1505996 (Refugee) [2016] AATA 3806 (4 May 2016)

DECISION RECORD

DIVISION:	Migration & Refugee Division
CASE NUMBER:	1505996
COUNTRY OF REFERENCE:	Ukraine
MEMBER:	Glen Cranwell
DATE:	4 May 2016
PLACE OF DECISION:	Brisbane
DECISION:	The Tribunal affirms the decision not to grant the applicant a Protection visa.

Statement made on 04 May 2016 at 1:32pm

Any references appearing in square brackets indicate that information has been omitted from this decision pursuant to section 431 of the Migration Act 1958 and replaced with generic information which does not allow the identification of an applicant, or their relative or other dependant.

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 to refuse to grant the applicant a Protection visa under s.65 of the *Migration Act 1958* (the Act).

2. The applicant who claims to be a citizen of Ukraine, applied for the visa [in] September 2014 and the delegate refused to grant the visa [in] March 2015.

3. On 13 April 2016 the Tribunal wrote to the applicant advising that it had considered all the material before it relating to the application but it was unable to make a favourable decision on that information alone. The Tribunal invited the applicant to give oral evidence and present arguments at a hearing on 4 May 2016. The applicant was advised that if she did not attend the hearing and a postponement was not granted, the Tribunal may make a decision without further notice.

4. On 3 May 2016 the applicant's daughter wrote to the Tribunal in the following terms:

> On behalf of my [mother] … and as per her request, I wish to notify you that my mother has left Australia and returned to Ukraine due to an unforeseen situation relating to an illness of one of our family members in Ukraine.
>
> A (sic) per my mother's request – could you please withdraw her application as she is unable to attend the scheduled hearing on the 4th May.

5. Attached to this letter was a withdrawal form signed by the applicant's daughter.

6. The Tribunal checked the applicant's movement records, which indicate the applicant departed Australia [in] May 2016.

7. The Tribunal has decided not to accept the withdrawal for the following reasons:

   - Although the applicant's daughter is listed on the application for review form as the representative, the daughter is not a registered migration agent.
   - The Tribunal has no evidence from the applicant herself confirming that she wishes to withdraw the application for review.
   - The applicant was in Australia as recently as the day before the withdrawal form was signed. In these circumstances, the Tribunal would have expected the applicant to have been in a position to provide evidence (for example, in the form of a letter) confirming that she wishes to withdraw the application for review.

8. The applicant did not appear before the Tribunal on the day and at the time and place of the scheduled hearing. In these circumstances, and pursuant to s.426A of the Act, the Tribunal has decided to make its decision on the review without taking any further action to enable the applicant to appear before it.

RELEVANT LAW

9. The criteria for a protection visa are set out in s.36 of the Act and Schedule 2 to the Migration Regulations 1994 (the Regulations). An applicant for the visa must meet one of the alternative criteria in s.36(2)(a), (aa), (b), or (c). That is, the applicant is either a person in respect of whom Australia has protection obligations under the 'refugee' criterion, or on other

'complementary protection' grounds, or is a member of the same family unit as such a person and that person holds a protection visa of the same class.

Refugee criterion

10. Section 36(2)(a) provides that a criterion for a protection visa is that the applicant for the visa is a non-citizen in Australia in respect of 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).

11. Australia is a party to the Refugees Convention and generally speaking, has protection obligations in respect of 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.

12. 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.

13. There are four key elements to the Convention definition. First, an applicant must be outside his or her country.

14. 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)). Examples of 'serious harm' are set out in 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.

15. 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.

16. 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.

17. 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 being persecuted for a Convention stipulated reason. 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.

18. 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. The expression 'the protection of that country' in the second limb of Article 1A(2) is concerned with external or diplomatic protection extended to citizens abroad. Internal protection is nevertheless relevant to the first limb of the definition, in particular to whether a fear is well-founded and whether the conduct giving rise to the fear is persecution.

19. Whether an applicant is a person in respect of 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.

Complementary protection criterion

20. If a person is found not to meet the refugee criterion in s.36(2)(a), he or she may nevertheless meet the criteria for the grant of a protection visa if he or she is a non-citizen in Australia in respect of whom the Minister is satisfied Australia has protection obligations because the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the applicant being removed from Australia to a receiving country, there is a real risk that he or she will suffer significant harm: s.36(2)(aa) ('the complementary protection criterion').

21. 'Significant harm' for these purposes is exhaustively defined in s.36(2A): s.5(1). A person will suffer significant harm if he or she will be arbitrarily deprived of their life; or the death penalty will be carried out on the person; or the person will be subjected to torture; or to cruel or inhuman treatment or punishment; or to degrading treatment or punishment. 'Cruel or inhuman treatment or punishment', 'degrading treatment or punishment', and 'torture', are further defined in s.5(1) of the Act.

22. There are certain circumstances in which there is taken not to be a real risk that an applicant will suffer significant harm in a country. These arise where it would be reasonable for the applicant to relocate to an area of the country where there would not be a real risk that the applicant will suffer significant harm; where the applicant could obtain, from an authority of the country, protection such that there would not be a real risk that the applicant will suffer significant harm; or where the real risk is one faced by the population of the country generally and is not faced by the applicant personally: s.36(2B) of the Act.

Section 499 Ministerial Direction

23. In accordance with Ministerial Direction No.56, made under s.499 of the Act, the Tribunal is required to take account of policy guidelines prepared by the Department of Immigration – PAM3 Refugee and humanitarian - Complementary Protection Guidelines and PAM3 Refugee and humanitarian - Refugee Law Guidelines – and any country information assessment prepared by the Department of Foreign Affairs and Trade expressly for protection status determination purposes, to the extent that they are relevant to the decision under consideration.

CONSIDERATION OF CLAIMS AND EVIDENCE

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

- application for protection visa;
- interview with delegate dated [in] March 2015;
- various newspaper articles;
- applicant's birth certificate;
- applicant's divorce certificate;
- applicant's pension certificate;
- letter from [a doctor] dated [in] June 2014;
- letter from [name] [Church] dated [in] August 2014;
- copy of applicant's passport

25. The applicant's claims are set out in her protection visa application as follows:

> **What do you fear may happen to you if you go back to that country?**
>
> I have well-founded fear of returning to Ukraine due to the escalating war crisis and the rapid invasion of Russian separatists in many regions of Ukraine, which have proven to carry devastating effects on peaceful civilians. I am currently outside of my country of nationality and owing to many fears, unwilling to avail myself of the protection of my country.
>
> Due to my religious beliefs, which are contrary to the activities of war, as a Christian I oppose this war and any kind of bloodshed. Currently in the Ukraine, the government strongly advises against any views contrary to the war activities and any uncooperative personal attitude is under threat of reprimand.
>
> I fear for my state of health as I am suffering from [a medical condition] and returning to Ukraine will place my health at a higher risk due to the fear of Russian invaders and the detrimental outcomes it has proven to carry on peaceful civilians.
>
> **Who do you think may harm/mistreat you if you go back?**
>
> Based on the supporting media articles attached with this application and the latest news on the war crisis in Ukraine, I fear that I will be treated cruelly by the Russian invading rebels who bomb peaceful civilians and destroy villages and cities in Ukraine. President Putin recently stated that Russia is one of the most powerful nuclear-powered countries in the world and if he so desired, he would invade Kiev (the capital of Ukraine) in a few days.
>
> **Why do you think this will happen if you go back?**
>
> It will affect me personally because I am a Ukranian national and have nowhere else to go, and as the country is being rapidly invaded by Russian separatists it is inevitable that civilians anywhere in Ukraine are under threat of being bombed and

peaceful way of life devastated in many shattering ways, which this unpredictable war can force on me if I return.

If I go back it will have a devastating effect on my safety and health as due to the escalating economy crisis in Ukraine and high inflation (related to this war) my pension of $80 a month is not sufficient for even basic expenses of food and medicine that I require to sustain my health. Returning to the country in a state of raging war will put my fragile health at a high risk as I will be subjected to a lot of stress due to fear for my wellbeing and safety, especially as I oppose this war due to my religious beliefs.

Do you think the authorities of that country can and will protect you if you go back?

I fear that I am personally at risk as Ukraine is unfit to offer me any realistic protection. The facts state that there are a lot of killed civilians (women and children) and destroyed dwellings, where unfortunately, the Ukranian government is not offering any compensation to the victims and the assistance that is offered is inadequate.

I believe that it is unreasonable for me to relocate to another area of Ukraine, as may be encouraged by the officials of Ukraine, as there is no certainty as to which area/region of the country will remain safe from the invasion, and destructing actions of the Russian rebels and the Russian army.

The Ukrainian government has recently announced that the gas supply was cut off by Russia to the Ukraine and that the people must know that the dwellings and buildings in general will not be heated in winter.

Assessment of claims

26. The applicant claims to be a Ukrainian national. In the absence of evidence to the contrary, the Tribunal finds that Ukraine is her country of nationality for the purposes of the Convention and also her receiving country for the purposes of s.5(1) and s.36(2)(aa) of the Act.

27. The mere fact that a person claims fear of persecution for a particular reason does not establish either the genuineness of the asserted fear or that it is 'well-founded' or that it is for the reason claimed. Similarly, that an applicant claims to face a real risk of significant harm does not establish that such a risk exists, or that the harm feared amounts to 'significant harm'. It remains for the applicant to satisfy the Tribunal that all of the statutory elements are made out. Although the concept of onus of proof is not appropriate to administrative inquiries and decision-making, the relevant facts of the individual case will have to be supplied by the applicant himself or herself, in as much detail as is necessary to enable the examiner to establish the relevant facts. A decision-maker is not required to make the applicant's case for him or her. Nor is the Tribunal required to accept uncritically any and all the allegations made by an applicant. (*MIEA v Guo* (1997) 191 CLR 559 at 596, *Nagalingam v MILGEA* (1992) 38 FCR 191, *Prasad v MIEA* (1985) 6 FCR 155 at 169-70).

28. The Tribunal also notes that the recent decision of the Federal Court in *BZADA v MIC and RRT* [2013] FCA 1062, where Rangiah J held at [21]:

> As his Honour correctly found, the Tribunal was unable to reach the requisite level of satisfaction to grant the applicant a visa given his failure to attend the hearing and the Tribunal's inability to test and examine his claims in evidence. The relevant statutory scheme (ss 65 and 36(2) of the Migration Act) requires the Tribunal to reach a requisite level of satisfaction as to the criterion set out in s 36(2). Satisfaction of the criteria for the grant of a protection visa depends not on a particular matter being

established but on the Minister (or the Tribunal standing in the shoes of the Minister) attaining a state of satisfaction as to a number of matters which have to exist for Australia to owe protection obligations to an applicant.

29. Without the benefit of a hearing, the Tribunal is unable to be satisfied of the claims the applicant raised in her application as set out in the preceding paragraphs. In particular:

- the Tribunal is not satisfied that the applicant has anti-war views, or that she would express such views if she returned to Ukraine;
- the Tribunal is not satisfied that the applicant currently suffers from any medical condition that would worsen or be unable to be treated if she returned to Ukraine. In this regard, the Tribunal notes that the most recent medical evidence available to it is from June 2014, which is almost 2 years ago;
- the Tribunal is not satisfied that the applicant would be unable afford the basic necessities of life and medication. In this regard, the Tribunal notes that the applicant is in receipt of a pension and when in Ukraine lives with her [child]. The Tribunal has no current information on her [child]'s employment situation.

30. The delegate's decision record, provided to the Tribunal by the applicant, contained relevant country information summarised as follows:

- Ukraine has been in a state of war since March 2014.
- The conflict in Ukraine is confined to the eastern regions of the country.
- The applicant's home region of Vinnytsia is several hundred kilometres from the eastern regions affected by the fighting.

31. The Tribunal has also considered a more recent report from the Office of the United Nations High Commissioner for Human Rights (OHCHR), the organisation that has undertaken monitoring of the human rights situation. The report[1] did not refer to any casualties other than in the east, and did not suggest that a person such as the applicant living in Vinnytsia faces a real chance of serious harm or a real risk of significant harm. Thus, although the conflict in the east continues, the Tribunal considers that the current country information available to it does not indicate that there was a real chance or real risk of harm to a person who was not in the conflict-affected eastern area.

32. After considering all the evidence the Tribunal is unable to satisfy itself that the applicant faces a real chance of serious harm in the reasonably foreseeable future in Ukraine for one of the reasons specified in the Refugees Convention. Therefore the Tribunal is not satisfied, on the evidence before it, that the applicant has a well-founded fear of persecution for a Convention reason.

33. The Tribunal then considered whether there are substantial grounds for believing that, as a necessary and foreseeable consequence of the applicant being removed from Australia to Ukraine, there is a real risk that she will suffer significant harm. However, without the benefit of a hearing and in light of its findings above, the Tribunal is unable to satisfy itself in this regard.

[1] Office of the United Nations High Commissioner for Human Rights Report on the human rights situation in Ukraine 16 May to 15 August 2015 http://www.ohchr.org/Documents/Countries/UA/11thOHCHRreportUkraine.pdf

CONCLUSIONS

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

35. Having concluded that the applicant does not meet the refugee criterion in s.36(2)(a), the Tribunal has considered the alternative criterion in s.36(2)(aa). The Tribunal is not satisfied that the applicant is a person in respect of whom Australia has protection obligations under s.36(2)(aa).

36. There is no suggestion that the applicant satisfies s.36(2) on the basis of being a member of the same family unit as a person who satisfies s.36(2)(a) or (aa) and who holds a protection visa. Accordingly, the applicant does not satisfy the criterion in s.36(2) for a protection visa.

DECISION

37. The Tribunal affirms the decision not to grant the applicant a Protection visa.

Glen Cranwell
Member