

071512328 [2007] RRTA 190 (21 August 2007)

DECISION RECORD

RRT CASE NUMBER: 071512328

DIAC REFERENCE(S): CLF2007/37624

COUNTRY OF REFERENCE: Uzbekistan

TRIBUNAL MEMBER: John Cipolla

DATE DECISION SIGNED: 21 August 2007

PLACE OF DECISION: Sydney

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

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

This is an application for review of a decision made by a delegate of the Minister for Immigration and Citizenship to refuse to grant the applicant a Protection (Class XA) visa under s.65 of the *Migration Act 1958* (the Act).

The applicant, who claims to be a citizen of Uzbekistan, arrived in Australia and applied to the Department of Immigration and Citizenship for a Protection (Class XA) visa. The delegate decided to refuse to grant the visa and notified the applicant of the decision and his review rights by letter.

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.

The applicant applied to the Tribunal for review of the delegate's decision.

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

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.

Section 36(2)(a) of the Act provides that a criterion for a protection visa is that the applicant for the visa is a non-citizen in Australia to whom the Minister is satisfied Australia has protection obligations under 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).

Further criteria for the grant of a Protection (Class XA) visa are set out in Parts 785 and 866 of Schedule 2 to the Migration Regulations 1994.

Definition of 'refugee'

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.

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.

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.

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

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.

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.

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.

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.

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.

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

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

The applicant lodged a protection visa application with the Department. The application indicated that the applicant was born in Uzbekistan.

The form C submitted with the application indicates that the applicant speaks, reads and writes English, speaks and reads Turkish, and speaks, reads and writes Uzbek. The applicant claims to be Islamic. The applicant also claims to be married.

The Tribunal notes that at Question 24 the applicant when asked about his countries of former habitual residence or transit before arrival in Australia, he notes Uzbekistan and Country A. The applicant travelled to Australia on an Uzbekistan passport issued by the Republic of Uzbekistan a number of years ago. The applicant claims not to have travelled outside his home country prior to his current trip to Australia.

The applicant provided evidence of living in six addresses in Uzbekistan in the last ten years. The applicant completed 13 years of education and had studied in Australia. The applicant claims to have worked for a number of months.

The applicant's claims are annexed to his refugee application and are replicated in full.

"I am an Uzbek. I am married. I don't hold the citizenship nor possess the rights to stay in any other country.

My father, [name], born on [DOB] in [location], died on [date] in [location] Hospital. He had a small injury he went to a hospital but he died mysteriously. The cause of death never revealed to us. He was only [age]. He was very healthy. I can provide the death certificate of my father. I was too young to remember. There was strong believed (sic) in our family that he was killed by the authorities because of his political belief.

My mother, [name], born on [DOB] in [location], Republic of Uzbekistan. She is a [occupation] in [location]. My mother is a widow. She never married after my father's demise.

I have [three siblings]. My mother is the bread earner of the family.

On [dates]: I went to school in [location].

In [date] I was engaged with [name] born on [DOB]. She is an Uzbek from my town. She is also my neighbours. We fell in love. We went to the same school.

In [date] I moved to [location] for further studies.

From [dates], I did a [educational] course in [location].

On [date], I sat for [exam] but a place in the [institution] was not given to me. It was sold to someone else. I was disadvantaged because I did not have a strong connection with authorities or did not bribe them. The places for the [institution] were already determined to designate students.

From [dates], I was self-studying and assisted my maternal [relative A], [name] with his business. My [relative A] was selling [equipment], my [duties] for my [relative A's] company. His company called [name] located in [location].

In [date], my [relative], [relative A] sent me to Andijan Province for business. My [relative A] sent me to check the prices of [equipment]. He wanted to open [a new business] in [location].

In [date] I was the witness of Uzbek protestors. [Specific details of the protest deleted in accordance with s431 of the Migration Act].

I was not part of the demonstration but I got caught up with the mob. I was going to go to market but everybody was joining the demonstrators against the government. I saw helicopters were circling around the sky and monitoring the protestors. Then I saw tanks appeared on the streets and armed soldiers. I felt some sense of danger and I was scared from the boiling situation. It was afternoon [date] that I went home.

On [date], the police raided the house where I was staying. The owner, [Person B] was a friend of my late father. He was from our village but he went to Andijan and married and settled there. He was religious Sofi Muslim and he had some followers who came to his house to study with him. While I was with him he taught me how to pray. I did not know much about Islam. He was my spiritual father.

They ransacked the house and took some Islamic books. The police arrested me, [Person B] with a view to others. I was taken to a police station. I was questioned by the police what I was doing in Andijan. I was told that I was Akramye and came to Andijan for political purpose. I said I did not know anything about Akramye and I told me why I came to Andijan, I showed my papers. They put me in a dark room. They woke me in the middle of the night and asking me question what I am doing in Andijan. They accused me of Islamic extremism. They asked me question concerning my family and they kept me there seven days they told me kill me. On the seventh day my [relative A] and my mother came searching for me in Andijan. They released me by paying bribes to the authorities. They thanked God that I was alive. My mother cried so much. We did not see [Person B] again. During the period I was at police station I suffered from physical and mental forms of torture. They hit me to my face and kicked me in the stomach. They [description of injuries] by using excessive force. They expected me to tell them that I was with Akramye Group but I told them the truth that I did not know them. I am still suffering from these injuries. It becomes sometimes very painful. In [date], I returned to [location] with [relative A].

My father's wife's father, [Person C] was arrested in seven years ago. He was accused of being Wahabi. He was not a Wahabi. His relative only allowed seeing him once a year. He was being tortured. His wife waited for this release [number] years and she never married. From his marriage [Person C] has only one child. This

year he divorced his wife asking her not to wait for him because the authorities torture him until he would die.

In [year] my [relative A]'s friend, [Person D] was arrested he was a businessman in [location]. He had a business in [location]. Then he went to [location] of [name] Region of his hometown. He went to mosque a few times. He was warned by the authorities on a few occasion but he did not take the warning seriously. On the third occasion the police put some Wahabi books and Hesb-e-Tahir books and some guns in his car at night time. The next time the police sieged his house and charged him as Islamic extremists. For the communist authorities it is a good opportunity to arrest business people or democracy loving people or people with Caliphate view to brand name under the name of Islamic extremist and terminate them.

I stayed in [location] until [date]. I could not sleep, I was very depressed and I very sad and I was thinking about how the police would kill [Person B] and I was suffering from nightmares. My [relative A] advised me I would go back to my town, get married, I may get better.

In [date], I went to my town of [name] and married my wife, [name]. We had been living together since [date]. In my religion it is mandatory to attend in Friday's prayers collectively in the mosques. So I went to [location] Mosque in my village about two kilometres from my family home every Friday. I noticed to be the only young person against all elders. I did not know that the authorities had agents in the mosques as mosque goers.

On [date] it was Saturday morning there were five armed policemen raided my family house. Two officers came inside my house and the other three waiting outside and keep an eyed from the outside of my house. The ransacked the house and looking for books and written materials and anything. I was at home with my family. My family I mean my wife and siblings. They hand-cuffed me and took me to police station. They arrested me in front of my wife and family. My family feared for my life and they could not dear to stop the policeman. They took me to the normal police car.

They interrogated me. They questioned me. They said that I belonged to Hezb-e-Tahrir. They put to me that I was a Wahabi sect. They asked me questions about why I was in Andijan on [date]. I told the truth. That was I did not belong to any political party as Hezb-e-Hahree or Wahabi sect. I told them that my travel to Andijan to total accidental not with intention to participate in the uprising. They asked me to write the names of Hazbe-Tahrir people whom I was in contact with. They asked me the names of Hazb-e-Tahrir activists. They questioned about the names of Wahabi activists. They accused me of being a member of Hazb-e-Tahree and being a Wahabi but denied all the allegations. I was detained for [number] days in the police station. In the first [number] days the were nice with me but on the [number] day the completely changed they said that this the time that I should tell the truth.

On [date], they tortured me to extract information that they were after and expected from me. They put me in a room with a lot of light putting my eyes direct to the light and strapping me in a chair. They did not let me to sleep. Every time I went to sleep they put cold water on me and started to bush me.

On [date] they put me in room with a very harsh noise. I felt that my brain would expose from the load (sic) noise. I cried and asked them to stop it. Every time they stopped it they came back and asked me to tell them about what they wanted. But I

told nothing because I knew nothing. I vowed that I did not know anything but they did not believe me.

On [date] they took me to a water barrel full of cold water. They pushed my head into the water and held it until me breaking point and then the got me out I could not breathe. They keep repeating this for several times. I did not know anything I told them. My [injury] got worse as a result of beatings.

On [date]. The naked I and they scared to rape me but I did not have anything to tell them. Then my [relative A] found out that I was arrested, he came and released me by paying bribes to a third person. Nobody was allowed to see me in the first [number] days. My [relative A] on the [number] days managed to come to the station with another person who knew they had a police station and released me on undertaking that I did not belong to any political party and to promise not to go to Juma (Friday prayers), to report to authorities any Hezb-e-Tahrir of Wahabi if I would get an invitation from them. I signed an undertaking and I was released on good behaviour bond undertaking of [relative A] signed at the police station.

I returned to my family home. I was in fear of being arrested and killed. I could not sleep and forced myself not to sleep because when I slept I got nightmares. I screamed in the middle of the night and my mother came to my bed comfort me and she slept with me and my wife. My wife was crying for my condition and she was scared too and it was very hard. My [injury] got worse and it was painful and I still suffer from the same symphthems (sic). I can not read. I can not concentrate and life did not mean anything to me.

In [date] I went to [location] my [relative A] asked me to come to [location] and work for him. My mother and my wife were very concerned about my condition. My mother asked his, [relative A], to take me to [location] and keep me busy there it would be good for my mind if I could occupy my mind. My mother asked my [relative A] if he could get me out of Uzbekistan as it was not safe for me. [Relative A] was like a father for me, he was looking after our family. He knew that the authorities would come and take me because I had already a file with the police. He knew that the police realised only for money. He knew that the next time if I were caught I could be killed. My [relative A] said too that he would send me to Australia to [study] and get treatment for your mind and that I would concentrate better.

On [date] I came to Australia to [study] on student visa. I went to [institution]. I was staying in [location] then I met [Person E] and his family after [period of time] of my arrival in [Australia]. I felt lonely and I went to their place.

I felt lonely and I could not concentrate I wanted to return because could not sleep and it was very hard for me. I still had those bad dreams and my wife was calling me and crying for me and she was crying and I rang my mother told her that I would return for good. I spoke to [Person E] about my psychological problems and pain of my [injury] and he took me to a herbalist and he bought me some medicine which helped me a little bit not too much.

From [date] I returned to Uzbekistan and joined my wife and my mother I landed in [location]. I remained in [location]for [number] days and I returned to my wife and mother and siblings. My family was happy to see me but they were feared because of my presence in my home country because the authorities would come after me. I kept a low profile being contained in my home not venturing outside.

I did not go for Juma prayers but I was going to Australia every Friday to [name] Mosque. I did not go for I did not go to Juma (Friday prayers) but I went on [date]. I finished my prayers around 1.45 pm. Again there were all the elders and some of them greeted me knowing that I returned. I did not notice anything. Juma prayers is compulsory in my religion also the prayers give me good feelings. That the only way I worship God. Since I saw not any other young people then I said to myself to go to mosque again. I felt that those people who reported me would do the same. I did not return home than I escaped to my friend's place, called [Person F]. He was my school friend. He had shop the town of [location]. I went to his shop and I told him that I sensed that the authorities would come after me to my family house and searching for me. [Person F] was not a religious person. He was selling cigarettes [goods] in his mixed business shop. He told me that he had always told me not to go to mosque because you would put everyone in trouble. I told him to help me as I needed this help the most.

[Person F] called his [relative] to come and take over the shop. [Person F] took me to his family home. He said to his father that I was in trouble. His father [name] went to my family address from his home the next morning early in the morning. He said to my wife and mother that I was safe. They were not sleeping at night because the police came to their house and ransacked the house and the police were after me and questioned my family. They police could not find anything. Then the police said that they should find me and said that I should be reporting to police station as soon as possible. My mother begged [Person F]'s father to keep me in their place until I would leave the country.

On [date], [Person F's father] returned to his house and told me that I was in trouble and the police was after me and he wanted me to leave as soon as possible and he told me that my presence would endanger his family as well. He said that he cannot hide me in his house for the rest of my life. Then [Person F] took me by his car to [location], my [relative A]'s place. It took us about six hours. We arrived there it was getting dark when we arrived.

[Person F] stayed overnight and returned home. My [relative A] learned what had happened. My [relative A] was very worried about me and told me to go back to Australia and he would help my family to leave Uzbekistan. He said that he would send them to [Country Z]. My [relative A] took me to the [airport] and he was there and my plane departed. I did not say goodbye to my mother and my wife and [siblings]. I may never see them again. This is torturing me all the time.

On [date], I escaped from Uzbekistan and arrived at [Australia] on [date]. I will be killed by Uzbekistan authorities if I were to return to my homeland. I doubt the protection of my government and the authorities are after me. My mother told me I should return to Uzbekistan and she said that the authorities were after me. The authorities will kill me. I am young. I like to live. I have not anything wrong. I was at the wrong time in the wrong place and I should be able to pray and go to Friday prayers because as I do here in Australia. I go to Turkish mosques. The prayers give me peace of mind. I am not a extrimits (sic). I just pray because any Muslim should pray and that gives me peace of mind. I am a moderate Muslim. I don't have the citizenship of any other countries and I don't have the right to stay in any other country. Please help me. I don't have a criminal history, I never been charged by the police anywhere. I am a law obedient person. I am very fear for my life. I get headaches, I lost weight. I cannot sleep.

Life now does not have any meaning to me. I am separated from my wife and family. I am in constant fear. I am going mad. My [injury] is very painful. I cannot work or

study because of the pain and I cannot sleep. The lack of concentration and constant fatigue torturing me every night. I like to be alone with myself and I don't like to see people. I need treatment.”

A decision was made by the Department of Immigration to reject the applicant's protection visa application. The Departmental reasons are substantially replicated below.

The Department noted that

“The applicant is a [age] student from [location], Uzbekistan where he lived with his mother and younger siblings. The applicant's father died in [year] in a hospital, but his family were never told the cause of his death and suspect it was related to his political beliefs. He completed high school in [date], and undertook a [course] between [dates] in [location]. However he was not offered a [institution] place due to the corruption of the selection process which favours students whose families can pay bribes. From [dates], the applicant studied independently and worked for his [relative A] who owned a [business].

In [date], the applicant's [relative A] sent him to Andijan to [business purposes], with a view to extending his business in [location]. While there, the applicant witnessed the [protest] on [date] while he was going to the market. The applicant was not a protestor but became caught up in the mob. When he saw helicopters, tanks and armed police appear the applicant became scared and returned home. The next day, the applicant claims the house where he was staying was raided by police who arrested him, the house's owner and two others. The owner of the house had been a friend of the applicant's father, and had taught the applicant about Islam and how to pray. The applicant was taken to a police station where he was asked about why he was in Andijan. He was told by police that he was a member of Akramiya and that he had come to Andijan for political reasons. The applicant denied this but he was kept in a dark cell for [number] days and questioned about his family and his political and religious affiliations. The applicant claims he was tortured during this detention and was told he would be killed. The applicant's mother and [relative A] came to search for him in Andijan and after locating him secured his release on the [number] day of the detention by paying bribes. The applicant never saw his father's friend again, and returned to [location] with his [relative A]. He remained in [location] until [month] but was very depressed and suffered nightmares after being tortured. His [relative A] told him to return to [location] and get married, hoping this would help him recover. The applicant married on [date]. (The Tribunal notes that this appears based on the application to be incorrect)

The applicant then started attending the local mosque in [location] each Friday and noticed he was the only young man among all the elders. On [date], the applicant claims five armed police raided his family's house and ransacked it. The applicant was handcuffed and taken to a police station where he was interrogated. The applicant was accused of being a member of Hezb-Ut-Tahrir (HuT) and Wahabbist. He was questioned about his presence in Andijan during the [protest] there. At first the applicant claims the police were nice to him and then they began torturing him to extract information. The applicant claims he was subject to bright lights, sleep deprivation, near drowning, loud noise and threatened rape. On the [number] day, the applicant's [relative A] secured his release by paying bribes and guaranteeing that the applicant would not attend Friday prayers and would report any information about extremism.

The applicant returned home but suffered nightmares and was afraid to sleep. He suffered ongoing pain from the injuries he had received during torture, including a [specific injury]. The applicant could not concentrate and lost all interest in life.

In [date], the applicant's [relative A] asked him to come to [location] and work for him. The applicant's mother asked [relative A] to get the applicant out of Uzbekistan, and [relative A] decided to send the applicant to Australia to [study] and to get psychiatric treatment.

On [date] the applicant first arrived in Australia. He started [studying]. About a [period] later, the applicant met a [man], who helped the applicant obtain some pain relief medication for his injuries. The applicant regularly attended Friday prayers at [location] Mosque.

On [date], the applicant returned to Uzbekistan to visit his wife and family. After spending [number] days in [location] he went to [location] where he kept a low profile and stayed in the family home. The applicant did not go to the mosque for two Fridays but did so on [date]. However he then became afraid that he would be reported again and sought refuge at a friend's home. The friend went to tell the applicant's family the next day that he was okay, but learnt that the police had been to the applicant's family's home the previous night and questioned the family about the applicant's whereabouts. The police left instructions that the applicant should report to the police station when he came home. The friend's family then told the applicant they did not want him to bring them trouble, and that he must leave. The applicant's friend drove him to [relative A]'s in [location]. [Relative A] told him to return to Australia. On [date], [Relative A] took him to the airport and stayed with him until his flight had departed. The applicant returned to Australia on [date].

The applicant claims it is unsafe for him to return to Uzbekistan. The applicant claims his wife's father was in prison [number] year's ago and accused of being a Wahabi. His family are only permitted to see him once a year. He is tortured in prison, and ended up divorcing his wife believing he would never be released alive. A friend of [relative A's] was also arrested after being warned twice to stay away from the mosque. This man ignored the warnings and so the police planted material in his car incriminating him as a member of HuT. The applicant claimed that he now also has a police profile which will lead to further arrests and mistreatment, and possibly death, should he now return to Uzbekistan.

On [date] the applicant's migration agent submitted a psychologist's report which reiterates the applicant's claims. This report states that the applicant has experienced adverse health effects from the torture he has suffered, including weight loss, heart palpitations, shivering, weakness and pain in his right arm. The report states that the applicant suffers symptoms associated with post traumatic stress, including nightmares, headaches, flashbacks and hyper-vigilance. The report states that the applicant suffers from anxiety, depression and post-traumatic symptoms related to his experiences in Uzbekistan as well as his uncertainty relating to his future."

The Departmental delegate then considered a range of country information and looked at the relevant assessment criteria to ground a finding, a well founded fear of persecution for a convention based reason. The Department concludes:

"However, I have carefully considered the applicant's claims and I find them not to be credible. I have considered the applicant's claims to have been persecuted both as a witness of the Andijan [protest] and as a practising Muslim in Uzbekistan.

However I find the claims to be implausible, internally inconsistent and not supported by the available country information.

The applicant claims he was sent by [relative A] in [date] to Andijan [for business purposes]. He [relative A] wanted to open [a business] in [location]. The applicant claims he remained in Andijan up to and following the [protest] that took place in that city of more than 320,000 inhabitants on [date]. The applicant himself states that the [protest] occurred [reasons for protest]. There are numerous reports detailing the arrests of the business people in [year], and of the large number of protests and demonstrations which occurred in Andijan from the end of [year]. In part these protests were in response to the repressive measures ordered by the Uzbek authorities of which the rest of the business was but one part. However the civil unrest also arose due to the poor economic conditions affecting this part of Uzbekistan in particular. The [protest] was but the culmination of a period of serious civil unrest dating back to the arrest of [a particular person] from [date]. Human rights once described the situation in Andijan prior to the [protest] thus:

The crackdown on the Andijan business community and the closure of these firms raised tensions not only because of the unfairness of the businessman's trial. In the already economically depressed Fergana Valley, the loss of thousands of jobs as a direct result of the crackdown was devastating, plunging many families into poverty. And no end to their misery was in sight: instead, the government was continuing to arrest more businessmen and shutting their companies, adding to the economic hardship." (Human Rights Watch, Uzbekistan: Rights Defenders Targeted After Massacre 9 June 2005)."

Given the situation at the time, it is unclear why the applicant was Andijan at all. His claimed presence in Andijan is difficult to accept as credible when considered in the context of the political and social unrest which was occurring in that province in the months preceding that [protest]. It is difficult to accept that [relative A] would send his inexperienced [the applicant] to a distant province in the grip of political and social conflict for a number of reasons. Firstly, the applicant had little apparent business experience which he could bring to his alleged task. Second, it is implausible that a trip to [specific reasons] would be of two to three months duration. Thirdly, [Relative A] would have been able to obtain the information by simpler and less expensive – and less risky means i.e. by telephone etc. I have strong concerns that the applicant was not in Andijan Province as he claims at the time of the [protest]. His claims to be in Andijan on business at the time of the [protest] are not plausible.

Even if I were to accept the applicant was in Andijan, and did actually witness the [protest] or its aftermath, I do not accept his claim that he was targeted the day immediately following by the police, arrested and detained for [number] days. The available country information reports ongoing violence in Andijan on [date] particularly around the border area near Kyrgyzstan, a fact that would have subsumed the immediate attention of local state authorities. Other reports discuss the Uzbek Government's urgent attempts to restrict reporting on the incident. Independent journalists, human rights campaigners and eye witnesses were all immediate targets of the campaign to suppress reporting of the events.

Human Rights Watch reported in June 2005 that

"In just the past two weeks, Uzbek authorities have arrested at least ten human rights defenders and opposition activists in Andijan and other cities on trumped up charges. Others have been beaten by unknown assailants, threatened by local authorities and placed under house arrest..."

In Tashkent and Jizzakh, numerous human rights activists have been questioned about the events in Andijan and threatened with arrest or criminal charges should they engage in demonstrations or other public activities (Human Rights Watch: Rights Defenders Targeted After Massacre 9 June 2005).”

So while I accept that there was a crackdown and many were arrested, there is no credible reason why the applicant would have been arrested the day immediately following the Andijan [protest] if ever. The applicant is not a journalist. There is no evidence that he was interviewed by the media. He is not a human rights activist. It is not clear therefore why the police would have any interest at all in him, as a mere witness at best, in the obvious chaos that would have surrounded such an event, when official priorities to cover up the events and suppress ongoing dissent would have been paramount. I do not accept the applicant’s claim to have been arrested as a suspected Islamist following the Andijan [protest].

The applicant claims that he then returned to [location], and later [location] where he married and began attending Friday prayers at the local mosque. The applicant’s claims of being targeted by the police for his attendance at the mosque is also not plausible. This claim is inconsistent with independent reporting about the situation of Muslims in Uzbekistan. For instance, Human Rights Watch reports that Uzbek Government makes a distinction between Muslims who observe their religion in officially sanctioned mosques as opposed to those who independently observe Islam:

“The government repression that has attended this campaign against independent Muslims – those who practise their faith independent of government sanctioned mosques and other government religious institutions – has included illegal arrest and torture, sometimes resulting in death. The accused have faced unfair trials and lengthy terms in prison under inhumane conditions. Family members of those targeted have also been detained, tortured, threatened and stigmatised...

Over the years the scope of the campaign has been expanded from a focus on independent-minded and popular spiritual leaders to anyone in the religious community who expresses dissent with the policies of the Karimov Government.” (Human Rights Watch - Bullets Were Falling Like Rain: The Andijan Massacre, May 2005)

There is no indication that the applicant was involved in any underground religious activity or group. He claims to have been arrested for simply attending Friday prayers a couple of times. There is no evidence that indicates that Muslims are arrested in Uzbekistan simply for attending Friday prayers, not even young men. This claim is not plausible and is inconsistent with the available country information I therefore give it no weight in this assessment.

The applicant returned to Uzbekistan for [number] weeks in [date]. The applicant claims he was fearful in Uzbekistan and hid in his family’s house, however he attended one Friday prayer session regardless. It would appear from the applicant’s statement that it only occurred to the applicant that attending prayers was a dangerous activity at the conclusion of the prayers, a claim which is simply not plausible. If the applicant had genuinely been tortured in the past for simply attending the mosque, it would be inconceivable that he would risk his life to return to Uzbekistan to visit his wife and family, only to further risk his and their lives by attending the mosque shortly before he was due to return to Australia. I reject the applicant’s claim as implausible concerning the efforts by police in [date] to arrest him for having attended Friday prayers at his local mosque.

I also consider several other factors relevant in deciding the applicant’s claims are not credible. These include the fact that the applicant’s family, including his wife, have apparently experienced no adverse attention from the authorities themselves, despite evidence that Uzbek authorities commonly target and punish family members of perceived dissidents and opponents for the misdeeds of their relatives. Instead of any

punishment or mistreatment of the applicant's family, the applicant indicates a younger sibling has recently gained admission to [an institution].

The applicant chose to voluntarily return to Uzbekistan in [date]. I consider the fact that he returned there on his own accord and then was able to legally depart the country is evidence that the applicant does not genuinely fear persecution.

The applicant has submitted a psychologist's report in support of his claims. This report lacks credibility on several counts. Firstly, it is unsigned by the psychologist and no contact details appear in the letterhead or anywhere in the report. The majority of the report is concerned with reiterating the applicant's claims, as outlined in his protection visa application. Whilst indicating that the applicant is depressed, anxious and suffering Post Traumatic Stress Disorder under the heading Prognosis the report details country conditions in Uzbekistan as reported in the media and non-governmental organisations. This type of commentary appears as a regular in a medical analysis and casts doubts on its credibility. The applicant claims to have been tortured a further week and by the medical examination the applicant recently underwent in connection with his application for a protection visa. In this medical report, the applicant gives no information of any medical history consistent with his claims of torture, ongoing pain and incapacity, and psychological disturbance.

Finally, I have considered the fact that the applicant arrived in Australia in [date], yet did not apply for a protection visa for a further [number] months. This fact adds weight to my conclusion that the applicant's claim to fear persecution in Uzbekistan is not genuine.

Based on the available evidence, I conclude that the applicant's claim to fear persecution in Uzbekistan is not genuine. His claims to have been targeted for serious mistreatment for witnessing the Andijan [protest] and for attending prayers at his local mosque are not consistent with the available country information, the lack of adverse attention experienced by his family members, his voluntary return to Uzbekistan, the medical evidence and the applicant's significant delay in seeking protection in Australia. I consider the applicant's claims both individually and cumulatively and find that he does not have a well founded fear of convention based persecution in Uzbekistan."

The Tribunal conducted a hearing and the applicant gave evidence to the Tribunal without the assistance of an interpreter. There was no request prior to the Hearing for an interpreter. At the commencement of the Hearing the Tribunal ascertained with both the applicant and the adviser about whether the applicant was able to proceed without an interpreter. Both the adviser and the applicant confirmed that, the applicant would not need an interpreter and would be able to conduct the hearing in English. The Tribunal advised the applicant that it was extremely important that the applicant understood its questions and the Tribunal understood the applicant's responses. The Tribunal advised the applicant that it had no problem understanding his English. The Tribunal cautioned the applicant that if he did not understand the nature of a question, that he should ask for it to be repeated. The applicant advised the Tribunal that he would have no problem as he was competent in English.

The Tribunal was advised by the applicant of his full name and his date of birth, and that he was married on a specific date in Uzbekistan.

The Tribunal asked the applicant when his father passed away. The applicant stated when this was, the applicant did not know the circumstances surrounding his father's death. The

Tribunal noted that the applicant was one of a number of children and asked the applicant how his mother was able to provide financial support for herself and her children. The applicant advised that a great deal of support had been forthcoming from relative A. The applicant stated that relative A ran a business and was able to provide support, in addition to this his mother worked.

The Tribunal noted that the applicant in his statement to the Department indicated that he was studying from a specific period and assisting his relative A. The Tribunal asked the applicant what he was studying, the applicant stated that he was self studying in order to prepare himself for further education and that he was studying mathematics, physics, and English. He was studying at the home of relative A in a specific location.

The Tribunal inquired what the nature of relative A's business was, the Tribunal noting that this was not particularly clear in the application before the Department. The applicant stated that relative A sold various equipment. The applicant stated that relative A had two businesses. The Tribunal inquired how many people were employed in relative A's business. The applicant confirmed that relative A managed the businesses. There were two shops as noted above in two suburbs with one salesman in each. There were administration staff, and the visa applicant was also an employee.

The Tribunal noted that the applicant claims that relative A sent the applicant to Andijan Province for business. The Tribunal sought more information about this business trip. The applicant advised the Tribunal that he was travelling to Andijan Province in order to buy goods, and to check out a range of goods for the business. The Tribunal asked the applicant how far it was from relative A's location to Andijan Province, and the applicant advised it was a number of hours by car. The Tribunal asked the applicant how he travelled to Andijan Province and he advised that he travelled by taxi. There were four people in the taxi, and he paid a total of 7,000 SUM, approximately \$7.00 AUD for the journey.

The Tribunal asked the applicant when he started helping out relative A in his business. The applicant advised that he had always helped relative A in the business and that he started working for him in a specific year. The applicant could not remember his commencement date. The applicant advised that relative A paid him a salary.

The Tribunal stated that given that relative A employed a number of salesmen in the respective businesses, that one would expect they would have expertise in the purchase and sale of goods, that it would seem more prudent to send an experienced salesperson to Andijan Province to check out and purchase goods for the business. The applicant responded that his relative A trusted him, that the salesman just worked in the respective shops. That relative A gave him money to stay in Andijan and that he did not provide money for the purchase of the goods. The applicant stated that he was checking out a range of goods. The Tribunal asked the applicant to name some of the brands of goods that he looked at and he stated a specific brand. The applicant also stated that whilst he was in Andijan Province relative A had organised for him to stay at a friend of relative A's house, a man who was able to introduce the applicant to the Koran and Islamic prayer rituals.

The Tribunal asked the applicant why relative A was not able to check out the prices of goods in Andijan Province over the phone or by the internet. The applicant stated that in Uzbekistan people go to markets to check out products and that there was a large market in Andijan Province. The Tribunal noted that in the applicant's statement to the Department it

intimated that he went to Andijan to look at other equipment as well. The Tribunal asked what types of equipment he looked at. The applicant stated this was incorrect and that he only went to Andijan to check out goods made by a specific manufacturer.

The Tribunal noted that the applicant in his statement claims to have been sent to Andijan by relative A on a specific date and he confirmed that that was correct. The Tribunal asked him why he was still there two months later, how he was able to support himself for that period of time and where he stayed. Once again the applicant stated that he was staying with a friend of relative A's and learning the Koran. Relative A paid his costs.

The Tribunal asked the applicant how he came to be caught up in the protest in Andijan Province. The applicant stated that "I was going to market, on [date], [day] is market day. People were gathering. I stood and looked at what was going on. I saw people coming. Some people had guns and weapons. There were a lot of women and men talking about hardship and screaming. I saw tanks and helicopters. I did not go to the markets. I went back home to relative A's friend's place. There were thousands of protesters. This happened in a specific location. I was one of thousands of people. I was scared and that's why I did not go to the market and went home."

The Tribunal asked the applicant for his recollection of the protest based on his experience. The applicant stated that he saw helicopters and tanks, he did not see any shootings and he saw that some of the protesters were carrying weapons.

The Tribunal noted that the applicant claims that the police raided the home in which he was staying in Andijan Province on a specific date, the home of Person B, a friend of his late father, and of relative A. The Tribunal noted that thousands of people were involved in the protest based on country information. The Tribunal enquired how the applicant would come to be located after the protest. The applicant stated that Person B's brother-in-law was in gaol accused of being Wahabi and that Person B had always been under surveillance. He happened to be at Person B's home when the police came.

The Tribunal asked the applicant to describe more about the incident of the police attending Person B's home that particular date. The applicant stated that the police attended and searched through everything and took Islamic books. The applicant was handcuffed along with Person B and taken to a police station. He was questioned. He was asked what he was doing in Andijan, whether he had come to Andijan Province to protest, he was also accused of being Akramaye. The applicant claims that he was taken to a police station in Andijan by uniformed police. In elaborating detail about the questioning by police the applicant stated that he was mainly questioned about his religious beliefs and whether he was involved in the protest. He was asked about the 'Akramaye' group but he did not know what this group was and was not able to provide any information.

The Tribunal asked the applicant whether he was physically mistreated at the time of the arrest and detention. The applicant stated that he was kicked, bashed and that he suffered a specific injury. The Tribunal asked how the applicant came to be released. The applicant stated that relative A came and paid a bribe, which was able to affect his release after a number of days in detention.

The Tribunal asked the applicant whether he sought treatment for the injuries sustained during the period of detention. The applicant stated that he went to a doctor who suggested surgery for his injury but the applicant was too scared to have the surgery.

The Tribunal noted that the applicant relates an incident several months later in his statement to the Department. The Tribunal asked the applicant what had happened to him. He stated that he was in his own hometown and he was praying and practising Islam. He was attending Friday prayers. He stated that on a specific date the police came to the family home. He stated that they had been tipped off by unknown persons about his Islamic practise.

The Tribunal asked what the predominant religion of Uzbekistan is and the applicant confirmed it was Islam. However he claimed that the government was still communist and targeted Islamic practise. The applicant claims to have been handcuffed and taken to a police station and asked about Wahabi. He was accused of being in Andijan Province and protesting. The applicant explained everything, including why he was in Andijan Province. He stated that the police did not believe this fact. The applicant claims to have been beaten and tortured. He stated that they mistreated him. The applicant stated that the police accused him of belonging to Hezb-e-Tahrir. The applicant advised that he did not belong to any political party such as Hezb-e-Tahrir or Wahabi sect. He stated that he was in Andijan for business reasons and had no participation in the uprising and protests. The applicant claims to have been detained for a number of days in detention. The applicant stated that he was released after relative A paid bribes to get him out of detention. The applicant had to sign a letter not to attend Friday prayers. However, the Tribunal noted that the applicant claims to have been the subject of a number of arbitrary arrests, detentions, and to have been severely mistreated whilst in detention suffering physical and mental injury. The Tribunal noted that the applicant came to Australia to study as the holder of a student visa. The Tribunal stated that it could not reconcile the fact that the applicant claimed he had been through such traumatic experiences in his home country and he did not apply for protection during the time that he was in Australia as a student.

The applicant responded that he did not know or did not search out the potential for lodging a protection visa application, that he was busy studying his course and then he did another course which took up a lot of time.

The Tribunal asked the applicant why he would risk returning to Uzbekistan as this return substantially diminished the real fear that he held of persecution and the well-foundedness of his fear of persecution. The applicant stated that he was alone in Australia, that he missed his family, that he had psychological problems, and that his family did not want him to come back because of an inherent risk.

The Tribunal asked the applicant why he left Uzbekistan again and returned to Australia. The applicant stated that after several weeks back in Uzbekistan he went to Mosque to pray. He stated that people were nice to him, but when he went back home he was aware of the presence of agents in the Mosque. He stated that because of his past experiences he has a bad history with the authorities. He concluded that if he was arrested again he would be in a lot of trouble. He decided to leave Uzbekistan again.

The Tribunal asked the applicant what would happen to him if he returned to Uzbekistan. The applicant stated that he would be taken to prison, that he would not be released, that his parents had advised that the authorities have asked about his whereabouts. The applicant

stated that his family would not advise him if they had been subject to any pressure by the authorities.

The applicant was represented in relation to the review by his registered migration agent.

The Tribunal notes that at the time of the lodgement of the protection visa application, the applicant's representative submitted a psychologist's report. That report was unsigned. The Department, in its reasons for decision noted that:

“The applicant has submitted a psychologist's report in support of his claims. This report lacks credibility on several counts. Firstly, it is unsigned by the psychologist, and no contact details appear in the letterhead or anywhere in the report. The majority of the report is concerned with reiterating the applicant's claims, as outlined in his protection visa application. While indicating that the applicant is depressed, anxious and suffering PTSD, under the heading “Prognosis” the report details country conditions in Uzbekistan as reported in the media and by non-governmental organisations. This type of commentary appears as a regular in a medical analysis and casts doubt on its credibility. The applicant's claims to have been tortured are further weakened by the medical examination the applicant recently underwent, in connection with his application for a protection visa. In the medical report, the applicant gives no information of any medical history consistent with his claims of torture, ongoing pain and incapacity, and psychological disturbance.”

A signed copy of the report was provided to the Tribunal at hearing.

FINDINGS AND REASONS

The applicant was born in Uzbekistan.

The evidence before the Tribunal indicates that the applicant was ostensibly raised by his mother, after the death of his father. The applicant stated that he and his family received substantial financial support from his relative (relative A). The applicant claims that relative A runs a business in a specific location. The Tribunal noted that the nature of this business was unclear in the Departmental application, and the Tribunal sought clarification of the nature of the business at hearing. The applicant advised the Tribunal that relative A sold goods. He stated that the business also sold equipment. The applicant also stated that the business sold other equipment. The applicant at hearing advised that there were effectively two businesses, one that dealt with specific goods, and the other that dealt with different products. The applicant advised the Tribunal that relative A managed the business and each of the two businesses had its own sales person, there was also other administrative persons, and the visa applicant after he failed to obtain a place at an educational institution was also offered ongoing employment with relative A.

The applicant's claims centre around the assertion that relative A sent him to Andijan province for two reasons. One reason was to enable the applicant to undertake some business enquiries on behalf of relative A, and the second reason was for the applicant to live with a religious friend of relative A, Person B, in order to take instruction in Islamic religion.

The evidence before the Tribunal indicates that a protest occurred in Andijan. This protest occurred when the Uzbek Interior Ministry and National Security service troops fired into a crowd of protesters, killing between 187 on the official count of the government, and 5,000 people, with most outside reports estimating several hundred dead.(see Wikipedia). The applicant alleges that whilst he was visiting Andijan on the business trip for relative A and

whilst receiving religious instruction in Andijan that he was inadvertently caught up in the events of the protest. The applicant claims to have witnessed the Andijan protest, and described at hearing observing tanks, helicopters and a large group of people gathering, some of whom were carrying weapons. The applicant claims to have been one of thousands of people in attendance.

The applicant claims that that the police raided the house in which he was residing, that of his relative A's friend Person B. The Tribunal noted at hearing, that based on the country information thousands of people were involved in this protest. The Tribunal inquired at hearing how the applicant came to the attention of the police. The applicant claims that Person B's relative was in jail, and accused of being Wahabi and that Person B had always been under surveillance because of this. The applicant claims that he was taken to a police station, he was questioned by police about what he was doing in Anjdijan, and that he was accused of being 'Akramye'. The applicant claims to have been mistreated. The applicant claims that he was released after a number of days because relative A was able to pay bribes to affect his release. The applicant claims to have had an injury due to the use of excessive force whilst in detention. The applicant claims to be still suffering from these injuries. No independent medical evidence was provided to the Tribunal pertaining to the alleged injury.

The applicant also claims that several months later five armed police raided the family home. The house was ransacked, the applicant claims to have been handcuffed and taken to a police station. The applicant in his statement to the Department noted that:

“they arrested me in front of my wife and family. My family feared for my life and they could not dear (sic) to stop the policeman. They took me to the normal police car. They interrogated me. They questioned me. They said that I belonged to Hezb-e-tahrir. They put to me that I was a Wahabi Sect. They asked me questions about why I was in Andijan on [date]. I was detained for [number] days in the police station. In the first [number] days THC (sic) were nice with me but on the [number] night THC (sic) completely changed. They said that this the THC (sic) time that I should tell the truth. On [date] they tortured me to extract information that they were after and expected from me. [Details of mistreatment deleted in accordance with s431 of the Migration Act]. I did not know anything I told them. My [injury] got worse as a result of beatings.

On [date]. The (sic) naked eye and they scared to rape me but I did not have anything to tell them. Then my [relative A] found out that I was arrested he came and released me by paying bribes to with the person.”

The applicant claims to have been released on the basis of signing a good behaviour bond.

The Tribunal notes that the applicant's claims indicate that he was subject to an arbitrary arrest on a specific date, and that he was taken to a police station, he was detained for a number of days and allegedly physically and mentally mistreated. This led to a physical injury.

The applicant's claims also indicate several months later he was once again arbitrarily arrested, taken to a police station, subjected to days of physical and mental torture, abuse and ongoing interrogation.

The evidence before the Tribunal indicates that the applicant arrived in Australia as the holder of a student visa. He commenced studying in Australia. The applicant remained in Australia until a specific date. In that period the applicant did not apply for a protection visa.

The fact that the applicant did not apply for a protection visa in Australia after his arrival is a real cause for concern for the Tribunal. The Tribunal believes that if a person had been subjected to two arbitrary arrests, two weeks of interrogation and torture, along with threats of death and rape, that once they had managed to flee their country of nationality that they would make inquiries about the potential of protection in a safe third country once they had arrived there.

Of even greater concern to the Tribunal is that fact that the applicant returned to Uzbekistan to visit his wife and family and stayed in his home country for a specific period. The applicant remained in Uzbekistan, returning to Australia on a specific date. The Tribunal does not accept that an applicant that had been through the two incidences would be willing to avail himself of the protection of Uzbekistan by returning there.

The Tribunal finds it implausible that the applicant would avail himself of the protection of Uzbekistan, if he had been subjected to the human rights abuses he alleges occurred.

The Tribunal finds that the applicant's claims have been fabricated in an attempt to secure protection obligations in Australia. The Tribunal finds that the applicant was not subjected to arbitrary arrest on two different dates.

The applicant at hearing appeared to be an articulate and intelligent man. The applicant had proficient English, indeed his English was so proficient that the applicant did not require the services of an interpreter at hearing and wished to proceed without one. The Tribunal believes that somebody with the degree of intelligence and English language skills of the applicant would have had no trouble in finding out about the potential for protection in the period that he was first in Australia.

The Tribunal has taken into account the psychologist's report. However, the Tribunal gives little weight to that report on the basis that the Tribunal has found that it is implausible that an applicant who had been through what the applicant claims to have suffered, would not avail themselves of protection at the first available opportunity, and would be willing to avail themselves of the protection of Uzbekistan, their country of origin by returning there and staying in that country for a specific period.

Accordingly, I am not satisfied the applicant has a well founded fear of persecution for a Convention reason should he return to Uzbekistan.

CONCLUSION

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 as amended by the Refugees Protocol. Therefore, the applicant does not satisfy the criterion set out in s.36(2) of the Act for a Protection visa.

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

DECISION

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