IMMIGRATION AND PROTECTION TRIBUNAL NEW ZEALAND

RŌPŪ TAKE MANENE, TAKE WHAKAMARU AOTEAROA

[2020] NZIPT 801660–661

Appellants:	**AJ (Ukraine)**
Before:	M A Roche (Member)
Counsel for the Appellants:	S Lamain
Counsel for the Respondent:	No Appearance
Date of Hearing:	4 February 2020
Date of Decision:	17 February 2020

DECISION

[1] This is an appeal against a decision of a refugee and protection officer declining to grant refugee status or protected person status to the appellants who are a mother (the mother) and son (the son). The mother is a citizen of the Ukraine. She is also a Russian citizen. The son was born in New Zealand. There is some dispute concerning his nationality but, as will be seen below, the Tribunal finds him to be entitled to Ukrainian citizenship.

[2] The son is a minor and was represented at the appeal hearing by his mother as the responsible adult pursuant to section 375(1) of the Immigration Act 2009 (the Act).

INTRODUCTION

[3] The mother fears that, if she returns to the Ukraine, she will be separated from her husband (the husband). He is a Russian national who was recognised as a refugee by the Refugee Status Branch (RSB, now the Refugee Status Unit) in June 2019. She may also be separated from her two children, who are the son, born in New Zealand in September 2018, and a daughter, born in New Zealand in

November 2019, who is a New Zealand citizen. Submissions filed by counsel also suggest that the mother may face difficulties in the Ukraine because of her Russian citizenship. Specifically, it is suggested that her Ukrainian citizenship may be revoked, and she would then be expelled to Russia where she is at risk from the authorities because of her husband's political activities there.

[4] Given that the same claim is relied upon in respect of all limbs of the appeal, it is appropriate to record it first.

THE APPELLANT'S CASE

[5] The account which follows is a summary of that given by the mother at the appeal hearing. It is assessed later.

[6] The mother is aged in her mid-20s. She was born in the Ukraine where her parents and brother remain. As a teenager she travelled to Moscow to complete her secondary schooling. When this was completed, she commenced a tertiary course at a college in Moscow. While in Russia, she visited her family in the Ukraine from time to time.

[7] In 2013, the mother met her husband who was a Russian national. In early 2014, the couple began to live together in Moscow. Shortly after this, the husband began to have problems related to his support for and communication with pro-Ukrainian groups, in particular the Donbas Battalion, an offshoot of the Ukrainian National Guards. In 2014, the husband left Russia and spent two years in various European countries before being deported to Russia from Norway in mid-2016. Around this time, the mother applied for Russian citizenship. She was entitled to this, having resided in Russia for five years. It was eventually granted.

[8] In November 2016, the mother and the husband married. They were, by this time, living in Z city in Russia.

[9] In May 2017, the mother was home alone when the house was raided by a group of men wearing a mixture of civilian clothes and uniforms. They told the mother that they had a search warrant and proceeded to search the house. They were rough and unpleasant to her. During the search, she grabbed her handbag and fled from the house while the men were distracted.

[10] The mother telephoned the husband who told her not to return to the house. He met her and together they made their way to the train station where they caught a train to Minsk, Belarus.

[11] In June 2017, the mother and the husband attempted to travel from Belarus to Ukraine. The husband was stopped at the border and told he was not permitted to depart. The mother carried on and entered Ukraine without difficulty, using her Ukrainian passport. She was eventually joined there by the husband who made his way there via Moldova and Cyprus.

[12] In Ukraine, the mother and husband married again under Ukrainian law. They did this so that the husband would be able to obtain Ukrainian residence. It was their intention to remain permanently in Ukraine.

[13] Thereafter, the husband made a number of applications for Ukraine residence but was refused because of his Russian nationality. The couple decided to try to find somewhere they could live together. They left Ukraine and travelled to Turkey, Malaysia and Thailand, eventually settling in Bali, Indonesia. By now, the mother was pregnant, and it was the couple's intention that the baby be born in Bali.

[14] In August 2018, the husband received a telephone call from the couple's former landlady in Russia. She told the husband that she had been summoned by the police and questioned about the mother and husband, that there was a criminal case against them, and that the Russian police wanted to question them. The husband was very concerned that the Russian authorities would extradite them from Bali and looked for a place where they would not be able to do this easily.

[15] The couple booked a flight to the Cook Islands and were granted a transit visa for New Zealand. In September 2018, they arrived at Auckland airport where they immediately claimed refugee and protected person status. The son was born in Auckland four days later.

[16] In June 2019, the husband was recognised as a refugee by the RSB. The mother and the son were declined refugee and protected person status on the basis that the son's recognition as a Ukraine national was a mere formality and that neither the mother nor the son faced a real chance of persecution or other qualifying harm in Ukraine.

[17] In November 2019, the mother gave birth to a daughter in Auckland. The daughter has been recognised as a New Zealand citizen by birth (because of the husband's refugee status).

[18] Ukrainian citizenship law does not recognise dual nationality. There is a procedure in the law whereby nationals who have taken out another nationality can have their Ukrainian citizenship revoked. The mother does not fear this happening because the Ukrainian authorities are unaware of her Russian citizenship and would only find out if she told them. Her fear is that, if she is returned to the Ukraine, she will be permanently separated from the husband and one, if not both, of her children. The husband cannot live in Ukraine and has a well-founded fear of being persecuted in Russia.

Evidence of the husband

[19] The husband appeared before the Tribunal and gave evidence. He confirmed that the account he gave the RSB about his experiences in Russia and elsewhere was true and correct. He corroborated the mother's account of the raid of their home in May 2017, following which the couple departed to Minsk.

[20] The husband said that he had wanted to stay with the mother in Ukraine and would have done so if he had been able to obtain Ukrainian residency, however he was not permitted to stay longer than three months.

[21] When asked whether the Ukrainian authorities would be aware that the mother had taken out Russian citizenship, he said that she had signed a document promising to notify the Ukrainian authorities of her application for Russian citizenship but that she had not done so and that she has little knowledge of such procedures. The husband said that the Ukrainian authorities are not aware of the mother's Russian citizenship, and the only way they will find out is if the mother or the Russian authorities notify them.

[22] The husband agreed that the son was hypothetically entitled to Ukrainian citizenship. He thought that it would be necessary to apply for this in person at a Ukrainian consulate or embassy, however he does not want the son to have Ukrainian citizenship. This is because he is worried that the war between Ukraine and Russia will continue and that, if the son has Ukrainian citizenship, he will eventually have to perform military service there.

Material and Submissions Received

[23] The following documents were filed in support of the appeal:

(a) A memorandum of submissions (29 January 2020).

(b) Various items of country information.

(c) Statement of the mother (28 January 2020).

(d) Statement of the husband (28 January 2020).

(e) Certified copy of birth certificate for the youngest child.

ASSESSMENT

[24] Under section 198 of the Act, on an appeal under section 194(1)(c) the Tribunal must determine (in this order) whether to recognise each appellant as:

(a) a refugee under the 1951 *Convention Relating to the Status of Refugees* ("the Refugee Convention" or "the Convention") (section 129); and

(b) a protected person under the 1984 *Convention Against Torture* (section 130); and

(c) a protected person under the 1966 *International Covenant on Civil and Political Rights* ("the ICCPR") (section 131).

[25] In determining whether each appellant is a refugee or a protected person, it is necessary first to identify the facts against which the assessment is to be made. That requires consideration of the credibility of the appellants' account.

Credibility

[26] The Tribunal found the mother and the husband to be credible witnesses. The mother's evidence was consistent with the account she provided to the RSB. It was also consistent with the husband's evidence and the account he had provided to the RSB. The mother's account is accepted in its entirety. The relevant facts for the purpose of this decision are as follows:

(a) The mother has dual Ukrainian and Russian citizenship.

(b) The Ukrainian authorities are unaware of the mother's Russian citizenship.

(c) The husband is a Russian citizen.

(d) The husband was unable to obtain Ukrainian residency.

(e) The husband and the mother are of adverse interest to the Russian authorities.

(f) The husband has been recognised as a refugee in New Zealand.

(g) The older child was born in New Zealand.

(h) The younger child was born in New Zealand and is a New Zealand citizen.

The Refugee Convention

[27] Section 129(1) of the Act provides that:

> "A person must be recognised as a refugee in accordance with this Act if he or she is a refugee within the meaning of the Refugee Convention."

[28] Article 1A(2) of the Refugee Convention provides that a refugee is a person who:

> "... owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear, is unwilling to return to it."

[29] In terms of *Refugee Appeal No 70074* (17 September 1996), the principal issues are:

(a) Objectively, on the facts as found, is there a real chance of the appellants being persecuted if returned to the country of nationality?

(b) If the answer is yes, is there a Convention reason for that persecution?

Assessment of the Claim to Refugee Status

[30] For the purposes of refugee determination, "being persecuted" requires serious harm arising from the sustained or systemic violation of internationally recognised human rights, demonstrative of a failure of state protection – see *DS (Iran)* [2016] NZIPT 800788 at [114]–[130] and [177]–[183].

[31] In determining what is meant by "well-founded" in Article 1A(2) of the Convention, the Tribunal adopts the approach in *Chan v Minister for Immigration*

and Ethnic Affairs (1989) 169 CLR 379, where it was held that a fear of being persecuted is established as well-founded when there is a real, as opposed to a remote or speculative, chance of it occurring. The standard is entirely objective – see *Refugee Appeal No 76044* (11 September 2008) at [57].

Objectively, on the facts as found, is there a real chance of the appellants being persecuted if returned to Ukraine?

[32] Turning first to the plight of the mother, counsel has submitted that she is at risk of having her Ukrainian citizenship revoked, and then being deported to Russia, where she is of adverse interest to the authorities because of her association with the husband. In order to assess this risk, it is necessary to consider country information and Ukrainian citizenship law.

[33] Counsel has also submitted, in the alternative, that family separation will inevitably result from the removal of the mother, and perhaps the son, to Ukraine and this would give rise to serious harm to the mother. He submits that this harm would arise from the violation of internationally recognised human rights, specifically the protection afforded to the family under Article 23 of the ICCPR.

Harm arising from Russian citizenship

[34] Pursuant to Article 2 of the 2001 Ukrainian Citizenship Law (the citizenship law), Ukraine does not recognise dual citizenship. Article 2 provides that, if a citizen of Ukraine has acquired the citizenship of another state, in legal relations with Ukraine such person shall be recognised as a citizen of Ukraine only. A commentator suggests that Ukraine's opposition to the principle of dual citizenship is political, stemming from concerns over negative consequences of dual citizenship (particularly with Russia) for the sovereignty and territorial integrity of Ukraine: O Shevel *EUDO Citizenship Observatory – Country Report: Ukraine* (April 2013) (the EUDO report) at p1.

[35] The issue of dual citizenship is highly politicised with respect to Russia. A recent, simplified procedure whereby Ukrainian nationals can be issued with Russian passports in Ukraine's separatist regions, and Russian passports issued to expatriate residents of Russian-annexed Crimea and their families, was condemned by the Ukrainian government. The Prime Minister was quoted as saying that the [Russian] passports were a "flagrant violation of all rights and morals" and that Kiev would never recognise documents issued by "the aggressor country": "Russia Starts

Giving Passports to Ukrainians from Donetsk, Luhansk" *Deutsche Welle* (14 June 2019).

[36] Article 19 of the citizenship law provides that Ukrainian citizenship can be lost if a citizen voluntarily acquires foreign citizenship. The EUDO report at p10 notes that loss of Ukrainian citizenship under Article 19 is not automatic but requires an administrative procedure for each individual case. This entails a governmental body submitting a formal petition with supporting documents, including a document from the authorities of a foreign state confirming that a particular Ukrainian citizen has acquired foreign citizenship (a foreign passport is insufficient). A motion on citizenship deprivation is then submitted to the Foreign Ministry which, in turn, submits it to the Ministry of Interior and the Security Service to confirm there are grounds for citizenship deprivation. The final decision is ultimately taken by the Citizenship Commission of the Presidential Administration and is only legally complete when signed off by the President: EUDO report at pp18 and 19.

[37] Despite the politicisation of dual citizenship and the provisions for loss of citizenship under Article 19, the Tribunal is aware of only one public report of a Ukrainian citizen being stripped of citizenship. This was a bishop of the Russian-affiliated Ukrainian Orthodox church of the Moscow patriarchate, who held dual Ukraine-United States citizenship: A Roth "Ukraine Deports Orthodox Bishop After Stripping Citizenship" *The Guardian* (14 February 2019).

[38] Amongst the country information filed by counsel is a 2018 article reporting the then Minister of Foreign Affairs of Ukraine, Pavlo Klimkin, ruling out the possibility of dual citizenship with Russia. Minister Klimkin is quoted as stating, "All cases of obtaining Russian citizenship [by Ukrainian nationals] must be investigated accordingly by our security services": "Ukraine Rules Out Possibility of Dual Citizenship with Russia" *UA Wire* (6 October 2018). There are no reports before the Tribunal of any such investigation and it is noted that Pavlo Klimkin is no longer a government minister.

[39] While the mother took out Russian citizenship, she has never travelled on a Russian passport. There is undoubtedly a procedure under Ukrainian citizenship law for her Ukrainian citizenship to be revoked but there appears to be no real chance of this occurring. On the evidence of the mother and the husband, the Ukrainian authorities are unaware of her Russian citizenship and would only find out if she told them or if they were informed of this. Neither of these possibilities is likely. The mother was able to enter Ukraine without difficulty after taking out Russian citizenship. She was not required to disclose this citizenship at the border. Both

the mother and the husband gave evidence that, had the husband been able to obtain Ukrainian residence, they would have settled in Ukraine where they would have had the support of the mother's family. Neither of them held any concern that the mother's Ukrainian citizenship would be revoked.

[40] In closing submissions, counsel suggested that, in the future, should communications between Ukraine and Russia improve, information identifying dual citizens, including the mother, could be disclosed to Ukraine by Russia. This is speculative. On the facts before the Tribunal, the risk that the mother will be deported to Russia following revocation of her Ukrainian citizenship does not rise to the real chance level.

Serious harm arising from family separation

[41] Counsel has submitted, in the alternative, that family separation will inevitably result from the removal of the mother, and perhaps the son, to Ukraine and this would give rise to serious harm to her. He submits that this harm would arise from the violation of internationally recognised human rights, specifically the protection afforded to the family under Article 23 of the ICCPR.

[42] Should the mother be required to return to Ukraine, she will be separated from the husband, who cannot reside there. She is a psychologically fragile young woman. A 2019 psychologist's report on the RSB file suggested she may have some depression and anxiety. She was tearful and notably distressed at times during the Tribunal hearing. It is accepted that the separation of the mother from the husband (and perhaps one or both children) would result in serious harm to her in the form of emotional and psychological distress.

[43] In order for serious harm to be characterised as persecution for the purposes of the Refugee Convention, it must result from a breach of internationally recognised human rights: see [30] above. In his submissions, counsel identifies the human right relied on as "the right to family life" and refers to Article 23 of the ICCPR.

[44] Article 23(1) provides: "The family is the natural and fundamental group unit of society and is entitled to protection by society and the State."

[45] The decisions of the United Nations Human Rights Committee concerning rights relating to family life usually consider Article 23 together with Article 17(1) which provides: "No one shall be subjected to arbitrary or unlawful interference with

his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation".

[46] Although Article 23 provides for the protection of the family by the state, the question of whether there is interference with the family, usually involving separation, is determined by reference to Article 17. For an action of the state to breach the right to protection against interference with a person's family, it is necessary to establish that such interference is arbitrary or unlawful. As it is not suggested that a refusal on the part of Ukraine to extend a right of residency to the husband would be unlawful, it must be examined whether this would be arbitrary.

[47] In a 2017 view, the Human Rights Committee noted that the mere fact certain members of a family are entitled to remain on the territory of a State party does not necessarily mean requiring other members of the family to leave constitutes interference. It further noted that such separation would constitute arbitrary interference if, in the circumstances of the case, the separation of a person from their family and its effects were disproportionate to the objectives of the removal: United Nations Human Rights Committee *Decision Adopted by the Committee Under the Optional Protocol, Concerning Communication No 2196/2012 CCPR/C/120/D/2196/2012* (8 September 2017) at [7.7]. This approach has long been recognised by the Tribunal, see for example: *Prajapati v Minister of Immigration* [2019] NZIPT 600557–599 at [57]; *Tauinaola v Minister of Immigration* [2019] NZIPT 600583 at [55]; and *AH (Samoa)* [2013] NZIPT 500842 at [34]–[35].

[48] The husband was unable to gain Ukraine residence. There is now some question as to whether, if the family attempted to return to Ukraine, the husband would be able to enter the country even temporarily. In December 2018, it was reported that Ukraine had banned all Russian men of military service age from entering the country. The then President was quoted as stating that the purpose of the ban was to prevent Russia sending operatives to the Ukraine to "form detachments of private armies here, which in fact are representatives of the Armed Forces of the Russian Federation": D Reisinger "Ukraine Has Banned All Russian Men of Military-Service Age" *Fortune* (1 December 2018).

[49] The current restrictions on the ability of Russian men to enter and to gain residence in the Ukraine must be viewed in the context of the conflict between Russia and Ukraine which, while currently the subject of a ceasefire, is estimated to have resulted in 13,000 deaths: "Ukraine and Russia Agree to Implement Ceasefire" *BBC News* (10 December 2019). Limiting the presence of Russian men of military age in the Ukraine appears to be a legitimate strategy employed by Ukraine to

protect itself from Russia. In this context, the inability of the husband to enter Ukraine or to gain Ukrainian residence does not constitute arbitrary interference with the mother's family in breach of Articles 17 and 23 of the ICCPR. It follows that, while serious harm may arise from this interference, it is not persecution in terms of the Refugee Convention because it does not breach internationally recognised human rights.

[50] Even were this incorrect, the anticipated harm is unrelated to any Convention ground. At the hearing, counsel suggested that the Convention ground was membership of a particular social group, specifically, that the mother was a member of the group "Ukrainians married to Russian nationals".

[51] A particular social group for the purposes of the Refugee Convention cannot be defined solely by reference to the well-founded fear of being persecuted. The persecution must exist independently of, and not be used to define, the social group. See: *Islam v Secretary of State for the Home Department v Immigration Appeal Tribunal and Another Ex Parte Shah* [1999] UKHL 20 at 656; and J C Hathaway and M Foster *The Law of Refugee Status* (Cambridge University Press, Cambridge, 2014) at p425.

[52] The plight of the mother arises entirely from the application of Ukrainian immigration law to the husband and its effect on her. She is not at risk of harm because of her association with or membership of a group or because of a shared immutable characteristic in the terms articulated in *Matter of Acosta* (US BIA Interim Decision 2986, 1985 WL 56042, 1 March 1985), adopted by the Supreme Court of Canada in *Canada (Attorney General) v Ward* [1993] 2 SCR 689 at 736–738 and by the Refugee Status Appeals Authority in *Refugee Appeal No 1312/93* (30 August 1995) at pp47 and 50 which was affirmed by the Tribunal in *AC (Egypt)* [2011] NZIPT 800015 at [100]. The Tribunal finds that there is no applicable Convention ground in respect of the mother's refugee claim.

The son

[53] Turning now to the son, it has been submitted that he is stateless. Ukraine citizenship law provides, at Article 7, that a person whose parents or either parent were citizens of Ukraine at the moment of his/her birth shall be a citizen of Ukraine. The husband initially suggested that the registration of the son's citizenship had to be done in person at the Ukrainian Embassy, which is in Canberra. Later in the hearing, he accepted that the son was entitled to Ukrainian citizenship but indicated he would oppose this because of his fears concerning the son's eventual military

service obligation. Although there is no requirement that the husband consent to the son being recognised as a Ukrainian citizen, the husband's evidence was, effectively, that he would obstruct such recognition.

[54] In *AC (Venezuela)* [2019] NZIPT 801438–439 at [83]–[91] the Tribunal discussed inchoate nationality. This term reflects the position where an individual is treated as a national of a particular country on the basis of pre-existing nationality (apparent from an assessment of the law of the state in question), notwithstanding that the status has not yet been formally recognised by the authorities. Such nationality needs to be recognised by request and forwarded on a nondiscretionary basis. The Tribunal distinguished an inchoate nationality from prospective or potential nationality, where nationality would need to be acquired and could not be conceived of as actual nationality. The Tribunal noted the acceptance of an inchoate nationality as sufficing as nationality for the purposes of Article 1A(2), reflecting the aim of the Convention to provide surrogate protection only when national protection is unavailable.

[55] Having considered Ukrainian citizenship law, the Tribunal finds that the son has been a Ukrainian citizen from the moment of his birth and is entitled to recognition as such. He is treated as a national of Ukraine for the purpose of this decision.

[56] It is not suggested that the son faces any risk of serious harm for any reason in Ukraine. The Tribunal finds that he does not have a well-founded fear of being persecuted there. This being the case, it is unnecessary to consider the issue of Convention ground.

Conclusion on Claim to Refugee Status

[57] For the reasons set out above, neither appellant is entitled to be recognised as a refugee.

The Convention Against Torture

[58] Section 130(1) of the Act provides that:

> "A person must be recognised as a protected person in New Zealand under the Convention Against Torture if there are substantial grounds for believing that he or she would be in danger of being subjected to torture if deported from New Zealand."

Assessment of the Claim under Convention Against Torture

[59] Section 130(5) of the Act provides that torture has the same meaning as in the *Convention Against Torture*, Article 1(1) of which states that torture is:

> "… any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions."

[60] The appellants rely on the same evidence under this aspect of their claims as are relied on in terms of their refugee claims. There is no evidence suggesting that the appellants are in danger of being tortured if returned to Ukraine. It follows that there are no substantial grounds for believing that the appellants are in danger of being tortured if returned to Ukraine.

The ICCPR

[61] Section 131 of the Act provides that:

> "(1) A person must be recognised as a protected person in New Zealand under the Covenant on Civil and Political Rights if there are substantial grounds for believing that he or she would be in danger of being subjected to arbitrary deprivation of life or cruel treatment if deported from New Zealand.
>
> ...
>
> (6) In this section, cruel treatment means cruel, inhuman, or degrading treatment or punishment."

[62] By virtue of section 131(5):

> "(a) treatment inherent in or incidental to lawful sanctions is not to be treated as arbitrary deprivation of life or cruel treatment, unless the sanctions are imposed in disregard of accepted international standards:
>
> (b) the impact on the person of the inability of a country to provide health or medical care, or health or medical care of a particular type or quality, is not to be treated as arbitrary deprivation of life or cruel treatment."

Assessment of the Claim under the ICCPR

[63] Again, the appellants rely on the same evidence in support of their claims under section 131 as they did to support their claims under the Refugee Convention and the *Convention Against Torture*.

[64] Just as the appellants do not face a real chance of cruel, inhuman or degrading treatment, or of arbitrary deprivation of life, as a form of 'being persecuted' in the context of the refugee enquiry, neither are they in danger of it in the context of the ICCPR.

[65] The appellants are not protected persons under section 131 of the Act.

CONCLUSION

[66] For the foregoing reasons, the Tribunal finds that the appellants:

(a) are not refugees within the meaning of the Refugee Convention;

(b) are not protected persons within the meaning of the *Convention Against Torture*;

(c) are not protected persons within the meaning of the *International Covenant on Civil and Political Rights*.

[67] The appeals are dismissed.

Order as to Depersonalised Research Copy

[68] Pursuant to clause 19 of Schedule 2 of the Immigration Act 2009, the Tribunal orders that, until further order, the research copy of this decision is to be depersonalised by removal of the names of the appellants and any particulars likely to lead to the identification of the appellants.

"M A Roche"
M A Roche
Member

Certified to be the Research Copy released for publication.

M A Roche
Member