beset by a high level of corruption and fraud. The will of political leaders to fight corruption and implement adequate reforms is questioned, although it is argued that the situation would be much worse had Romania not been admitted into the European Union in early 2007:

The hard-hitting judgment from the European Commission listed an array of deficiencies, citing inadequate measures to fight money-laundering, vote-buying, fraud and killings linked to organized crime.

...Romania fared slightly better in the report, though it was told that its reform efforts remain "fragmented."

With Croatia in talks to join the E.U., and several other nations in Southern and Eastern Europe also hoping to do so, the report may reinforce growing skepticism in some European capitals about the wisdom of further expansion.

"The bad news, and the slowdown in terms of reform in Romania and Bulgaria, can only weaken the case for further enlargement of the E.U.," said Nicu Popescu, research fellow at the European Council on Foreign Relations.

However, he added that both countries would have been in worse shape had they not been admitted to the E.U. in 2007, and are nevertheless much more successful than other nations in the region like Moldova or Ukraine.

"In fact enlargement has been a success because, though they are perceived to be bad by E.U. standards, Romania and Bulgaria are hugely successful by Eastern European standards," Mr. Popescu added.

In a statement, the president of the European Commission, José Manuel Barroso, underlined the need for greater political commitment to the task of rooting out corruption.

"Citizens in both countries and across the rest of Europe must feel that no one is above the law," he said.

Following publication of the report Bulgaria was given 21 recommended tasks to carry out, while Romania given 16. A special monitoring system for both countries, set up when the two countries joined the E.U. because of concerns that they weren't ready, is to be extended into 2010.

...There was no direct mention of the two countries' ambitions to join the Schengen zone, Europe's passport-free travel zone, though the tone of the documents released Wednesday suggest that is not a likely prospect in the near future.

...The Romanian justice minister, Catalin Predoiu, called for a political consensus that would enable the judicial system to function efficiently and the courts to take fast decisions.

"With or without a monitoring mechanism, Romania will remain committed to pursuing judicial reforms because such reforms are, first of all, in the interest of its citizens," Mr. Predoiu said.

Both governments know it will be hard to win over critics.

...As for Romania, the report said that permanent political infighting is hindering reform efforts.

"Against this background the positive results of concrete reform efforts at technical level remain fragmented, reforms have not yet taken firmly root and shortcomings persist."

Romania's record on combating corruption was questioned. "It is striking," the report said, "that virtually none of the cases of highest public interest have yet reached a decision" (Castle, S. 2009, 'E.U. Report Finds Bulgaria and Romania Beset With Problems', *The New York Times*, 22 July http://www.nytimes.com/2009/07/23/world/europe/23briefs-Brussels.html?_r=1).

Transparency International's Global Corruption Barometer report published in May 2009 surveyed approximately 73,000 individuals around the world in order to determine the extent to which they perceive six key sectors and institutions in each country to be corrupt. The sectors included political parties, public officials/civil servants, parliament/legislature, business/private sector, the judiciary and the media. In Romania, the results showed that the parliament/legislature sector was perceived to be the most affected by corruption. On a scale of 1 to 5 measuring perception of the extent to which various institutions are affected by corruption (where 1 is not at all corrupt, and 5 is extremely corrupt), respondents on average scored Romania's political parties and parliament/legislature at 4.3; public officials/civil servants and business/private sector at 3.8; the media at 3.4; and the judiciary at 4.2; with an average score across all sectors of 4.0. In addition, 14 percent of respondents reported paying a bribe in the last 12 months; and fewer than 30 percent of respondents reported that they would be willing to pay more to buy goods from a corruption-free company. Significantly, 69 percent of respondents indicated that the current government's actions in the fight against corruption were ineffective (Transparency International 2009, 'Global Corruption Barometer 2009', May, pp. 5-6, 8, 16, 28, 30-33 <http://www.transparency.org/content/download/43788/701097>).

The most recent US Department of State human rights report on Romania released in February 2009 indicates that corruption is still widespread, with the government's lack of effective implementation of the prescribed criminal penalties for official corruption a significant problem. The report highlights "[t]he authorities' generally ineffective response to corruption", and the fact that "no major case of high-level corruption had yet resulted in judgments involving prison sentences":

The Ministry of the Interior and Administrative Reform is responsible for the national police, the gendarmerie, and the border police; the Office for Immigration; the General Directorate of Information and Internal Protection, which oversees the collection of intelligence on organized crime and corruption; the General Anticorruption Directorate; and the Special Protection and Intervention Group. The national police agency is the Inspectorate General of Police, which is divided into specialized directorates and has 42 regional directorates for counties and the city of Bucharest. The internal intelligence service also collects information on major organized crime, major economic crimes, and corruption.

While police generally followed the law and internal procedures, police corruption remained a significant reason for citizens' lack of respect for the police and a corresponding disregard of police authority. Low salaries, which were sometimes not paid on time, contributed to the susceptibility of individual law enforcement officials to bribes. Instances of high-level

corruption were referred to the National Anticorruption Directorate, which continued to publicize its anticorruption telephone hotline to generate prosecutorial leads for corruption within the police. Eight thousand posters were displayed throughout the country to publicize the hotline.

...Government Corruption and Transparency

The law provides criminal penalties for official corruption, but the government did not implement the law effectively. The country is subject to a special European Commission mechanism for regular monitoring for progress in justice sector reform.

The authorities' generally ineffective response to corruption remained a focus of public criticism, political debate, and media scrutiny throughout the year. NGOs and the media continued to note that no major case of high-level corruption had yet resulted in judgments involving prison sentences. While there were some convictions of lower-level officials for corruption, the European Commission, in its July interim progress report, criticized court sentences as "lenient and inconsistent" and parliament for lacking an "unequivocal commitment to rooting out high level corruption." Moreover, there were efforts to weaken the criminal procedure code, such as through parliamentary provisions requiring authorities to notify suspects that they are being wiretapped.

A Freedom House 'Nations in Transit' report on Romania published in 2009 also provides some detailed information on the government's anti-corruption efforts throughout the previous year, identifying problems with the accountability of the Superior Council of Magistracy, a lack of judiciary reform, continuing partial immunity for MPs, and amendments to the procedural code allowing suspects to be warned prior to home searches:

Corruption. Romania's anticorruption efforts were seriously hindered in 2008 by Parliament's efforts to reinstate immunity for ministers who also enjoy MP status. Many candidates in local and legislative elections, including some members of the government personally profited from abusing their positions. Several politicians tried to curtail the powers of the anticorruption agency and sack Chief Prosecutor Morar, but the President and Constitutional Court have prevented such efforts thus far.

...

7. What protection is available to those in Romania who expose corruption?

A report by the Committee on Legal Affairs and Human Rights dated 14 September 2009 identifies Romania's Whistleblower Protection Act of 2004 (Law No. 571/2004), which refers to the protection of "an individual who reveals violation of laws in public institutions made by persons with public powers or executives from these institutions". The report explains that "[w]hilst the Romanian legislation is fairly progressive, it only applies to employees of the public sector":

Moldova

59. The 2009 USSD report on human rights practices in Moldova, published on 11 March 2010 and available at <http://www.state.gov/g/drl/rls/hrrpt/2009/eur/136046.htm>, includes the following:

Security forces committed killings and engaged in widespread beatings and unlawful detentions during and after the April 7-8 election-related protests. Security forces beat persons in custody and while apprehending them, and they held some persons in incommunicado detention. Prison conditions remained harsh. Under the previous government, security forces occasionally harassed and intimidated the political opposition and media. There were reports of police corruption, arbitrary detention by police, and occasional illegal searches. The government attempted to influence the media and intimidate journalists, maintained some restrictions on freedom of assembly, and refused official registration to some religious groups. Judicial corruption was a problem. Persistent societal violence and discrimination against women and children, trafficking of women and girls for sexual exploitation and men

for labor, discrimination against Roma, difficulties registering minority religious groups, limits on workers' rights, and child labor were also reported.

Following the April 5 parliamentary election and announcement that the PCRM had increased its majority, a group of between 10,000 and 15,000 persons gathered in Chisinau on April 7 to protest the election results. Protesters initially demonstrated peacefully, and police largely stood by and did not intervene. During the course of the day, a small group of demonstrators began to throw rocks at the police. Violence intensified as protestors set fire to the parliament building and severely damaged the presidential building. Several protesters and approximately 200 police officers were injured. After midnight, as police used force in an attempt to disperse the remaining demonstrators; human rights groups alleged that security forces killed as many as three persons. That night and during the days that followed, police arrested more than 300 demonstrators; many reported being beaten and abused while being taken into custody and while in detention. During the days that followed, security forces conducted a campaign of harassment and intimidation against members of the political opposition, journalists, and others assumed to be opponents of the PCRM government. Plainclothes police abducted and detained persons suspected of involvement in the protests. Security forces beat journalists and destroyed cameras; plainclothes police abducted and detained the editor of an independent newspaper. Police visited high schools and universities, seeking the identities of protesters and threatening students with expulsion if they participated in protests. Following the disturbances on the night of April 7-8, crowds declined rapidly, and demonstrations ceased within a few days. The arbitrary arrests also ceased.

60. The latest USSD report on human rights practices in Moldova, published on 8 April 2011 and available at <http://www.state.gov/g/drl/rls/hrrpt/2010/eur/154439.htm>, includes the following:

Section 4 Official Corruption and Government Transparency

The law provides criminal penalties for official corruption; however, the government did not implement these laws effectively, and NGOs and international organizations reported that corruption was pervasive throughout the government and society. A Transparency International preliminary survey revealed that only 75 percent of public officials could define the concept of a "conflict of interest."

Police corruption remained a serious problem. According to prosecutors, the Interior Ministry ignored, or only superficially examined, reports of police corruption. The prosecutor in charge of the Ministry of Interior's anticorruption activities noted that corruption was endemic and took place at all levels--from low-level functionaries to government ministers.

On August 24, Justice Minister Tanase noted that many judges illegally gave lenient sentences to persons convicted of trafficking-related offenses. He cited the case of Cahul Court judge Vasile Vulpe who in 2008 issued a five-year suspended sentence for human trafficking when the penalty prescribed by law is 10 to 25 years in prison. Judge Vulpe's immunity from prosecution was subsequently lifted, and a Chisinau court tried Vulpe of purposefully issuing an illegal judicial decision. He was acquitted in June 2009. On November 11, in a subsequent lawsuit brought by Vulpe challenging his dismissal as a judge, the Supreme Court upheld the legality of Vulpe's dismissal upon the expiration of his judicial appointment.

A Transparency International survey conducted in 2009 reported that 51 percent of those interviewed said they had paid bribes to the police. According to the Prosecutor General's Office, between January and November, prosecutors initiated 103 criminal investigations against police, including in 43 cases of alleged torture. The CCECC initiated 31 criminal investigations, mainly on charges of corruption. Of these, the prosecutors sent 62 cases to court, and the CCECC sent 21 cases.

Corruption in the educational system was widespread. The law provides for punishing university rectors, deans, and chairs for corrupt acts, including grade buying and extortion,

with fines or imprisonment of two to seven years. The law does not apply, however, to professors and lecturers. Ministry of Education regulations do not address corruption explicitly, and the bylaws of the major universities do not provide sanctions for cheating or bribery. There were reports that some university officials offered falsified documents for sale to assist students in obtaining work and travel visas

The government acknowledged that corruption was a major problem. NGOs and political party representatives asserted that authorities at times failed to act in an impartial manner.

Relocation Within Europe

61. As noted in the delegate's decision,

[t]he Treaty of Maastricht made nationals of all European Union (EU) Member States citizens of the EU. The rights attached to this citizenship were confirmed by the EU Charter of Fundamental Rights signed and proclaimed in Nice in 2000, and Council Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely (the 'Free Movement Directive'), which entered into force in April 2006. On 1 January 2007 Romania joined the EU.

62. However, some countries have imposed limitations on the work rights of the nationals of some other EU countries, including the following, accessed from the *Europa* website at http://ec.europa.eu/youreurope/citizens/work/migrant-worker/work-permits/index_en.htm:

Nationals of Romania and Bulgaria

You have the right to work - as employed or self-employed - without a work permit in: Bulgaria, Cyprus, Czech Republic, Denmark, Estonia, Finland, Greece, Hungary, Latvia, Lithuania, Poland, Portugal, Romania, Slovakia, Slovenia, Spain and Sweden.

Until **31 December 2013**, your ability to work might be restricted in: Austria, Belgium, France, Germany, Ireland, Italy, Luxembourg, Malta, The Netherlands, United Kingdom. To work in these countries, you will need a **work permit**. Some countries have simplified their procedures or reduced restrictions in some sectors or for some professions.

Norway, Iceland and Liechtenstein impose **full restrictions**.

Switzerland can impose restrictions until 31 May 2016.

Before you try to work in a country that still imposes restrictions, you need to seek information on the applicable procedures.

FINDINGS AND REASONS

Nationality

63. The applicant claims to be a national of both Romania and Moldova. He entered Australia as the holder of an apparently genuine Romanian passport issued by the Romanian authorities, expressed to be valid until [a date in] August 2018, and indicating that the applicant is a national of that country. The passport also indicates that the applicant was born in MDA, ie, Moldova, and although no further evidence of the applicant's Moldovan nationality has been submitted, the Tribunal is prepared to accept that the applicant is a national of that country as claimed, given his detailed account of having resided there. The Tribunal finds that the applicant is a national of Romania, and therefore a citizen of the EU, and also a national of Moldova.

Assessment of Protection Claims

64. The applicant has applied for a Protection visa, seeking to invoke Australia's obligations under the Convention.
65. However, a preliminary question arises from the fact that the applicant's country of nationality, Romania, is a member of the European Union (EU). Consequently, s.36(3) may operate to relieve Australia of any protection obligations it might otherwise have had towards the applicant as his EU citizenship gives him the right to enter and reside in other EU countries.
66. While it will usually be convenient to approach an applicant's claims by first considering Article 1 of the Convention pursuant to s.36(2)(a) of the Act, there is no requirement for a decision-maker to be satisfied as to whether or not Australia has "protection obligations" pursuant to s.36(2)(a) before considering the qualification in s.36(3). In an appropriate case, it may be proper for a decision-maker to consider first whether or not Australia is taken not to have protection obligations to an applicant by reason of the operation of s.36(3): *NBGM v MIMIA* (2006) 150 FCR 522 per Black CJ at [20].
67. On the other hand, the genuineness of the applicant's claims was in issue at the primary stage, as a consequence of which the Tribunal considers it appropriate to deal with those claims.

Real Chance of Serious Harm Capable of Amounting to Persecution

68. The Tribunal considers that the applicant has given a detailed and consistent account of the problems he claims to have experienced in Romania, his reasons for leaving that country, and the harassment he is said to have subsequently received from Romanian criminals in neighbouring Moldova.
69. The applicant does not appear to have exaggerated his claims. He acknowledged that he does not know for a fact whether anybody was convicted as a consequence of his whistleblowing activities, or whether this was just used by criminals as a pretext for extorting money from him. Nevertheless, he was clear about the fact that the problems from Romania followed him to neighbouring Moldova, and that once these people did track him down, it was necessary for him to pay the money demanded in order to avoid further violence.
70. The applicant's account finds general support in the country information, both with respect to the illegal logging problem in Romania, and also with respect to the corruption and mafia activity which pervades in both countries.
71. The applicant has also provided specific documentary evidence consistent with his claim to have been assaulted in Moldova.
72. The Tribunal therefore accepts that the applicant's claims to have been targeted by Romanian criminals are true, and finds both that he has been persecuted in the past and that he faces a real chance of experiencing further serious harm capable of amounting to persecution at the hands of Romanian criminals in the event that he returns to Moldova or Romania in the reasonably foreseeable future.
73. The applicant also claimed at the hearing that he may be at risk of persecution by the authorities in Moldova, apparently for reason of his imputed political opinion, because he transported some people to a demonstration in his minibus. However, the applicant also

conceded the chance of this happening was slight. The country information confirms that there was an uprising of sorts at this time in Moldova, and the Tribunal accepts that the applicant, as a mini-bus driver, may well have transported some of the people involved. However, he does not claim to have experienced any adverse consequences as a result of this indirect participation in these events despite having remained in Moldova for a considerable period after the uprising, and the 2009 USSD report indicates that although there was a serious crackdown in response to the demonstrations, both the demonstrations and the arbitrary arrests soon ceased. The Tribunal therefore does not accept that the applicant faces a real chance of experiencing serious harm for this reason if he returns to Moldova in the reasonably foreseeable future.

Convention Nexus – Risk from Romanian Criminals

74. The applicant has not clearly identified any Convention basis for the harm feared, but it is implicit from his claims that he may be at risk of persecution because of his membership of a particular social group comprising whistleblowers.
75. There is certainly some evidence to suggest that such a group exists in Romania, given that the country information shows both that the level of corruption is significant and also that laws have been put in place with the intention of protecting whistleblowers, thereby tending to show that there is such a group and they have been identified as being in need of protection.
76. In their joint judgment in *Applicant S v MIMA* (2004) 217 CLR 387, Gleeson CJ, Gummow and Kirby JJ set out the preconditions necessary for a group to constitute a “particular social group” for the purposes of Article 1A(2), as follows:

First, the group must be identifiable by a characteristic or attribute common to all members of the group. Secondly, the characteristic or attribute common to all members of the group cannot be the shared fear of persecution. Thirdly, the possession of that characteristic or attribute must distinguish the group from society at large. Borrowing the language of Dawson J in *Applicant A*, a group that fulfils the first two propositions, but not the third, is merely a “social group” and not a “particular social group”. As this Court has repeatedly emphasised, identifying accurately the “particular social group” alleged is vital for the accurate application of the applicable law to the case in hand.
77. Whistleblowers are identified by the common characteristic of having reported corrupt or illegal activities, which characteristic is discrete from their possibly shared fear of persecution. The group is also distinguished by virtue of having had the risks they face on account of their activities acknowledged and legislation put in place to protect them. The Tribunal is therefore prepared to accept that the applicant’s claims give rise to a Convention claim based on his membership of a particular social group comprising whistleblowers in Romania.
78. However, for a person to satisfy the Convention definition of a refugee, there must be a nexus between the harm feared and the Convention ground. Where the Convention ground relied on is the person’s membership of a particular social group, the serious harm must be inflicted *for reason of* the person’s membership of that group: see, for example, *Applicant A & Anor v MIEA & Anor* (1997) 190 CLR 225 at 284, per Gummow J.

79. In the present case, there is no evidence to support the proposition that the applicant was targeted for reason of his membership of a group of whistleblowers, or of any other group. Rather, the evidence of the applicant's claims suggests that he was targeted in his individual capacity. In other words, the motivation of the persecutors appears to have been revenge and punishment directed against the applicant personally because some of their number are said to have been convicted as a consequence of the applicant's complaints, and apparently also criminal greed in threatening and bashing him in order to extort money from him on an ongoing basis, and the tribunal finds accordingly.
80. The Tribunal notes that the Convention nexus need not attach to the direct agents of persecution; it can attach to the state where the agents of harm are non-state agents, and the state, for a Convention reason, is unwilling or unable to protect the citizen from the harm feared: see *Khawar v Minister for Immigration & Multicultural Affairs* [1999] FCA 1529, per Branson J at [18]-19]. However, there is no evidence before the Tribunal to suggest that there is any Convention reason for the inability or unwillingness on the part of the Romanian or Moldovan authorities to protect the applicant.
81. The Tribunal also notes that the applicant originally took his complaint to the local police in [Village 1], but claims that it soon became apparent to him that they were corrupt and had no interest in assisting him. The authorities at a higher level did intervene and investigate the complaint, and this is what led to the applicant's problems. He claims that he had to leave the village of [Village 1] on account of the hostility he faced there, as a consequence of which he returned to Moldova. In Moldova too, the police appeared uninterested in pursuing the applicant's complaint when he was beaten up. The Tribunal accepts these claims to be true. However, in neither case does the evidence suggest that the applicant was targeted for any Convention reason. Rather, it seems that the police in each case were either corrupt or inefficient or both, and this accords with the country information concerning the high levels of corruption in both Romania and Moldova.
82. Consequently, the Tribunal is not satisfied that there is any Convention basis for the harm the applicant faces from Romanian criminals in circumstances where there appears to be a failure of state protection in both Romania and Moldova, and finds for the purposes of s.91R(1)(a) of the Act that the essential and significant reasons for the harm feared by the applicant are not Convention-based.

Application of Article 36(3)

83. In determining whether subsection 36(3) of the Act applies to the applicant, relevant considerations will be: whether the applicant has a legally enforceable right to enter and reside in a third country either temporarily or permanently, and however that right arose or is expressed; whether he has taken all possible steps to avail himself or herself of that right; whether he has a well-founded fear of being persecuted for a Convention reason in the third country itself; and whether there is a risk that the third country will return the applicant to another country where he has a well-founded fear of being persecuted for a Convention reason.
84. On the basis of the evidence before the Tribunal, including the copy of the applicant's current Romanian passport on the departmental file, and the country information reproduced above concerning the Maastricht Treaty, the Free Movement Directive, and Romania's recently acquired membership of the EU, the Tribunal finds that the applicant has the right to enter and reside in, at least temporarily, all other EU countries.

85. The applicant does not claim to have taken all possible steps to avail himself of that right for the purposes of s.36(3). Rather, he claims to have well-founded fear, in the event that he does take such steps, of experiencing further persecution from the Romanian mafia which is said to operate throughout Europe.
86. The laws of the EU do not provide unrestricted access by all EU citizens to all EU countries. It is clear from the EU website information concerning labour market rights that many Western European countries have imposed limitations on the citizens of some EU countries accessing work rights. Bearing in mind that serious harm for the purposes of s.91R(2) includes: significant economic hardship; the denial of access to basic services; and the denial of a person's capacity to earn a livelihood of any kind, in circumstances where those infringements threatening his capacity to subsist, the Tribunal considers that s.36(3) does not apply to those countries imposing labour market access limitations on the basis of a person's nationality, because of a well-founded fear of persecution for the Convention reason of their nationality, as provided for in s.36(4).
87. However, as the *Europa* website explains, there are still many countries in the European Union where the applicant, as a Romanian national, can work without restriction, namely Bulgaria, Cyprus, Czech Republic, Denmark, Estonia, Finland, Greece, Hungary, Latvia, Lithuania, Poland, Portugal, Romania, Slovakia, Slovenia, Spain and Sweden.
88. The applicant does not claim to be at risk of persecution from the authorities of these countries, only from the Romanian mafia. However, in the view of the Tribunal, it is one thing to accept that some Romanians with a grudge against the applicant tracked him down in adjacent and largely ethnically congruent Moldova, and another thing to suggest that he will not be safe from those people anywhere in Europe. The problems the applicant experienced appear to the tribunal to have been fairly localised, and he himself believes that he was only traced in Moldova because government corruption there enabled his identity to be disclosed when he became a local government employee.
89. No evidence has been advanced to suggest that the power of the Romanian mafia is so extensive, or its interest in the applicant so great, that he would be targeted throughout Europe, and the applicant conceded at the hearing that he was unaware of any other person being tracked down elsewhere in Europe in such circumstances.
90. The Tribunal therefore finds that there is only a remote chance that the applicant would encounter further persecution in the reasonably foreseeable future from Romanian criminals if he were to relocate elsewhere in the European Union to one of the countries listed above at [87].
91. The Tribunal finds that the applicant's right to reside in those EU countries listed above at [87] is a presently existing, legally enforceable right to reside in those countries, albeit only temporarily, for the purposes of s.36(4).
92. It follows from this that the Tribunal finds that s.36(4) does not apply to modify the operation of s.36(3) with respect to these countries.

93. The Tribunal is aware of examples in recent years of at least some *Roma* from Romania being expelled from European Union countries such as Italy¹ and France² and sent them back to their homeland. However, the applicant does not claim to be a Rom; he has given his ethnic group as Moldovan in his protection visa application. No evidence has been advanced, and the Tribunal is unaware of any reports, suggesting that non-Roma Romanians have been subjected to the same treatment as their Roma countrymen. In the absence of any such evidence, the Tribunal is not satisfied that if the applicant were to relocate to one of the countries listed at [87] he would face a real chance of being forcibly returned to Romania or Moldova in the reasonably foreseeable future. Consequently the Tribunal also finds that 36(5) does not apply to modify the operation of s.36(3) in respect of those countries.
94. The applicant does not claim to have taken all possible steps to avail himself of his right to enter and reside in the EU countries listed above at [87], and there is no evidence before the Tribunal to suggest that he has done so. On the contrary, he states in his visa application that he has never traveled to any country other than Moldova and Romania prior to his trip to Australia.
95. The Tribunal therefore finds that as a Romanian, and therefore an EU citizen, holding a current and valid EU passport, the applicant has a presently existing, legally enforceable right to enter and reside temporarily in other EU countries including those listed at [87] where, the Tribunal has found, he does not face a real chance of persecution or risk *refoulement* to another country where he would face such a threat.
96. Consequently, the Tribunal finds that s.36(3) applies to the applicant as a person who has not taken all possible steps to avail himself of right to enter and reside in a country other than Australia, and that Australia would therefore not owe protection obligations to the applicant, even if there were a Convention basis for the harm he fears in Romania and Moldova.

CONCLUSIONS

97. The Tribunal is not satisfied that the applicant is a person to whom Australia has protection obligations under the Refugees Convention. Therefore the applicant does not satisfy the criterion set out in s.36(2)(a) for a protection visa.

DECISION

98. The Tribunal affirms the decision not to grant the applicant a Protection (Class XA) visa.

¹Italy expels Romanians, condemns attack <http://www.reuters.com/article/2007/11/03/us-italy-immigration-idusl0323935220071103>

² France sends Roma Gypsies back to Romania <http://www.bbc.co.uk/news/world-europe-11020429>