

0806237 [2008] RRTA 487 (2 December 2008)

DECISION RECORD

RRT CASE NUMBER:	0806237
DIAC REFERENCE(S):	N97/001258
COUNTRY OF REFERENCE:	Bulgaria
TRIBUNAL MEMBER:	Phillippa Wearne
DATE:	2 December 2008
PLACE OF DECISION:	Sydney
DECISION:	The Tribunal affirms the decision not to grant the applicant a Protection (Class AZ) 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 AZ) visa under s.65 of the *Migration Act 1958* (the Act).
2. The applicant, who claims to be a citizen of Bulgaria arrived in Australia and applied to the then Department of Immigration and Ethnic Affairs (Department of Immigration and Citizenship) for a Protection (Class AZ) visa. The delegate decided to refuse to grant the visa and notified the applicant of the decision. However, in later reviewing the matter the Department deemed that this notification was ineffective, and the applicant was properly notified of his review rights by letter.
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 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) of the Act, as in force before 1 October 2001, provided that a criterion for a protection visa is that the applicant for the visa is a non-citizen in Australia to whom 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 AZ) 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. These provisions were inserted on 1 October 2001 and apply to all protection visa applications not finalised before that date.
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 case file N97/001258 and the Tribunal's case file 0806237 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.

The visa to come to Australia

20. The applicant was granted a Tourist visa. He indicates that he left Bulgaria and arrived in Australia.

Ms X

21. The applicant travelled to Australia with Ms X. She submitted her own claims to be a refugee with the applicant (folios 24-35). She describes occupation in a professional field. The applicant described her as his de facto wife (folio 22).

The protection visa application (PVA)

22. The applicant lodged the protection visa application (PVA) a number of years ago.
23. According to the PVA, the applicant was born in Bulgaria. He indicated that he speaks, reads and writes Bulgarian and English. He gives his religion as "orthodox".
24. He indicated that his passport was issued in Bulgaria.
25. He indicated that he had 11 years of formal education, and that he had completed a trade qualification.
26. He states that the reason he gave for the issue of obtaining his visa was "tourist to see Australia."
27. He lists various occupations when he resided in Bulgaria.
28. The applicant stated that his parents and sibling resided in Bulgaria.
29. The Department received a statement made by the applicant to support the PVA.

30. The applicant claimed that he had worked as a manager of a small business in Bulgaria. He had first worked in the family's business for about three years. Then, he started his own business. He employed several staff. His wife (Ms X) worked for the business in her professional capacity. The business started well. It was always busy. However the "mafia" came in and wanted money. They wanted around a sum of money for protection, and each month they wanted more. When the applicant rejected their demands and told them he was not able to pay, they threatened him and his family. They damaged the building and other equipment. One day they poisoned his dog, saying that it would happen to him next time. The applicant and his family changed address. The Mafia found him. They told him they would kill his child. No one could protect them. The police had mafia connections. Their car was stolen and then left parked outside their home with a note that the mafia would find them. They changed their child's school. They came to Australia to protect their lives.
31. The delegate decided to refuse the applications and notified the applicant. (As noted above, this notification to the applicant was deemed to have been ineffective.)

Re-notification of the Department's decision to refuse the visa

32. The Department renotified the applicant of the delegate's decision (folio 96).

Application to the Tribunal for review

33. The applicant applied to the Tribunal for a review of the delegate's decision.
34. The applicant was represented in regard to the review by a registered migration agent. The agent made the following submissions (folios 14-16).

...In the [year] [the applicant] was a legitimate small-business owner in Bulgaria and like many other small business owners in his country, with the decline of communism, he encountered the rise of the Bulgarian mafia. As a result, he was subject to extortion, the physical intimidation and assault, at the hands of violent, brutal and ruthless organised criminals. He was forced to give over increasingly larger amounts of money from his business. When he sought the help of the police he was refused as a result of widespread and rampant corruption. His attempts to pursue the matter with the police culminated in and threats of death towards him and his family.

In order to secure his immediate safety [the applicant] exited Bulgaria for a country as far away as he could find. Travelling with his girlfriend at the time he arrived in Australia, on [date] hoping to recover from the emotional stress and consider his options. After regular communication with his [family member] back in Bulgaria, he determined that his life was at risk, should he return to Bulgaria. Because of this, on [date] he applied for a protection visa. His original [visitor visa] expired on [date], at which time he was automatically granted a [Bridging visa]. While awaiting the result of this application, he maintained regular contact with his [family member] in Bulgaria who assisted him financially and also informed him of the worsening situation as both Bulgarian and Russian-based mafia's began to dominate the country. [Family member] also made him aware of the continuing threat to his life and their safety. With this continued threat to his life the emotional trauma of what he had already endured and a limited ability to express himself in the English language [the applicant] was unable to fully or properly instruct an agent in [Australia] as to his wishes before he decided [to travel]. The agent, [name], [did] not advise that his application for a protection visa was refused.

After several years of living in fear both [for] his life, and that of his remaining family, as the conditions grew even more dangerous in Bulgaria, in addition to being unaware of his visa status, [the applicant] resigned himself to never being able to return to his native country. During the following years, [the applicant] dealt with the emotional and mental toll of his ordeal, as well as the social and cultural adjustments to Australia.

He maintained regular contact with his [family member], and with [the family member's] encouragement and financial assistance, he was finally able to overcome the challenges of a virtual exile from his own country.

In [year] [the applicant] began a relationship with [Ms Y], an Australian citizen, which despite significant issues such as physical distance and cultural differences continued to grow in both depth and commitment. Though unable to live together, they maintained a genuine and ongoing relationship. In [year] [Ms Y] fell pregnant to [the applicant] and by mutual consent [they] decided to keep the child, which was born in [year].

In [year] [Ms Y] fell pregnant once again to [the applicant] and once again, they decided to keep the child, who was born in [year]. In mid [year] [Ms Y] asked [the applicant] if he was willing to make a more formal commitment to her and their children, such as cohabitation and eventually marriage. It was at this time that [the applicant] attempted to clarify his visa status in order to make this formal commitment to the woman he loved and the mother of their children. Unaware of his status [the applicant] voluntarily surrendered to DIAC on [date]. [I]t was at this time that the issue of Srey became apparent.

...

As a lawful non-resident [the applicant] request that you consider his appeal against a refusal of a protection fees are based on relevant, compassionate and compelling grounds. What was unknown in [year] was the real depth, capacity and reach of the Bulgarian mafias in the wake of the Communist collapse. Enclosed are a number of relevant articles from reputable publications which deal with the extent of the Bulgarian mafias, their power, influence and willingness to engage in ruthless, violent and often murderous tactics and means in which to further their own ends. Some one hundred and fifty killings in the last 5 years have been attributed to them and all most all of them are on unsolved. The European Union itself has acknowledge the seriousness of the corruption and composite together bulkier and authorities in many cases, and placed both restriction and conditions on Bulgaria's entry to the EU as a result.

In [year], in good faith, [the applicant] sought assistance from Bulgarian authorities, only to discover firsthand how corrupt and subverted they had become. Unfortunately at the time of his original application, [the applicant] had neither the mastery of English language nor the now established and accepted basis of facts to properly explain his situation or provide sufficient information to support his claims.

[The applicant] was refused a protection visa on the grounds that he was not a person at risk under the convention.

As per the DIAC decision record, Part B, section 4.2.1

‘There is no evidence to suggest that the extortion directed to the applicants was for reasons of their race or religion or political opinion nationality or membership of a

particular social group. Nor is there any intimation that the police are failed to protect them from that extortion and harassment for a Refugees Convention reason’.

As organised criminals and crime syndicates are now commonly recognized as distinct and quantifiable social groups with their own rules and laws, it is not unreasonable to find that under the [C]onvention [the applicant] is at risk from a particular social group [sic]. And that his refusal to co-operate with unlawful demands places at risk, with a genuine fear for his life. Especially since recent conversations with his [family member] have confirmed that both the activities and violent nature of the Bulgarian mafias have only increased since [the applicant left] the country.

Also enclosed is documentation proving his biological fatherhood of [Ms Y’s] youngest child. [The applicant] requests that you consider on compassionate grounds, the emotional and mental intake is that separating him from [Ms Y] and their children would have. As a widower, [Ms Y] and her eldest child have already experienced the trauma of losing a loved one and had begun to suffer emotional stress from the insert the surrounding [the applicant’s] current situation.

...

35. The representative attached documentation referred to in the submissions (folios 17-19). He also attached various Internet articles (folios 2-13) entitled *EU warns of Bulgaria after killings* (2008), *EU suspends £400m in aid to Bulgaria over its failure to fight organised crime* (2008), *Bulgarian Mafia turf wars to hit EU* (2006); *Murders prompt EU warning Bulgaria over organised crime* (2008), *Bulgaria: the mafias dance to Europe* (2006) and *Media Mafia and Monopoly in Bulgaria* (2001)

The hearing

36. The applicant appeared before the Tribunal to give evidence and present arguments.
37. The applicant’s representative did not attend the hearing.
38. The Tribunal went through the definition of “refugee” with the applicant.
39. The Tribunal told the applicant that all his claims for protection were in issue. The Tribunal noted that he had left Bulgaria a long time ago. The Tribunal confirmed with him that he was claiming to fear persecution if he were to return there. The Tribunal explained that in examining his claims that it would have to have regard to the circumstances in Bulgaria when he was there, and also to the circumstances in Bulgaria today.
40. The Tribunal noted that the representative had requested that the Tribunal consider his application on “compassionate and compelling” grounds. The Tribunal explained that the only role for the Tribunal was to determine whether the definition of “refugee” applied to his circumstances. It could not decide that there may be other grounds on which he may be able to remain in Australia. The Tribunal told the applicant that consideration of his circumstances on other grounds was a matter solely within the Minister’s discretion.
41. The applicant checked his passport and said that he obtained a tourist visa to visit Australia on a particular date. He said that he had wanted to get out Bulgaria “as

quickly as possible”. The Tribunal noted that the PVA indicated that he had arrived in Australia a number of weeks after obtaining the visa. The Tribunal stated that this indicated that he had not left quickly as there had been a delay. The applicant said that he had travelled to Australia with his partner, *Ms X*. The applicant said that the delay was because they had to arrange for his child to stay with a family member in Bulgaria. They also went to stay with *Ms X*'s family and to say goodbye to them. He said that they were thinking “should we go or should we stay again”. They decided that they could not “stay anymore” and that they should move to another country.

42. They did not bring their child to Australia with them because she was too young. The applicant had a visa application rejected before. He was of the view that he would not be given a tourist visa if he had included his child in the application. He said “they would think that we were immigrating” He said “we had to sacrifice.”
43. He had trained in a trade, but he did not work in his trade in Bulgaria.
44. The applicant said that he had opened a small business in his hometown. He had hands on management of his business. The business was well positioned in the middle of the city. He operated the business for a few years before he was “pushed” to close it. He could not stand the ransoms and extortions anymore.
45. The business had started off reasonably well. The family had run a similar business during the communist regime. The applicant had spent a lot of time in the family's business as a child, and had helped in it from an early age.
46. The applicant lost interest in his business. He said that “it was open but [did not provide full services]”. His “head was not straight.” The business had been “dying” for several months before he closed it.
47. The Tribunal referred to the applicant's written claims and asked him about what had happened to him. He said that he had felt threatened, his dog had been poisoned and his car had been “stolen”. He said that the car had been moved from one spot to another. He said by moving it, “they were telling [him] that they could do anything they wanted”. The applicant said that he never been hit or attacked but had been threatened “heaps of times”. He had been verbally threatened. Windows had been shattered. *Ms X* had not been hit or attacked either, but the threats had been made against both of them. He said “they threatened the whole family”.
48. The applicant said that “ordinary people” like him referred to the Bulgarian mafia as *mafia*. This meant “ugly faces” in Bulgarian slang. There was one mafia group in the applicant's local area. That one group controlled everything. They did not have any competition. The group included ex-police officers, and former sports stars. The applicant said that if you complained to the police, the police told the mafia, and you got into more trouble.
49. The *mafia* in the applicant's area had begun to import equipment. They wanted to put them everywhere, including all the local businesses. They approached the applicant with a view to putting this equipment in his business. He did not want them. He said that it was a small premise and it would change the atmosphere. It would mean that *mafia* would come in and check on the equipment. This would inevitably put off the

clientele, and there would be bankruptcy. He refused. This put the applicant in the *mafia*'s "radar". From this time on, he was made to pay protection money.

50. The protection money requested started in fairly small amounts, but increased over time to amounts that he was unable to pay. The amount was raised month after month. Also, Bulgaria went through an economic inflation and the "money became bigger numbers". He said that he could not remember the turnover of his business. He said that he was "kind of struggling". He was making some money but most of his profits went to the *mafia*. He resisted the increase a few times and they started making threats "and then the dog got killed and the car got moved".
51. The Tribunal asked how the applicant knew the *mafia* was responsible for the death of the dog. He replied that "everyone knows that. If you made trouble with those people, everyone would expect that." The dog was a "[guard dog]", which stayed at the business premises overnight. One morning when the applicant arrived at work, he found the dog dead. It had been poisoned. The applicant said that he did not know the poison would have got into the locked building. He said that he reported the matter to the police. The police said "maybe that the dog had eaten rat poison". The applicant told the police that he did not keep rat poison. The police officer had said, "oh well, buy another one." The applicant said that the dog had died on [date].
52. Representatives of the *mafia* would come into the business once or twice a week, "to have a look" and to make sure the applicant "remembered them". They were not the same people each time.
53. The applicant said that he always handed over the money. If he had not, he "would have been beaten for a start". He said that he did not know what would have happened after that.
54. The applicant said that there was only the one occasion when his car was moved. That had happened after the dog was killed, "probably in [year]". At that time there had been a spate of car bombings. His father found the car a few days later, on the other side of the street in the parking lot. It was undamaged. The applicant had left his passport and licence in the car, but nothing had been stolen. The applicant said that it was his "habit" to leave those documents in the car. When the Tribunal pointed out that this seemed risky given the threats, the applicant said that he had not thought about it. He said that he had reported the matter to the police.
55. The Tribunal asked whether the applicant reported the increased demands for payment to the police. He said that the police were part of the problem. Some ex-police were members of the *mafia* who still had contacts within the police force. He said "they are all connected". He said that some police used his services without paying. He said "they just got up and left." The applicant said that "they were people in power and you can't tell people in power anything."
56. The applicant said that "a lot of people were paying the *mafia*". People were beaten and killed and had their lives threatened. This was why the applicant "decided to get out". He could not sleep, he could not go anywhere. The applicant cited the example of the owners of the local petrol stations. They were particularly vulnerable because of their high turnover. Two of them were beaten up badly.

57. The applicant said that he had no friends in the *mafia*, and he had never joined in their activities. They had their own group from schools.
58. The applicant's child was often at the business. The child came in after attending school. The child was there on occasions when the *mafia* men came into the business asking for money. He said that he could not remember if he had changed the child's school, apart from when they moved to one closer to where his family member lived, at the time that they left Bulgaria. The Tribunal referred to the applicant's statement which had claimed that they had changed schools because they felt frightened. The applicant then said that he remembered that they had changed schools. He and *Ms X* decided to put their child into a "weekly" school. They thought it was better if the child slept at the school over night. They moved her so that she would not be close to them if something bad happened.
59. The Tribunal asked the applicant if he was ever threatened outside the business premises. He said that he was not, but he could see the *mafia* men watching in the city centre. They "gave the look. It was obvious."
60. The Tribunal asked if the applicant had ever been threatened with death in Bulgaria. He said that "it was well known, you did not have to have a direct threat."
61. The applicant did not hear from the *mafia* when he closed the business. He did not have a confrontation with them because after closing the business he moved around a lot before coming to Australia. He said "but once you were a target, you were always a target."
62. The applicant said that *Ms X* returned to Bulgaria after a few years. She found that she could not live in Bulgaria, and she took their child to live in Country A. However, *Ms X* passed away earlier this year. The applicant's family member moved to Country A to look after the applicant's child.
63. The applicant is very sad that he has not seen his child since he left. He said that his child and guardian have applied for tourist visas to visit him in Australia. However, as his child was under 18 years old, there had been problems with guardianship and so on. He had forwarded documents relating to age and to prove that he was the child's father. He hoped that they his child will be able to come to Australia too.
64. The applicant started a relationship in Australia with *Ms Y*. She has a child. She has two children with the applicant. He does not live with *Ms Y* and the children currently. He wants to. He wants to be a "real de facto" or get married one day and become a proper family. Initially, they lived apart and saw each other only during the weekends. Then she moved to be closer. Now, they do live "about half an hour" apart.
65. The applicant said that he has not worked in Australia. Employers want tax file numbers. He does not have one. His sibling continues to send him money from Bulgaria.
66. The Tribunal pointed out that it seemed that he had not been in fear of persecution in Bulgaria, because he delayed applying for a protection visa for a few months after arriving in Australia. The applicant said that his English had been poor. They

eventually were recommended to get assistance from migration agency. They had paid “a lot of money”.

67. The applicant said that it has been many years since he left Bulgaria. The Tribunal pointed out that Bulgaria had changed in that time. Independent information indicated that the European Union (EU) had required Bulgaria to clean up the profiteering and racketeering. The Tribunal pointed out that it appeared that the situation in Bulgaria had improved. The Tribunal asked why it was that he would he still fear persecution more than 10 years after leaving Bulgaria. The applicant said that Bulgaria had only a “temporary” membership of the EU. He said that Bulgaria “needs to clean up the mafia and the police”. He thought that he could be “remembered” His sibling had told them that there were several of the “old ones still around”.
68. The Tribunal asked if the same group that had been in power at the time in his local town was still in power The applicant said that he did not know. The Tribunal said, if that were the case, how could he claim to fear persecution? The applicant repeated that his sibling had said that there were “a few of the old ones still around”. The Tribunal asked why these “old ones” still be interested to persecute the applicant many years later? The applicant said “I don’t know. But I [had] better be safe than sorry.” They might not do anything to him but he was not 100% sure of this. It could be dangerous. He did not know for certain. The Tribunal asked what he feared if he were to return to Bulgaria. He replied that “anything could happen.” The Tribunal pressed him and asked if there was anything specific that he feared. He said “threats, killing.”
69. He said he was not sure how he would earn income if he had to return to Bulgaria. He had no idea.
70. The Tribunal asked the applicant if he could relocate to another part of Bulgaria. He said that if he were in Bulgaria he would feel safe for a while but then it would be “to tempting” to visit his old home town and visit “old relatives”. The applicant said that he has some uncles in the town. The applicant is now in “another part of the globe” otherwise he would go and see them.
71. The applicant said that if he did have to leave Australia, he was fairly certain that he would not return to Bulgaria. He did not want to “go through that again”. There was a chance that he would be recognised and beaten and killed. But maybe he would be lucky and not be recognised. But he did not want to go around “stressed”. He said that instead of going to Bulgaria, he would go to Country A to see his child. The Tribunal asked them if that was inconsistent with his previous response about feeling tempted to visit his home town. The applicant replied that it was not inconsistent. He had been asked about the situation, were he to return to Bulgaria. He said that “the truth of the matter” was, if he had to leave Australia, he would not return to Bulgaria.
72. The applicant said that he had voluntarily attended DIAC offices this year. He had thought “I can’t keep living like that.” He wanted to sort out his immigration status so that he could stay in Australia, and live with his family here. He wants to be with his family “24 hours a day”. He wants to be like “a normal person and take care of [his] family.” The applicant was told that he had to sort out what he wanted to do. A migration agent had raised the possibility of him going to abroad, and applying for a visa there. However, then he had been told that he had not been properly notified of the Department’s decision, and so he applied to the Tribunal.

Independent information

73. The *mafia* (known in Bulgarian as *nutri*, plural *nutra*) in Bulgaria rose in the wake of the fall of the Communist regime in 1989, and was composed of former secret service members and professional sportsmen, most prominently wrestlers. These *mafia* groups took control of local street crime and then moved into racketeering and extortion before founding “insurance” companies, which were fronts for protection rackets. Local businesses would be offered ‘insurance’, and if they declined, their businesses would be attacked and damaged until they agreed to pay. By the mid-1990s, government sources, including the President, were claiming that Bulgaria was in danger of becoming a “mafia state”, and that organised crime had penetrated all levels of state authority. Several media reports claimed that the police were too under-resourced and demoralised, or too corrupt, to effectively combat organised crime and corruption. In 1997, the government began to crack down on the “strong-arm” insurance agencies, and the ‘mafia’ began to move their resources into semi-legitimate front organisations, and, according to two sources, the profusion of protection rackets declined, at least as practised by *mafia* organisations (Angelov, S. (undated), ‘Gang Bang’, *Vagabond* magazine http://www.vagabond-bg.com/index.php?page=business&sub=11&open_news=831 – Accessed 3 November 2008; and Schonfelder, B. 2005, ‘Bulgaria’s Long March Towards Meaningful Credit Contracts’, *Post-Communist Economies*, Vol. 17, No. 2, June 2005, pp. 173-204, p.199; Jones, G. 1995, ‘Organised crime threatens Bulgaria’s fragile economy’, *Reuters News*, 26 May –; ‘Bulgaria bomb blast was act of “kamikaze” – ministry’ 1996, *Reuters News*, 22 January; and Sergeva, V. 1995, “Thick necks’ terrorise Bulgarians’, *Agence France-Presse*, 12 November; Schonfelder, B. 2005, ‘Bulgaria’s Long March Towards Meaningful Credit Contracts’, *Post-Communist Economies*, Vol. 17, No. 2, June 2005, pp. 173-204, p.199; for Bulgaria becoming a “mafia state”, see: Fletcher, P. 1995, ‘Bulgaria threatened with mafia rule – president’, *Reuters News*, 10 February –Semerdjieva, L. 1995, ‘Bulgarian police reports boom in financial crime’, *Reuters News*, 19 January; and Amnesty International 1996, *Country Report – Bulgaria*, June; Jones, G. 1995, ‘Organised crime threatens Bulgaria’s fragile economy’, *Reuters News*, 26 May; Human Rights Watch 1999, *Bulgaria – Money Talks: Arms Dealing with Human Rights Abusers*, April; Fletcher, P. 1994, ‘Bulgaria declares war on organised crime’, *Reuters News*, 21 October.
74. A January 1995 report states that “[d]elays in structural reform of Bulgaria’s former communist economy have allowed corruption and racketeering to flourish and a poorly-paid police force is ill-equipped to cope”. According to this article, “[i]nterim Prime Minister Reneta Indzhova said last month organised crime had penetrated all levels of state authority and the judicial system was unable to break the power of criminal groups” The report quotes the National Police Director stating that “[o]rganised crime and racketeering also posed a direct danger to the population...as it involved killings, destruction of private property and kidnapping” (Semerdjieva, L. 1995, ‘Bulgarian police reports boom in financial crime’, *Reuters News*, 19 January).
75. The US Department of State’s 1997 *Country Report on Human Rights Practices* for Bulgaria states that:
- The Government generally respected the human rights of its citizens, but problems remained in some areas. Police used unwarranted lethal force against suspects and minorities in some cases. Security forces beat suspects and inmates and at times arbitrarily arrested and detained

persons. Government control of the police is not sufficiently complete to ensure full accountability. This results in a climate of impunity and inhibits government attempts to end police abuses (US Department of State 1998, *Bulgaria Country Report on Human Rights Practices for 1997*, 30 January).

76. Sources indicate that the *mafia* remains powerful in Bulgaria. A 2008 report from the Commission of European Communities states that “[t]he fight against high level corruption and organised crime is not producing enough results. While there has been movement on a few cases and widespread publicity given to the “war on corruption” these cases represent a negligible share of such crimes”. An October 2008 report from the *International Herald Tribune* states that EU grants to Bulgaria have been appropriated by organised crime groups to the extent that the EU has withheld €500 million of funding. According to 2008 reports from the US Department of State (USDOS), Transparency International and Human Rights Watch (HRW), corruption remains a major problem at all levels of government, the judiciary, and the police, and another 2008 Transparency International report claims that the Bulgarian public has little confidence in most public institutions. The 2008 USDOS report claims that “[a] large percentage of crimes went unreported because victims had little confidence in police”, and the 2008 HRW report claims a “widespread lack of confidence in the courts and the police” among the Bulgarian public. “Security” companies are still thriving; an October 2008 report from the *International Herald Tribune* claims that “[s]eventy-five percent of Bulgarian businesses have security protection”. This report also quotes “Stefan Popov, executive director of Riskmonitor, an anti-corruption organisation in Sofia”, who claims that “[t]he bad guys are insiders. It’s one thing to have some mafia guy corrupting officials. It’s quite different if the mafia guy becomes the public official”. A September 2008 report from the *Guardian* claims that “[c]orruption in Bulgaria is a way of life”, and quotes a diplomat who claims that “[i]t has got to the point where Bulgarians expect officials to be corrupt”. A May 2008 report from the *Telegraph* claims that “Bulgaria’s mafia was thriving aided by the interior ministry officials who were meant to be hunting them”. (US Department of State 2008, *Country Reports on Human Rights Practices for 2007 – Bulgaria*, March 11, sections 1.d, 1.e, 2.a, & 3; and Carvajal, D. & Castle, S. 2008, ‘Bulgarian corruption troubling the European Union’, *Novinite Sofia News Agency* (source: *International Herald Tribune*), 16 October).
77. Amnesty International’s 2008 report for Bulgaria states that the European Union (EU) is concerned about ongoing corruption and organised crime in Bulgaria:
- On 1 January Bulgaria became a member state of the European Union (EU). In its progress report in June, the European Commission urged Bulgaria to adopt tougher measures to fight and investigate corruption and to reform its justice system. The Bulgarian authorities were also instructed to implement a strategy to fight organised crime (Amnesty International 2008, *Amnesty International Report 2008 – Bulgaria*, 28 May).
78. A July 2008 progress report from the Commission of European Communities provides further information on Bulgaria’s fight against corruption and organised crime:
- On entering the EU in 2007, Bulgaria faced still serious challenges in ensuring the functioning of its judiciary and in fighting corruption and organised crime. These challenges were judged by the Commission and the other Member States to be surmountable and the Bulgarian authorities committed to remedy shortcomings in these areas so that Bulgaria could fully assume the rights and obligations of EU membership. The Bulgarian authorities and the other Member States recognised that far reaching judicial reform and a concerted effort to

fight corruption and organised crime were necessary if Bulgarians were to be able to exercise their rights as EU citizens and benefit from all the opportunities, including financial support, that EU membership would bring. More broadly, they recognised that principles which are at the heart of the EU – respect for the rule of law, mutual recognition and cooperating on the basis of a fundamental bargain of trust – could only be put into practice if these problems were tackled at source. (Commission of European Communities 2008, *Report from the Commission to the European Parliament and the Council: On Progress in Bulgaria under the Co-operation and Verification Mechanism*, European Commission website, 23 July http://ec.europa.eu/dgs/secretariat_general/cvm/docs/bulgaria_report_20080723_en.pdf – Accessed 23 October 2008).

FINDINGS AND REASONS

79. The applicant claims to be a national of Bulgaria. On the basis of the available information, the Tribunal is satisfied that the applicant is a national of Bulgaria and it has assessed his claims against Bulgaria as his country of nationality.
80. In consideration of the evidence as a whole and for reasons explained below, the Tribunal finds that the applicant does not have a well-founded fear of persecution.
81. The applicant claims to fear persecution in Bulgaria because he refused to have mafia equipment in his business premises and as a result came “into the radar” of the *mafia*. Increasing amounts of money were demanded from him. He claims that he was verbally threatened, his family felt threatened, his dog was poisoned and the building premises were damaged, his car was “stolen” and then replaced. He claims that the police did not assist him. He claims that if he were to return to Bulgaria a few of the “old ones” may recognise him and may harm him.
82. The Tribunal will consider the applicant’s fear of persecution on the basis of his membership of a particular social group.
83. The meaning of the expression “for reasons of ... membership of a particular social group” was considered by the High Court in *Applicant A*’s case and also in *Applicant S*. In *Applicant S*, Gleeson CJ, Gummow and Kirby JJ gave the following summary of principles for the determination of whether a group falls within the definition of particular social group at [36]:

... 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”. ...
84. 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.

85. The first question for the Tribunal to determine is whether there is a relevant social group of which the applicant is a member. If so, the next question for the Tribunal is whether the persecution that the applicant fears is for reasons of membership of the group.
86. The definition of “particular social group” is wide and flexible. In the 1992 Federal Court case *Morato v MILGRA*, Justice Lockhart stated:

The interpretation of the expression “particular social group” calls for no narrow definition, since it is an expression designed to accommodate a wide variety of groups of various descriptions in many countries of the world which, human behaviour being as it is, will necessarily change from time to time. The expression is a flexible one intended to apply whenever persecution is found directed at a group or section of a society that is not necessarily persecuted for racial, religious, national or political reasons.
87. The Tribunal considers it possible that the applicant could be a member of two particular social groups which are: *Bulgarian Business operators* or *Bulgarian business operators in the 1990’s*.
88. The Tribunal considers on the basis of the independent information, the groups that it has identified for the applicant, are cognizable within society and that these groups are distinguishable from Bulgarian society at large. Further, it is not the shared fear of persecution that is the attribute common to all the members of these groups.
89. The next question for the Tribunal is whether what the applicant fears gives rise to a well-founded fear of persecution for a Convention reason. This involves an inquiry as to whether the applicant faces a real chance of serious harm for the essential and significant reason of belonging to any of the particular social groups which the Tribunal has identified: *Bulgarian Business operators* or *Bulgarian business operators in the 1990’s*
90. The Tribunal accepts that the applicant’s dog may have died and that the police did not investigate the matter when he reported it. The applicant claims that the dog was poisoned by the *mafia*. However, he said that he did not know how the poison could have been administered, given the business premise was closed and locked. The applicant claims that his car was moved and then replaced undamaged with nothing stolen from it. He claims that the *mafia* was responsible. The Tribunal accepts that the car may have been moved by someone without the applicant’s consent. However, the Tribunal finds it unusual that the applicant would risk leaving his passport and licence in the car despite claiming to feel threatened at the time.
91. The applicant claims that he felt threatened and so paid increasing amounts of money to the *mafia*. He claims that the police would not have assisted him if he had reported the demands for payment because of the connection between some of the ex-police officers and the *mafia*. The Tribunal accepts that the applicant paid money to the *mafia*, and that these demands for money increased at the time that there was also economic inflation in Bulgaria.
92. However, the applicant delayed leaving Bulgaria for a number of weeks after obtaining his visa to visit Australia. Although the Tribunal accepts that it would take some time to arrange for a family member to care for his child and to say goodbye to

families, the extent of the delay indicates to the Tribunal that the applicant was not in fear of persecution. Further, the applicant told the Tribunal that after obtaining the visa to visit Australia, he and Ms X were still wondering whether they should stay or go. This indicates to the Tribunal that the applicant felt that he had a choice about staying and that he therefore did not fear persecution.

93. Also, the applicant delayed applying for a protection visa for several months, once he had arrived in Australia. This suggests that he was not in fear of persecution, even if it did take some time to find a migration agent.
94. The applicant told the Tribunal that if he were to return to live in another part of Bulgaria he would be tempted to return to his home town. This suggests that he is not in fear of harm, because if he were, he presumably would not be tempted to go there at all. He also told the Tribunal that he did not know whether the same *mafia* group was in power in his hometown. This suggests that he is not aware of the current situation as regards the *mafia* in his town. When this issue was brought to his attention, he told the Tribunal that his sister had told him that some of the “old ones” are around. However, when the applicant was asked about what persecution he feared may result if he were to return to Bulgaria, he said that he did not know what would happen. When pressed further, the applicant said that he might be recognised. He might be beaten or killed. However, the applicant has not claimed to have been physically harmed in the past. He told the Tribunal that he did not hear from the *mafia* when he closed his business. The Tribunal finds it difficult to accept a claim many years on, that there is a continued interest in him. The Tribunal does not accept the applicant’s claim that there is a continuing threat to his life and safety.
95. The applicant claims that despite Bulgaria’s recent entry into the EU, problems of corruption and racketeering still exist. The independent information set out above, and that submitted by the applicant’s representative, indicate that there is some basis for these concerns. However, the EU continues to monitor Bulgaria’s progress in this area. The European Commission continues to urge Bulgaria to adopt tougher measures to fight and investigate corruption and to reform its justice system and police administration. The challenges are judged by the Commission and the other Member States to be surmountable. The Tribunal considers that the fears of the applicant do not result from systematic and discriminatory conduct directed against him either as an individual or as member of a particular group.
96. On the basis of the available information, the Tribunal is not satisfied that there is a real chance of any Convention-related harm occurring to the applicant in the reasonably foreseeable future.
97. Therefore, the Tribunal finds that the applicant does not have a well-founded fear of persecution for a Convention-related reason.
98. While the applicant is not a person to whom Australia has protection obligations, the Tribunal feels some sympathy for him and his Australian family. He has not sought to mislead the Tribunal in regard to his claims. There is documentation regarding Ms Y’s children on the Tribunal file. The Tribunal has no reason to doubt his claim that he is the father of children. The Tribunal accepts that the applicant wishes to resolve his immigration status and care for his family. However, the only current role for the Tribunal is to determine whether the definition of “refugee” applies to the applicant’s

circumstances. A consideration of his circumstances on other grounds is a matter solely within the Minister's discretion.

CONCLUSIONS

99. Having considered the evidence as a whole, 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

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

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. PRRT38