

0907299 [2009] RRTA 1167 (10 December 2009)

DECISION RECORD

RRT CASE NUMBER: 0907299

DIAC REFERENCE(S): CLF2009/70095

COUNTRY OF REFERENCE: Russian Federation

TRIBUNAL MEMBER: Giles Short

DATE: 10 December 2009

PLACE OF DECISION: Sydney

DECISION: The Tribunal remits the matter for reconsideration with the direction that the applicant satisfies paragraph 36(2)(a) of the Migration Act, being a person to whom Australia has protection obligations under the Refugees Convention.

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is a review of a decision made by a delegate of the Minister for Immigration and Citizenship [in] August 2009 refusing an application by the applicant for a Protection (Class XA) visa. The applicant was notified of the decision under cover of a letter dated [in] August 2009 and the application for review was lodged with the Tribunal [in] September 2009. I am satisfied that the Tribunal has jurisdiction to review the decision.
2. The applicant is a citizen of the Russian Federation. She last arrived in Australia in August 2000 as a student and she applied for a Protection (Class XA) visa [in] May 2009.

RELEVANT LAW

3. In accordance with section 65 of the *Migration Act 1958* (the Act), the Minister may only grant a visa if the Minister is satisfied that the criteria prescribed for that visa by the Act and the Migration Regulations 1994 (the Regulations) have been satisfied. The criteria for the grant of a Protection (Class XA) visa are set out in section 36 of the Act and Part 866 of Schedule 2 to the Regulations. Subsection 36(2) of the Act provides that:
 - ‘(2) A criterion for a protection visa is that the applicant for the visa is:
 - (a) a non-citizen in Australia to whom the Minister is satisfied Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol; or
 - (b) a non-citizen in Australia who is a member of the same family unit as a non-citizen who:
 - (i) is mentioned in paragraph (a); and
 - (ii) holds a protection visa.’
4. Subsection 5(1) of the Act defines the ‘Refugees Convention’ for the purposes of the Act as ‘the Convention relating to the Status of Refugees done at Geneva on 28 July 1951’ and the ‘Refugees Protocol’ as ‘the Protocol relating to the Status of Refugees done at New York on 31 January 1967’ Australia is a party to the Convention and the Protocol and therefore generally speaking has protection obligations to persons defined as refugees for the purposes of those international instruments.
5. Article 1A(2) of the Convention as amended by the Protocol relevantly defines a ‘refugee’ as 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, is unable or, owing to such fear, is unwilling to return to it.’
6. The time at which this definition must be satisfied is the date of the decision on the application: *Minister for Immigration and Ethnic Affairs v Singh* (1997) 72 FCR 288.

7. The definition contains four key elements. First, the applicant must be outside his or her country of nationality. Secondly, the applicant must fear ‘persecution’. Subsection 91R(1) of the Act states that, in order to come within the definition in Article 1A(2), the persecution which a person fears must involve ‘serious harm’ to the person and ‘systematic and discriminatory conduct’. Subsection 91R(2) states that ‘serious harm’ includes a reference to any of the following:
- (a) a threat to the person’s life or liberty;
 - (b) significant physical harassment of the person;
 - (c) significant physical ill-treatment of the person;
 - (d) significant economic hardship that threatens the person’s capacity to subsist;
 - (e) denial of access to basic services, where the denial threatens the person’s capacity to subsist;
 - (f) denial of capacity to earn a livelihood of any kind, where the denial threatens the person’s capacity to subsist.
8. In requiring that ‘persecution’ must involve ‘systematic and discriminatory conduct’ subsection 91R(1) reflects observations made by the Australian courts to the effect that the notion of persecution involves selective harassment of a person as an individual or as a member of a group subjected to such harassment (*Chan Yee Kin v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379 per Mason CJ at 388, McHugh J at 429). Justice McHugh went on to observe in *Chan*, at 430, that it was not a necessary element of the concept of ‘persecution’ that an individual be the victim of a series of acts:
- ‘A single act of oppression may suffice. As long as the person is threatened with harm and that harm can be seen as part of a course of systematic conduct directed for a Convention reason against that person as an individual or as a member of a class, he or she is “being persecuted” for the purposes of the Convention.’
9. ‘Systematic conduct’ is used in this context not in the sense of methodical or organised conduct but rather in the sense of conduct that is not random but deliberate, premeditated or intentional, such that it can be described as selective harassment which discriminates against the person concerned for a Convention reason: see *Minister for Immigration and Multicultural Affairs v Haji Ibrahim* (2000) 204 CLR 1 at [89] - [100] per McHugh J (dissenting on other grounds). The Australian courts have also observed that, in order to constitute ‘persecution’ for the purposes of the Convention, the threat of harm to a person:
- ‘need not be the product of any policy of the government of the person’s country of nationality. It may be enough, depending on the circumstances, that the government has failed or is unable to protect the person in question from persecution’ (per McHugh J in *Chan* at 430; see also *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225 per Brennan CJ at 233, McHugh J at 258)
10. Thirdly, the applicant must fear persecution ‘for reasons of race, religion, nationality, membership of a particular social group or political opinion’ Subsection 91R(1) of the Act provides that Article 1A(2) does not apply in relation to persecution for one or more of the reasons mentioned in that Article unless ‘that reason is the essential and significant reason, or those reasons are the essential and significant reasons, for the persecution’ It should be remembered, however, that, as the Australian courts have observed, persons may be persecuted for attributes they are perceived to have or opinions or beliefs they are perceived to hold, irrespective of whether they actually possess those attributes or hold those opinions

or beliefs: see *Chan* per Mason CJ at 390, Gaudron J at 416, McHugh J at 433; *Minister for Immigration and Ethnic Affairs v Guo* (1997) 191 CLR 559 at 570-571 per Brennan CJ, Dawson, Toohey, Gaudron, McHugh and Gummow JJ.

11. Fourthly, the applicant must have a 'well-founded' fear of persecution for one of the Convention reasons. Dawson J said in *Chan* at 396 that this element contains both a subjective and an objective requirement:

'There must be a state of mind - fear of being persecuted - and a basis - well-founded - for that fear. Whilst there must be fear of being persecuted, it must not all be in the mind; there must be a sufficient foundation for that fear.'
12. A fear will be 'well-founded' if there is a 'real chance' that the person will be persecuted for one of the Convention reasons if he or she returns to his or her country of nationality: *Chan* per Mason CJ at 389, Dawson J at 398, Toohey J at 407, McHugh J at 429. A fear will be 'well-founded' in this sense even though the possibility of the persecution occurring is well below 50 per cent but:

'no fear can be well-founded for the purpose of the Convention unless the evidence indicates a real ground for believing that the applicant for refugee status is at risk of persecution. A fear of persecution is not well-founded if it is merely assumed or if it is mere speculation.' (see *Guo*, referred to above, at 572 per Brennan CJ, Dawson, Toohey, Gaudron, McHugh and Gummow JJ)
13. It is also relevant in the present case that the focus of the Convention definition is not upon the protection that the country of nationality might be able to provide in some particular region, but upon a more general notion of protection by that country: see *Randhawa v Minister for Immigration Local Government and Ethnic Affairs* (1994) 52 FCR 437 per Black CJ at 440-1. The issue is whether it is reasonable, in the sense of practicable, for the applicant to relocate to a region where, objectively, there is no appreciable risk of the occurrence of the feared persecution. What is 'reasonable', in the sense of 'practicable', will depend upon the particular circumstances of the applicant and the impact upon him or her of relocation within his or her country of nationality. However it should be noted that the Refugees Convention is concerned with persecution in the defined sense, not with living conditions in a broader sense. Whether relocation is reasonable in the sense of practicable is therefore not to be judged by considering whether the quality of life in the place of relocation meets the basic norms of civil, political and socio-economic rights: see *SZATV v Minister for Immigration and Citizenship* [2007] HCA 40 at [23]-[25] per Gummow, Hayne and Crennan JJ (with whom Callinan J agreed).

CLAIMS AND EVIDENCE

14. The Tribunal has before it the Department's file CLF2009/70095 relating to the applicant. The applicant appeared before the Tribunal [in] October 2009 to give evidence and present arguments. The Tribunal was assisted by an interpreter in the Russian and English languages although the hearing was mostly conducted in English. The applicant was unrepresented. A social worker at [agency and name deleted: s431(2)], who is the applicant's authorised recipient, attended the hearing.

The applicant's original application

15. The applicant is aged in her mid-twenties. In her original application she said that she had a sister in Australia who was an Australian citizen. She said that she had married in Sydney in

April 2004 and she produced a copy of her marriage certificate. The applicant said that she had attended school in [Town A] from 1989 to 1999. In answer to questions 41 to 45 on Part C of the application form (seeking her reasons for claiming to be a refugee) she said that she had come to Australia (in August 2000 according to the Department's movement records) to study English and hospitality. She said that while in Australia she had suffered a stroke which meant that she could not use her left arm and leg and that walking was difficult. She said that if she returned to Russia she would have no help. She said that there were no facilities to care for a young person like her and that she would be at home with her parents and she would have no future.

16. The applicant said that she was also receiving methadone on a daily basis and that in Russia methadone was illegal and she would not be able to continue with this medication. She said that she had been told that the methadone helped to stop epileptic fits which could lead to another stroke. She said that she had also been told that she was not fit to travel by air as this could cause another stroke. The applicant said that she thought that Russian people in the street would make fun of her and that the authorities would not care about her. She said that she was in regular contact with her parents in Russia by telephone.

The applicant's evidence at the Departmental interview

17. The applicant was interviewed by the primary decision-maker in relation to her application [in] August 2009. The applicant said that if she had another seizure and it lasted for more than two minutes it could lead to another stroke. She confirmed that she claimed that she would face discrimination by people in Russia because of her disability. She said that she could easily be attacked on the street. She said that when she had been in Russia in the 1990's it had been very common for people to threaten to kidnap people like her which was why her parents had sent her overseas to study. She also said that there had been no future there: it had been a very harsh time. She said subsequently that there had been too many criminals in Russia at the time. She said that it had been a mess and everybody had been able to do what they wanted.
18. The applicant said that she had suffered the stroke five or six years ago and she had already improved a lot but that her prognosis was uncertain. She said that she had become addicted to heroin because she had had a lot of problems: she said that her father had had an operation, her mother had a bad heart and she always fell down and her brother had been killed. She said that one day she had tried heroin because she had wanted to forget reality. She said that she had tried to give up heroin many times but she had failed. She said that once she had ended up in a psychiatric clinic and she had not even recognised her sister. She said that she had been on methadone for six years already.
19. Asked what she thought would happen to her in Russia the applicant said that she would just have to sit at home. She said that she might have another stroke because there was no methadone over there. She said that her parents were too old to look after her. She said that there were no support groups in Russia for people with disabilities. She said that everybody judged you and laughed at you: you did not see crippled people in the street in Russia. She said that if she became ill she would be able to go to the doctor but she repeated that they could not provide her with methadone. The applicant said that she and her husband were still together but that he was against methadone.
20. The applicant said that she did not know if she would be able to find a job in Russia. She said that as a result of her stroke she had a very bad memory. She referred to the fact that she had

been in Australia for almost ten years and that her sister was living here. She mentioned again that her parents were old and that they could not look after her. She said that she had not finished the course which she had come here to study because she had suffered a stroke. She said that it would be very difficult for her to return to Russia without an education and suffering from a disability. She said that she wanted at least to be able to finish her studies here.

Medical examination

21. When she undertook the medical examination in relation to her application for a protection visa the applicant apparently told the doctor that she had suffered intracranial bleeding after a burst cerebral aneurysm in around 2003. The doctor recorded that her gait was affected by the weakness in her left side due to the stroke but that she was mobile and able to perform activities of daily living without assistance. He recorded that she was also subject to poorly controlled seizures for which she had tried anticonvulsants with little effect. He recorded that she had been taking diazepam for both anxiety and the seizures after suffering the cerebral aneurysm. He also recorded that she had told him that she had suffered blackouts and anxiety when she had tried to cease taking methadone and that she had been admitted to a psychiatric unit as a result.

The applicant's evidence at the hearing before me

22. At the hearing before me the applicant confirmed that her parents were still living in [Town A] She said that she telephoned them and they telephoned her. She said that she had finished high school in Russia and that she had never had the chance to work for a living. She said that she had left Russia ten years before. She referred to the fact that her brother had been killed and some things had been happening there. She said that around eight years previously, when her parents had tried to find out the truth about the killing of her brother, they had received threats that their daughters would be kidnapped. She said that as a result her parents had decided to send her and her sister overseas. She said that she had been studying English and a Diploma of Hospitality Management but she had not had the chance to finish this because she had had a stroke.
23. The applicant said that she did not know if there would be continuing problems as a result of the matters relating to her brother's killing if she were to return to Russia now. She referred to the fact that she had not been back to Russia for ten years. She said that her brother had maybe known something illegal and they had just killed him. She said that she did not know if her parents had been having continuing problems because they had been trying to find out the truth about her brother's killing. She said that many people in Russia probably thought that she was dead because she had not been back to Russia for ten years.
24. I asked the applicant if she had talked to her parents about her employment prospects in Russia. The applicant said that her mother had told her that she would not be able to live in Russia because it was a very unstable country plus, with her disability, things were over for her in Russia. She said that she did not know how she would be able to finish her studies because she had a very bad memory as a result of her stroke. I noted that one of the issues I had to look at was whether there was a real chance that the applicant would suffer serious harm for one of the five Convention reasons and one aspect of that was her disabilities as a result of having suffered a stroke. I noted that the relevant Convention reason was her membership of a particular social group which could be defined as 'people with disabilities' or perhaps 'women with disabilities' I noted that I could look at whether the applicant would

be discriminated against in employment as a result of her disability and whether the discrimination would be sufficiently serious that she would be deprived of a livelihood or the capacity to survive.

25. The applicant said that she would just have to sit at home, she would not be able to go to a job. She said that she would not even be able to go out on the streets because people would make fun of her. She said that Russia was a cruel country, not like here. She said that she knew for sure that she would have medical problems. She said that she was on medication which did not exist in Russia and she could be put in gaol if she brought this medication to Russia. She said that after her stroke her situation was very dangerous because even with this medication she suffered from fits and her doctor had told her that if she had a fit which lasted for more than two minutes she could have another stroke. The applicant said that on one occasion she had tried to give up this medication and in seven hours she had had eight fits, she had lost consciousness, she had ended up in a psychiatric unit and she had not even been able to recognise her sister.
26. I noted that the applicant had told the primary decision-maker that she had been on methadone for six years and that I accepted that methadone was not available in Russia. I noted that the primary decision-maker had taken the view that this circumstance in itself did not bring her within the definition of a refugee because the law prohibiting methadone was a law which applied generally in Russia. I noted that different countries had different laws with regard to what treatments they permitted and there was a question as to whether a law which prohibited methadone was a law which was for the general welfare in the sense that it was appropriate and adapted to achieving some legitimate government object. I noted that this was a difficult issue. I would in effect have to find that the Government of Russia was persecuting her by denying her methadone. I noted that this was an argument which I would consider but it was a somewhat difficult argument to make. The applicant said that she understood.
27. I noted that if the Tribunal did not find that the applicant was a refugee she could seek the intervention of the Minister under section 417 of the Act. I noted that it was possible that the fact that she would not be able to have access to methadone in Russia (and that on the evidence before me this would have a significant impact on her health) was a matter which fell within the Minister's guidelines rather than a matter bringing her within the terms of the definition of a refugee in the Refugees Convention. I noted that Russia made available various other drugs but whether they were as efficacious would be a matter for medical evidence. I noted again that for this circumstance to bring her within the definition of a refugee I would have to find that denying her access to methadone amounted in itself to persecution.
28. The applicant said that her parents were not young any more and they could not look after her. She said that her sister here was an Australian citizen and she looked after her. She referred to the fact that she had also got married here after she had suffered her stroke. She said that she wanted to try to complete her education here. I noted that the applicant had said when she had been interviewed by the primary decision-maker that she was not separated from her husband but that he was against methadone. I noted that she had indicated to the Department some years previously that she had been thinking of applying for a visa on the basis of her marriage. The applicant confirmed that she had been told that it would not be possible for her to make such an application while she remained in Australia. I noted that the law had very recently changed in this regard (see the Migration Amendment Regulations 2009 (No. 10) which commenced on 14 September 2009) and that it might be worth her

while to seek advice about this change. I noted that there were services such as the Immigration Advice and Rights Centre which provided free advice. I noted that this did not affect her application for a protection visa.

29. The applicant said that she did not know how she had become illegal. She said that her brother had died, her father had had an operation, her mother had had an operation, she had started having fits and she had had a massive depression. She said that she might have been in hospital as a result of having suffered a stroke. I noted that this appeared to be what had happened: she had had a student visa at the time she had had her stroke and when the Department had followed this up they had been told that she had had a stroke. They had then kept issuing her with bridging visas because she had not been able to travel.
30. I asked the applicant whether she had talked to her parents about any difficulties she might have in terms of access to services or medical care in Russia. The applicant said that her mother had told her that in Russia she would not have a chance. She referred again to the fact that she was crippled, to the fact that Russia was a very cruel country and to the accident in which her brother had been killed. She referred to the fact that she had not even finished her education. She said that she would have no future in Russia. She confirmed that she would have access to medical care in Russia in the sense that if she fell ill she would be able to see a doctor and they would do the best they could.
31. I asked the applicant if there was anything else she wanted to say to me about the problems she feared she might experience if she were to return to Russia now. The applicant said that she would not have a job. She referred again to the fact that there would be no one to look after her and that her sister was here. She said that her marriage would fall apart. She said that the issue regarding the death of her brother had been really serious. She referred again to the fact that her memory problems would make it difficult for her to study. She also referred to the fact that Russia did not have some treatments for addictions, like methadone. She said that she was also suffering from deep depression. She said that in Russia people with disabilities just sat at home.
32. The applicant said that she had been prescribed anti-depressants but they did not help very much. The applicant's social worker, who was present at the hearing in her capacity as the applicant's authorised recipient and to provide support, noted that the applicant had only recently been given a Medicare card. The applicant said, to sum up, that she was dreading even having to think of having to return to Russia. She repeated that her parents were not young any more and that she would not be able to get a job there so her situation there would be horrible.

Background

33. According to the US State Department *Country Reports on Human Rights Practices for 2008* in relation to Russia:

‘Several laws prohibit discrimination against persons with disabilities or mandate equal treatment of them; however, the government generally did not enforce these laws. Citizens with disabilities continued to face discrimination and were denied equal opportunity to education, employment, and access to social outlets. The situation for persons with disabilities has reportedly worsened due to the replacement of government subsidies for items such as transportation and medicine with cash payments in 2004. Some affluent regions, such as Moscow, preserved benefits for

persons with disabilities at preexisting levels, while most other regions provided a limited number of benefits, such as free transportation.

The Ministry of Health and Social Protection estimated that there were 15 million persons with disabilities. In 2006, the human rights ombudsman said that in the previous 10 years, more than 120,000 persons became invalids as a result of military actions and war injuries. According to the NGO Perspektiva, the number continued to grow as a result of new conflict; however, there were no new figures available at year's end. Persons with disabilities were generally excluded from the social and political life of their communities and isolated from mainstream society.

...

Laws providing employment quotas exist at the federal and local levels; however, some local authorities and private employers continued to discourage persons with disabilities from working, and there was no penalty for failure to honor quotas. Human rights NGOs made some progress in persuading foreign companies in larger cities, including Moscow, to consider persons with disabilities as potential employees, and the Moscow city government reportedly encouraged employers to hire disabled persons. According to the NGO All-Russia Society of Disabled Persons, the overall number of persons with disabilities in the workforce declined from 72,500 in 2002 to 28,000 in 2007. The NGO attributed this to the 2002 elimination of tax benefits, which encouraged employment of persons with disabilities. In December, the NGO Perspektiva reported that the number of unemployed persons with disabilities had decreased to 85 percent from 90 percent in 2007.' (US State Department, *Country Reports on Human Rights Practices for 2008* in relation to Russia, Section 5, Discrimination, Societal Abuses, and Trafficking in Persons - Persons with Disabilities)

34. According to a 2009 United Nations Report, a Federal Law on Social Protection of Persons with Disabilities in the Russian Federation was adopted in 1995 and a federal targeted programme to support disabled persons was recently implemented but this programme largely relies on granting material assistance to the disabled. The report stated that:

'Causes for concern include the still widespread unwillingness of society to look at persons with disabilities as equals and the effective denial of equal rights with regard to education, employment, healthcare, marriage, child rearing, leisure, physical exercise and sports, and participation in public and political life. Even government officials sometimes harbour misconceptions that disabled persons are of no use for any community activity. As a result, proposals are drafted to establish specialized institutions to accommodate and educate persons with disabilities, as well as special transport routes and social venues. These arrangements encourage society at large to embrace the concept of specialized isolated environments for persons with disabilities rather than the establishment of an environment in which disabled persons can enjoy a full social life with a maximum degree of independence.' (Evgeny Gontmakher and others, *Russia: On the Path to Equal Opportunities*, UN Office in the Russian Federation, Moscow, 2009, page 5)

35. According to the same report, quotas for the employment of disabled persons were provided for under Article 21 of the Federal Law on Social Protection of Persons with Disabilities in the Russian Federation adopted in 1995 and these quotas and other benefits and preferences for enterprises hiring disabled workers initially resulted in an increase in the employment of disabled persons. However a reduction in government support after 2000 led to a decrease and in 2005 the situation deteriorated still further when employers with less than 100 workers

(that is, virtually all small and medium-sized enterprises) were exempted from allocating job quotas for the disabled. In addition, managers of enterprises with more than 100 workers were not held to account for non-compliance with the legislative requirements. The UN Report observed that in effect quotas for persons with disabilities were now non-existent (Evgeny Gontmakher and others, *Russia: On the Path to Equal Opportunities*, UN Office in the Russian Federation, Moscow, 2009, pages 42-43).

36. Other reports agree that many people with disabilities are effectively confined to their homes, both because of poor job prospects and problems of physical access to buildings and public transport (Richard Galpin, 'Russia's disabled suffer neglect and abuse', *BBC News*, 12 October 2009, downloaded from <http://news.bbc.co.uk/2/hi/europe/8302633.stm>, accessed 13 October 2009; Chloe Arnold, 'Russia: Disabled Still Largely 'Invisible' In Society', *RFE/RL*, 26 May 2008, downloaded from <http://www.rferl.org/content/article/1144492.html>, accessed 13 October 2009). According to a report prepared by the Russia Rule of Law program of the American Bar Association's Central European and Eurasian Law Initiative (ABA/CEELI), disabled women face additional obstacles to obtaining employment in that employers give preference to disabled men (ABA/CEELI, *CEDAW Assessment Tool Report for the Russian Federation*, February 2006, downloaded from http://www.abanet.org/ceeli/publications/cedaw/cedaw_russia.pdf, accessed 13 March 2006, page 81).
37. Disabled persons are entitled to a pension but according to the UN Report the level of the such pensions remains inadequate despite regular adjustments for inflation and increases (Evgeny Gontmakher and others, *Russia: On the Path to Equal Opportunities*, UN Office in the Russian Federation, Moscow, 2009, page 8). Moreover under new rules which were introduced in 2006 all disabled people applying for federal benefits must have their disabilities verified by the state, a process which takes two to four months (during which time the applicant has no right to any allowances or other privileges) and which must be repeated each year (Svetlana Osadchuk, 'Russia's Disabled People Find Life a Struggle', *St Petersburg Times*, 12 May 2008, downloaded from http://www.sptimes.ru/index.php?action_id=2&story_id=25979, accessed 13 October 2009).
38. Reports agree that methadone or buprenorphine maintenance treatment for drug users is not available in Russia as the use of both drugs is prohibited by law. The standard treatment for people dependent on opiates in Russia is provided by the state through 192 so-called narcological dispensaries and consists of inpatient detoxification using clonidine and/or medications with sedative effects followed by two to six weeks of inpatient rehabilitation. Patients are then referred to local health centres for follow-up but few patients keep appointments and one study found relapse rates of approximately 75 per cent at six months (Human Rights Watch, *Rehabilitation Required: Russia's Human Rights Obligation to Provide Evidence-based Drug Dependence Treatment*, November 2007, pages 4, 21-23; Evgeny M Krupitsky and others, 'Naltrexone for heroin dependence treatment in St Petersburg, Russia', *Journal of Substance Abuse Treatment*, 26 (2004) 285-294 at page 285).

FINDINGS AND REASONS

39. I found the applicant to be a credible witness. She has given her evidence openly and her evidence has been consistent over the course of the processing of her application. Her evidence is also consistent with what the doctor recorded when she undertook a medical examination in connection with her application. I accept that the applicant suffered a stroke as a result of a burst cerebral aneurysm in 2003 which has left her unable to use her left arm and affects her gait although she is mobile and able to perform activities of daily living

without assistance. I accept that, as she said at the hearing before me, the stroke has also affected her memory making it difficult for her to continue with her studies. I accept that the applicant is subject to poorly controlled seizures or fits for which she has tried anticonvulsants with little effect.

40. I accept that the applicant has been taking diazepam both for anxiety and for the seizures after suffering the cerebral aneurysm. I also accept that she has been on methadone for about six years. I accept that when she attempted to stop using methadone on one occasion she had fits, she lost consciousness, she ended up in a psychiatric unit and she was unable even to recognise her own sister. I accept that the applicant's doctor has told her that if she has a fit which lasts more than two minutes she could have another stroke. I accept that the applicant is also suffering depression for which she has been prescribed anti-depressants.
41. As I indicated to the applicant, I accept that the use of methadone is prohibited by law in Russia (by Article 31(6) of the Federal Law 'On Narcotic Drugs and Psychoactive Substances': see Human Rights Watch, *Rehabilitation Required: Russia's Human Rights Obligation to Provide Evidence-based Drug Dependence Treatment*, November 2007, page 23, footnote 51). There is a question as to whether that law is appropriate and adapted to achieving some legitimate government object or whether it is a law which, as the High Court said in *Chen Shi Hai v Minister for Immigration and Multicultural Affairs* (2000) 201 CLR 293 at [29] per Gleeson CJ, Gaudron, Gummow and Hayne JJ, 'offends the standards of civil societies which seek to meet the calls of common humanity'. As I noted in the course of the hearing before me, Russia does make various other forms of treatment available. On the other hand, the World Health Organisation added methadone to its list of essential medicines in 2005 (Richard Elovich and Ernest Drucker, 'On drug treatment and social control: Russian narcology's great leap backwards', in *Harm Reduction Journal* 2008, 5:23, downloaded from <http://www.harmreductionjournal.com/content/5/1/23>, accessed 15 October 2009).
42. As I indicated to the applicant, I consider that it is a difficult question whether the denial of methadone in itself amounts to persecution. I therefore propose to consider first whether there is a real chance that the applicant will be persecuted for reasons of her membership of the particular social group defined as 'people with disabilities' or 'women with disabilities' if she returns to Russia now or in the reasonably foreseeable future. In *Applicant S v Minister for Immigration and Multicultural Affairs* (2004) 217 CLR 387 at [36], Gleeson CJ, Gummow and Kirby JJ gave the following summary of principles for the determination of whether a group falls within the definition of a particular social group:

'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".'
43. Whether a supposed group is a 'particular social group' in a society will depend upon all of the evidence including relevant information regarding legal, social, cultural and religious norms in the country. However it is not sufficient that a person be a member of a particular social group and also have a well-founded fear of persecution. The persecution must be feared for reasons of the person's membership of the particular social group. Having regard to the independent evidence cited above under 'Background' I accept that both 'people with disabilities' and 'women with disabilities' constitute particular social groups in Russia for the

purposes of the Refugees Convention. All members of the group share a common characteristic or attribute, namely disability (and gender as well in the case of the narrower group), and the independent evidence indicates that possession of that characteristic or attribute distinguishes the group from society at large. I do not consider it relevant that the posited group contains people with different disabilities or with varying degrees of disability. The independent evidence indicates that 'people with disabilities' are distinguished from society at large by virtue of the shared attribute of their disability despite the fact that they may have different disabilities or that they may suffer from varying degrees of disability.

44. Apart from the issue regarding methadone the applicant has not suggested that she will not have access to appropriate medical care in Russia. However she has claimed that as a person with disabilities she will have no future and that she will just have to sit at home. She has said that she does not know if she will be able to find a job. Sadly, the independent evidence confirms that many people with disabilities are effectively confined to their homes, both because of poor job prospects and problems of physical access to buildings and public transport (Richard Galpin, 'Russia's disabled suffer neglect and abuse', *BBC News*, 12 October 2009, downloaded from <http://news.bbc.co.uk/2/hi/europe/8302633.stm>, accessed 13 October 2009; Chloe Arnold, 'Russia: Disabled Still Largely 'Invisible' In Society', *RFE/RL*, 26 May 2008, downloaded from <http://www.rferl.org/content/article/1144492.html>, accessed 13 October 2009). Furthermore, as referred to above, according to a report prepared by the Russia Rule of Law program of the American Bar Association's Central European and Eurasian Law Initiative (ABA/CEELI), disabled women face additional obstacles to obtaining employment in that employers give preference to disabled men (ABA/CEELI, *CEDAW Assessment Tool Report for the Russian Federation*, February 2006, downloaded from http://www.abanet.org/ceeli/publications/cedaw/cedaw_russia.pdf, accessed 13 March 2006, page 81).
45. The independent evidence suggests that although there are laws which prohibit discrimination against persons with disabilities or mandate equal treatment, the government does not enforce these laws (US State Department, *Country Reports on Human Rights Practices for 2008* in relation to Russia, Section 5, Discrimination, Societal Abuses, and Trafficking in Persons - Persons with Disabilities). Since 2005 employers with less than 100 workers - virtually all small and medium-sized enterprises - have been exempted from allocating job quotas for the disabled and managers of enterprises with more than 100 workers are not held to account for non-compliance with the legislative requirements. As referred to above, the 2009 UN Report observed that in effect quotas for persons with disabilities were now non-existent (Evgeny Gontmakher and others, *Russia: On the Path to Equal Opportunities*, UN Office in the Russian Federation, Moscow, 2009, pages 42-43).
46. The independent evidence indicates that disabled persons in Russia are entitled to a pension. However according to the UN Report the level of the such pensions remains inadequate despite regular adjustments for inflation and increases (Evgeny Gontmakher and others, *Russia: On the Path to Equal Opportunities*, UN Office in the Russian Federation, Moscow, 2009, page 8). Moreover under new rules which were introduced in 2006 all disabled people applying for federal benefits must have their disabilities verified by the state, a process which takes two to four months (during which time the applicant has no right to any allowances or other privileges) and which must be repeated each year (Svetlana Osadchuk, 'Russia's Disabled People Find Life a Struggle', *St Petersburg Times*, 12 May 2008, downloaded from http://www.sptimes.ru/index.php?action_id=2&story_id=25979, accessed 13 October 2009).

47. The primary decision-maker referred in the decision under review to the fact that, as mentioned in the US State Department Report, some affluent regions, such as Moscow, had preserved benefits for people with disabilities at higher levels and that the Moscow city government reportedly encouraged employers to hire disabled persons. However I accept that the applicant's only immediate family members in Russia, her parents, live in [Town A]. Having regard to her disabilities I do not consider that it would be reasonable, in the sense of practicable in her particular circumstances (see *Randhawa* and *SZATV*, referred to above) for her to relocate to Moscow even if it were to be accepted that the situation of disabled people there was marginally better than elsewhere in Russia.
48. I accept that, if the applicant returns to her home in [Town A] now or in the reasonably foreseeable future, she will wish to seek employment. Indeed, given the inadequacy of the pension to which disabled persons in Russia are entitled and the fact that all disabled persons must have their disabilities verified by the state each year, a process which takes two to four months, during which time the person has no right to any allowances or other privileges (see paragraph 46 above), I consider that the applicant will need to seek employment in order to survive. While I accept that the applicant's parents will try to support her as best they can I accept that they are old and in poor health and that their capacity to support the applicant financially is accordingly limited. While I likewise accept that the applicant married in Sydney in 2004 I accept her evidence that her marriage will fall apart if she is forced to return to Russia.
49. I find on the basis of the independent evidence that, if the applicant seeks employment in Russia, there is a real chance that she will be discriminated against in employment for reasons of her membership of the particular social group of 'people with disabilities' or 'women with disabilities' in Russia to such an extent that she will be denied the capacity to earn a livelihood of any kind. I consider that the independent evidence referred to above under 'Background' clearly demonstrates that people with disabilities do not merely face problems in obtaining employment because of their disabilities but rather that people with disabilities are discriminated against in obtaining employment for reasons of their membership of the particular social group of 'people with disabilities' and that 'women with disabilities' are doubly disadvantaged because employers give preference to disabled men.
50. I find on the evidence before me that, taking into account the inadequate level of government benefits for people with disabilities in Russia, such a denial of the applicant's capacity to earn a livelihood will threaten her capacity to subsist. I find that the persecution which the applicant fears is condoned by the Government of the Russian Federation in that, as referred to above, although there are laws which prohibit discrimination against persons with disabilities or mandate equal treatment, the government does not enforce these laws, and the government itself does not provide an adequate level of benefits for disabled people to subsist and places obstacles in the way of people seeking to claim such benefits
51. I consider, therefore, that the persecution which the applicant fears involves 'serious harm' as required by paragraph 91R(1)(b) of the Migration Act in that it involves a denial of her capacity to earn a livelihood of any kind which will threaten her capacity to subsist. I consider that the applicant's membership of the particular social group of 'people with disabilities' or 'women with disabilities' in Russia is the essential and significant reason for the persecution which she fears, as required by paragraph 91R(1)(a), and that the persecution which she fears involves systematic and discriminatory conduct, as required by paragraph 91R(1)(c), in that it is deliberate or intentional and involves her selective harassment for a Convention reason, namely her membership of those particular social groups. As I have said

above, I do not consider, having regard to the applicant's disabilities, that it would be reasonable, in the sense of practicable in her particular circumstances, for her to relocate to another part of Russia even if it were to be accepted that the situation of disabled people there was marginally better than in [Town A].

CONCLUSIONS

52. I find that the applicant is outside her country of nationality, the Russian Federation. For the reasons given above, I find that she has a well-founded fear of being persecuted for reasons of her membership of the particular social group of 'people with disabilities' or 'women with disabilities' in Russia if she returns to that country now or in the reasonably foreseeable future. I find that the applicant is unwilling, owing to her fear of persecution, to avail herself of the protection of the Government of the Russian Federation. There is nothing in the evidence before me to suggest that the applicant has a legally enforceable right to enter and reside in any country other than her country of nationality, the Russian Federation. I therefore find that the applicant is not excluded from Australia's protection by subsection 36(3) of the Act (see *Applicant C v Minister for Immigration and Multicultural Affairs* [2001] FCA 229; upheld on appeal, *Minister for Immigration and Multicultural Affairs v Applicant C* (2001) 116 FCR 154). It follows that I am satisfied that the applicant is a person to whom Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol. Consequently the applicant satisfies the criterion set out in paragraph 36(2)(a) of the Migration Act for the grant of a protection visa.

DECISION

53. The Tribunal remits the matter for reconsideration with the direction that the applicant satisfies paragraph 36(2)(a) of the Migration Act, being a person to whom Australia has protection obligations under the Refugees Convention.

I certify that this decision contains no information which might identify the applicant or any relative or dependant of the applicant or that is the subject of a direction pursuant to section 440 of the *Migration Act 1958*.

Sealing Officer's I.D. prrt44