

**060781033 [2007] RRTA 2 (9 January 2007)**

**DECISION RECORD**

**RRT CASE NUMBER:** 060781033

**COUNTRY OF REFERENCE:** Kyrgyzstan

**TRIBUNAL MEMBER:** Adolfo Gentile

**DATE DECISION SIGNED:** 9 January 2007

**PLACE OF DECISION:** Melbourne

**DECISION:** The Tribunal remits the matter for reconsideration with the direction that the applicant is a person to whom Australia has protection obligations under the Refugees Convention.

## **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 Multicultural Affairs 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 Kyrgyzstan, arrived in Australia in 2006 and applied to the Department of Immigration and Multicultural Affairs for a Protection (Class XA) visa in mid 2006. The delegate decided to refuse to grant the visa in late 2006 and notified the applicant of the decision and his review rights by letter posted in late 2006.

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, in this case 30 June 2006, although some statutory qualifications enacted since then may also be relevant.

Section 36(2) of the Act relevantly provides that a criterion for a Protection (Class XA) 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 the Refugees Convention as amended by the Refugees Protocol. 'Refugees Convention' and 'Refugees Protocol' are defined to mean the 1951 Convention Relating to the Status of Refugees and 1967 Protocol relating to the Status of Refugees respectively: s.5(1) of the Act. 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 the Refugees Protocol and generally speaking, has protection obligations to people who are refugees as defined in them. Article 1A(2) of the Convention 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 now 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 appeared before the Tribunal in late 2006 to give evidence and present arguments. The Tribunal also received oral evidence from the applicant's sibling. The Tribunal hearing was conducted with the assistance of an interpreter.

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

The applicant's claims are contained in a statement attached to his Protection Visa application as follows:

I, 'The Applicant', am making the following statement in support of my application for a Protection Visa. The circumstances outlined below make me to believe that I can no longer maintain a normal life without constant fear for my life and safety.

I am a citizen of Kyrgyzstan (Kyrgyz Republic) and left my country fearing persecutions for the reason of my ethnicity.

I am of mixed ethnic - Kyrgyz background. I was born and spend all my life in Kyrgyzstan before I left it to Australia. During all my life I was subjected to abuses and humiliation for the reason of not being Kyrgyz because I have a ethnic family name and non Kyrgyz appearance. However until recent past I never was subjected to an open abuses and physical attacks. Even under President Akaev regime non Kyrgyz citizen of the republic were relatively protected from beating and were not threatened to be eliminated if they would not leave Kyrgyzstan. However after so called "revolution" in Kyrgyzstan, which overthrew Akaev's regime, the life of Russians, Uigurs, Jews and all other non Kyrgyz ethnic minorities became unbearable. I never was a supporter of ex president Akaev, was unable to get a job and even criticized his policies; however I should state that under his rule people of non Kyrgyz background were not scared for their lives and safety.

Everything has changed when Mr. Akaev was outset. The situation in the country was getting worse and the population provoked by ultranationalists was looking for scapegoats, whom they could blame for all the trouble country has been experiencing. [Details deleted in accordance with s.431]

In the recent past more Kyrgyzs moved from country side to the capital city hoping to get a better life here but in the city they experienced even more problems because of high rate of unemployment, lack of accommodation and general poverty of the country. This terrible situation made them angry and lead

to formation of groups of young nationalistically orientated gangs who threaten and beat members of non Kyrgyz ethnic minorities.

In early 2005 I was beaten near my house by three Kyrgyzs who lived nearby. They often abused me before but that was the first time they beaten me. That beating (like all others that occurred later) started with calling me names and demanded that I have to leave Kyrgyzstan and relocate. The next time they met me again at the same place (another evening in mid 2005) and beat me again. Since that time I never leaved home after it got dark. In mid 2005 my door was painted with graffiti, [Details deleted in accordance with s.431].

In late 2005 when I was shopping at the local market I was approached by drunk Kyrgyzs who pushed me to the ground and kicked by boots. They screamed abusive words, laughed [Details deleted in accordance with s.431]. I was not surprised that market security officers and the police officer who were at the market did not pay any attention to their actions. The police shared the same attitude towards minorities as the majority of population.

In early 2006 I was looking for a job knocking almost at the every door in the city. In one small cafe I was asked to come inside allegedly to discuss work opportunity. When I was at the kitchen area of that cafe the owner, who invited me inside, ordered kitchen hands to place me on the heated stove and roast me as an animal. Two men approached me laughing and said that because I was from a ethnic minority - the stove is a place where I should end up. I managed to grab a knife and pointed it on my attackers. Luckily I managed to escape through the back door of the kitchen followed by laugh and abuses.

The last straw was an attack on me in early 2006. This has happened in midday when I was returned by bus from my friend. A group of four young Kyrgyzs (who beat me twice before) entered a bus on the bus stop and when they saw me they said approaching: "See, this animal is still alive, let's teach him again." They pushed me to the bus floor and kicked by boots, none in the bus even did them a notice. Then they ordered a bus driver to stop and threw me from the bus.

From that day I started to look for any opportunity to leave Kyrgyzstan. That opportunity occurred in one month when I get a proposition to join a group of sportsmen to go to Australia.

More sincerely I implore you to protect me by providing with permission to remain in Australia.

At the Tribunal hearing the applicant reiterated the claims made in his Protection Visa application form. He added a number of points in response to questions from the Tribunal as follows:

- He has had difficulties finding a job since his graduation in mid 2001. He has not been able to find any job since then. He attributes this to his ethnicity.
- [Details deleted in accordance with s.431]

- He has never made any application for a visa to any other country nor has he travelled to any other country.
- He was humiliated because he was from an ethnic minority even from school days.
- He was asked after he recounted each incident of alleged harm, why he did not report it to the police. He stated that the police do not act on these complaints and he added that he was aware that his sibling's complaints to the police about similar incidents had gone unheeded.
- On each occasion that he was beaten he recovered without resorting to a doctor or hospital.
- He was beaten three times by the same group of Kyrgyz youths who lived near him.
- The incident in mid 2005 happened within sight of a policeman who did not intervene.
- If he were to return he would continue to be beaten because of his ethnicity.

The Tribunal also heard from the applicant's sibling, who stated that they witnessed only one incident which the applicant describes, the one in middle 2005 at the market; they were overseas at the other times. However, they are aware of other occurrences through the telephone calls which they had made while overseas. They stated that the applicant has become scared and introverted since these things have happened to him. He cannot work because he is from an ethnic minority. They exhorted the Tribunal to find in favour of the applicant.

The applicant's adviser made an oral submission to the Tribunal indicating that he was aware that the process which the applicant described to get his visa was not uncommon.

He added that even though the government might be setting in place policies which are designed to reduce racism and ethnically motivated violence, there is a gap between the policy and the practice. He believed that the economic situation dictated the attitudes of people, especially those who were of Kyrgyz ethnicity and unemployed. If the economic situation were to improve these incidents would diminish. For the moments the ethnic minorities are the scapegoats.

He submitted that the police only responds to bribes and for good reason, their pay is so low that they need to supplement it by acting only after someone offers them money; the country has lost sight of normal understandings of law and justice. During the Akaev years the kind of anti-minority feelings were merely suppressed because of the better security apparatus; once the Akaev era ended there was no one to control these anti-minority actions. The adviser noted that the applicant had not exaggerated his claims and that the delegate's contention that the applicant had not sought police protection after the incidents and thus was not entitled to the protection of Australia, had been contradicted in the information cited by the very delegate about police corruption in Kyrgyzstan.

### ***Country Information***

The Country Reports on Human Rights Practices - 2005, Kyrgyz Republic, released by the Bureau of Democracy, Human Rights, and Labor, U.S. Department of State, March 8, 2006, states *inter alia*:

The 1993 constitution defines the Kyrgyz Republic as a democratic republic; the country has a population of approximately 5,092,800. The February-March parliamentary elections were marred by numerous, serious violations, particularly in the pre-election period, which subsequently sparked protests. On March 20 and 21, opposition demonstrators took control of the southern cities of Osh and Jalalabad. On March 24, President Akayev fled the country after opposition demonstrators overran the main government building in Bishkek. Following Akayev's departure, Prime Minister Kurmanbek Bakiyev assumed the interim presidency. Although acting President Bakiyev was the only serious contender, the July 10 presidential election marked tangible progress towards meeting international standards. A new parliamentary election was held on November 27 in two districts; although some violations were reported, the Central Election Commission (CEC) ruled that the violations were not sufficiently serious enough to alter the results. The civilian authorities generally maintained control of the security forces, although some members committed serious human rights abuses.

The March overthrow of the Akayev regime resulted in a considerable improvement in the government's respect for human rights, although problems remained. The following human rights problems were reported during the year:

security force abuse of persons, particularly detainees

poor prison conditions

impunity of security forces

arbitrary arrest and detention by the Akayev government

limitations on due process

restrictions on freedoms of speech, the press, and assembly by the Akayev government

corruption

violence against women and children

trafficking in persons

discrimination against ethnic minorities

child labor

The government's human rights record improved considerably following the change in leadership between March and July. Numerous ministry of internal affairs (MVD) officials were dismissed or prosecuted for abuses or misconduct. Harassment of opposition groups and independent media, including honor and dignity lawsuits against newspapers, decreased considerably. After the March 24

revolution the government did not restrict peaceful meetings or demonstrations, although prior notification to local authorities of such activities was still required.

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#### National/Racial/Ethnic Minorities

There were reports of discrimination against nonethnic Kyrgyz citizens. Minorities alleged discrimination, including from officials, in hiring, promotion, and housing. August statistical data reflected the following ethnic breakdown of the population: 67.4 percent Kyrgyz; 10.3 percent Russian; 14.2 percent Uzbek; 1.1 percent Dungan (ethnic Chinese Muslims); and 1 percent Uighur. Other ethnic groups, including Tatars and Germans, comprised 6.4 percent of the population.

Following the March 24 overthrow of the Akayev government, ethnic minority groups, particularly Russians, expressed fears of increased Kyrgyz nationalism. On several occasions flyers with anti-Russian slogans were distributed around Bishkek. However, no incidents of interethnic violence were reported.

In contrast, a representative of the Uighur community expressed hope that the change of power would end discriminatory actions against the Uighur minority that occurred during the Akayev period. Some Uighurs had reported harassment by authorities, as well as discrimination in employment and negative societal attitudes and media coverage of their community. Until the March 24 revolution former State Secretary Ibraimov prevented the Uighur community from holding festivities, demanding that the leader of the Uighur cultural center refute his earlier anti-Chinese statement in the local press. According to the same source this policy changed with the change of administration in March and ethnic Uighurs were able to elect their nominees to local bodies during the last elections.

Representatives of the large ethnic Uzbek minority alleged on several occasions that officials discriminated against their community. The former governor of the Osh region charged that President Bakiyev removed him from his position, in part because of his Uzbek ethnicity.

The law designates Kyrgyz as the state language and Russian as an official language and provides for preservation and equal and free development of minority languages. Russian-speaking citizens alleged that a ceiling precluded promotion beyond a certain level in government service. They also alleged that some otherwise qualified candidates were disqualified in elections in previous years on the basis of exams, the fairness of which was questioned. Both Uzbek and Russian were widely used both officially and unofficially. A 2004 language law requiring, among other provisions, that the president, prime minister, speaker of parliament, and a number of other unspecified public servants be proficient in Kyrgyz was pending implementation until 2015.

Site: <http://www.rferl.org/featuresarticle/2006/03/52ACB0B3-7B6D-4612-BC8F-D54BFA9BE29F.html>, Accessed on 29 Mar 2006

Source: RFE/RL 28 March 2006



KYRGYZSTAN: OSCE Chief highlights ethnic tensions in Kyrgyzstan

BISHKEK, March 28, 2006 (RFE/RL) -- Belgian Foreign Minister Karel De Gucht, the current chairman of the Organization for Security and Cooperation in Europe (OSCE), has called on Kyrgyzstan to do more to ease ethnic tensions in the country.

De Gucht said that, "although progress has been achieved in certain areas, many challenges remain, first of all the interethnic tensions in the north and in the south. They most probably necessitate a comprehensive action plan for national minorities' integration."

De Gucht made his comments on the Kyrgyz leg of a tour of Central Asia. The OSCE chairman met with Kyrgyz President Kurmanbek Bakiev, Foreign Minister Alikbek Jekshenkulov, and a number of other officials.

Earlier, in the Kazakh capital Astana, De Gucht said Kazakhstan has more chance than any of the other Central Asian states of assuming the OSCE presidency in 2009. However, he said that, for that to happen, key political reforms must be undertaken.

De Gucht is due to travel to Tajikistan on March 29 where he is expected to meet with President Imomali Rakhmonov during a two-day visit. From Tajikistan, he is due to travel to Afghanistan.

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E-mail: BBC Monitoring Alert, Kyrgyz Television, 9 February 2006

KYRGYZSTAN: Kyrgyz official urges journalists to be beware of ethnic conflict

Excerpt from report by Kyrgyz Television 1 on 8 February

[Presenter] Deputy Prime Minister Adaham Madumarov has been appointed head of a government commission on settling the situation in the village of Iskra in [northern] Chuy Region. He arrived in the village where a conflict between villagers occurred a few days ago. The governor of Chuy Region, Turgunbek Kulmurzayev, has told that criminal cases have been brought against six people, who have been arrested for possessing firearms, cartridges and grenades. Six people received light injuries in the riot. They are currently receiving treatment in a hospital.

Our film crew is also working along with members of the commission in the village of Iskra.

[Correspondent] The situation in Iskra has stabilized. The special government commission has met local people to find out the cause of the riot. Local people have complained that some media outlets risked inflaming the situation, which was about to be resolved, by disseminating incorrect reports. Both conflicting sides admitted their faults and achieved a reconciliation following a meeting with villagers today.

[Madumarov] I am earnestly requesting journalists, my colleagues, please, do not look for something that does not exist. You bear similar responsibility for what is happening in our state. An incorrect word can spark a fire. Incidentally, this village is also figuratively called Iskra [English: a spark]. Who does benefit from this? You are also our state's citizens and you are also patriots. For the sake of attracting the attention of TV viewers, you report about a particular event in such a way that as if it is not happening in Kyrgyzstan.

[Correspondent] Deputy Prime Minister Adaham Madumarov has called on the local people not to succumb to emotion and provocation. There are special state bodies designed to settle moot points. Conflicts and attempts to resolve them by force in contravention of laws will bring to no good. He called on the inhabitants of Iskra for unity and stop dividing one another on their ethnic features. We are all part of the nation of Kyrgyzstan. We should cement bonds of friendship and brotherhood.

[Passage omitted: local elders attended the meeting]

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Site: <http://eng.gazeta.kz/art.asp?aid=71239> , Accessed on 8 Feb 2006

Source: Gazeta.kz , 9 February 2006

**KYRGYZSTAN: Government commission to settle interethnic conflict in Kyrgyzstan**

8 Feb. BISHKEK. A government commission has been created in Kyrgyzstan to settle an interethnic conflict in Iskra village, Chu region, Kyrgyz govt press service has advised Kazakhstan Today correspondent.

The government has assigned Vice Premier Ardakhan Madumarov head of the commission, and Turgunbek Kulmurzayev, governor of Chu region, deputy head of the commission. The commission includes members of the presidential administration and PM apparatus, heads of Ministries and other authorities, leaders of Dungan community.

PM Felix Kulov speaking at a govt meeting has observed that it is necessary to carry out preventive and explanatory work among the population. The law enforcement authorities have received orders to work with individuals from "risk groups" capable of impacting the conflict, with victims of these events and their relatives. On order from the PM police will be patrolling the area around Iskra 24 hours using help of militias formed by locals.

The PM believes that assemblies of locals should be carried out with participation of the elders. "If a person hits another person it should not necessarily imply an interethnic conflict," - Mr. Kulov said. At the same time he considers it necessary to analyse better the reasons for the conflict. The governor of Chu region assured the Prime Minister that all necessary measures were taken.

The commission has departed for the incident scene today, February 8, 2006. It will report on results of its work to the President of KR on February 10.

The conflict was sparked by an incident in a computer games club in Iskra when a group of young Dungans forced a small Russian boy, an orphan, away, taking over his seat there. Two Kyrgyz lads came to the boy's defence. Later they were beaten up by a group of young Dungans. Presently, according to the governor of Chu region, criminal cases have been filed against 6 individuals arrested in possession of arms: 7 bullets and three grenades were confiscated. 6 persons were injured in the rumbles, some of which have been hospitalised with light wounds.

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E-mail: BBC Monitoring Alert, Kyrgyz AKIpress news agency website, 8 February 2006

## KYRGYZSTAN: Call for tougher crime action after Kyrgyz village riot

Text of report by Kyrgyz AKIpress news agency website

Bishkek, 7 February: Following riots that took place in the village of Iskra in [northern] Chuy Region, the Coalition For Democracy and Civil Society [NGO] expresses concern and calls on the law-enforcement agencies to strictly suppress socially dangerous actions of hooligans who are directly connected with the dramatic events.

"It is important that state bodies take strict and adequate measures against the people who challenged our society. Today, as ever, it is extremely important that the principle of inevitability of punishment for crime is carried out in practice.

"The riots in Chuy Region once again show the level and scale of the criminalization of our society and the urgency of reforming the law-enforcement and prosecution bodies. These facts also confirm that there were real reasons behind the concern of the entire nation of Kyrgyzstan over processes posing threat to public security and the lives of the citizens.

"We think that the overall lack of supremacy of the law, the inability of the state bodies to fight crime, the fact that some officials are playing with criminal elements, and the public perception of crime bosses as heroes have led to the deterioration of the situation and the growth of crime in our country," the coalition said.

[Some 300 residents of the villages of Iskra, Saylyk, Karadobo and Chymkorgon protested demanding that six local Dungan (Muslim Chinese) families be evicted after allegations that they had beaten up Kyrgyz villagers on 5 February. The protesters set fire to some houses of Dungan people and started stoning their houses]

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Site: <http://hrw.org/english/docs/2006/01/18/kyrgyz12241.htm>, Accessed on 24 Jan 2006

Source: Human Rights Watch, 18 January 2006

## KYRGYZSTAN: Human Rights Watch World Report 2006

Popular demonstrations swept through Kyrgyzstan in March 2005, leading to the ouster and resignation of President Askar Akaev. Echoing the "rose" and "orange" revolutions that brought regime change in Georgia and Ukraine, the country-wide protests and disintegration of the Akaev government dramatically altered the political landscape in Kyrgyzstan.

Following deeply flawed parliamentary elections in February and March 2005, people took to the streets. Outraged by the corruption and repression that characterized the parliamentary vote—including attacks on independent media and the perceived unfair advantage given to candidates who were relatives of the president—protestors in southern Kyrgyzstan and later in the capital took over administrative buildings and defiantly expressed their dissatisfaction with the status quo. A variety of grievances merged into a single demand: the resignation of President Askar Akaev.

Violent clashes between police and protestors flared over several days, and eyewitnesses reported the presence in the crowd of government saboteurs who attacked protestors and police alike, causing chaos and panic. Dozens of people were reportedly injured and

government and private property was damaged. However, police dropped their weapons and refused to use violence to suppress the protestors who arrived at the Kyrgyzstan White House on March 24, 2005. The demonstrators forced their way in and took over the seat of government. One of the leaders during the weeks of protest, long-time politician Kurmanbek Bakiev, was named the new president. President Akaev fled the country and later formally resigned his post.

Political prisoner Feliks Kulov was released by protestors on March 24, 2005. On April 6, the Supreme Court overturned his conviction on charges of abuse of power; a second conviction, for embezzlement, was quashed on April 11. Kulov withdrew as a candidate for the July presidential election and President Bakiev, whose leadership was confirmed in that election, later appointed him Prime Minister.

### Promises of Reform

In the immediate aftermath of the revolution, the people of Kyrgyzstan had high hopes that the Bakiev government would put a stop to the corruption and repression that had undermined the Akaev administration.

As of this writing, promises of reform made during the early days of the Bakiev administration had not materialized. While Bakiev twice in 2005 announced his support for the abolition of the death penalty in Kyrgyzstan and called for constitutional amendments, no such legislation had been introduced as of late November.

One of the main reforms urged by civil society activists is the creation of a new constitution that would restore freedoms stripped during the Akaev era and would settle important issues regarding the structure of the government, such as whether Kyrgyzstan should be a presidential or parliamentary republic. The Constitutional Committee, set up to draft a new constitution, initially received praise for including civil society representatives in addition to government officials among its members. However, observers later criticized the body as ineffective and marred by infighting and noted that President Bakiev had increased the number of government representatives vis-a-vis representatives of civil society.

Continuing reports of police abuse in 2005, including torture of adult and children detainees, further undermined people's confidence in the government's promises of reform.

In a positive development, local rights groups and media watchdogs reported increased freedom of the media following the change in government.

### Human Rights Defenders

During the final months of the Akaev government, as the country geared up for parliamentary elections, human rights defenders suffered intense persecution.

Tursunbek Akun, a prominent human rights defender and leader of the NGO Human Rights Movement of Kyrgyzstan, was kidnapped on November 16, 2004. He was held for fifteen days by men he believed to be associated with police and national security services. Akun was discovered on December 1 at a Bishkek hospital where doctors found he was suffering from "deep psychological trauma." A private doctor later diagnosed him with a brain concussion.

Kyrgyz government officials denied that Akun was the victim of kidnapping or forced disappearance and failed to investigate the possible role of law enforcement agents in the crime. The spokesman for the Ministry of Internal Affairs and the deputy chairman of the National Security Service publicly accused Akun of staging his own disappearance for self-promotion and to discredit law enforcement bodies. Akun claimed that he had been held by members of the security forces in the basement of an unknown house, where his kidnappers allegedly demanded that he stop collecting signatures in support of Akaev's resignation. Prior to his abduction, Akun had been actively advocating for the early resignation of President Akaev. As of September 2005, no one had been held accountable for the kidnapping and police had halted their investigation.

Aziza Abdurasulova, head of the human rights NGO Kylym Shamy (Candle of the Century), was active in the search for Akun while he was missing. On November 26, 2004, a person who identified himself as a police officer tried to force her into his car, claiming she had a stolen cell phone and that she had to be taken to the police station. Her phone had in fact been given to her by the Bishkek office of the U.S.-based organization Freedom House. Abdurasulova fled from the officer. She later received calls on her cell phone from senior police officers asking to meet with her. At a press conference, the spokesman for the Ministry of Internal Affairs accused her of trying to draw public and political attention to herself with allegations that police officers had attempted to abduct her.

With a new government in place, the long-exiled head of the Kyrgyz Committee for Human Rights (KCHR), Ramazan Dyrlydaev, was able to return to the country. The KCHR continued to face serious obstacles to its operations, however. During the Akaev government, the KCHR had been stripped of its registration and an alternate group was granted registration under the same name; it is illegal in Kyrgyzstan for two groups with the same name to be registered. As of this writing, the genuine KCHR had not been re-registered.

### Key International Actors

The Organization for Security and Cooperation in Europe (OSCE) criticized the former Akaev government for failing to ensure that the February and March 2005 rounds of parliamentary elections complied with international standards. In its report on the July elections that followed President Akaev's ouster, the OSCE noted that the "election marked tangible progress by the Kyrgyz Republic towards meeting OSCE commitments, as well as other international standards for democratic elections."

Following a meeting with then-Foreign Minister Roza Otunbaeva in September, European Commissioner for External Relations Benita Ferrero-Waldner stressed the "unique window of opportunity for the Kyrgyz government to show its political commitment to fully embrace democratic values, develop economic and social policies, which will benefit the Kyrgyz population, and tackle corruption."

With relations already at a low point after Uzbek president Islam Karimov condemned the March "revolution," tensions between Kyrgyzstan and Uzbekistan escalated further when hundreds of Uzbeks sought refuge in Kyrgyzstan following the May 13 massacre of largely unarmed protesters by security forces in the Uzbek city of Andijan. Uzbek authorities pressured the Kyrgyz government to return Uzbek asylum seekers and obtained the handover of four men on June 9. Under strong international pressure, the government of Kyrgyzstan vowed not to return any more of the refugees.

On July 29, 2005, the U.N. High Commissioner for Refugees airlifted 439 Uzbeks from Kyrgyzstan to Romania. One month later, the government of Uzbekistan cancelled its contracts to supply natural gas to Kyrgyzstan. Uzbek authorities went on to implicate Kyrgyzstan in what they claimed was an Islamic insurgency in Andijan. The state prosecutor's office charged that the "rebels" had trained in southern Kyrgyzstan. The Kyrgyz authorities denied these allegations.

Kyrgyz-Russian cooperation grew closer in 2005 after Kyrgyz authorities allowed Russia to double the number of its troops at the Kant airbase.

Relations between Kyrgyzstan and the U.S. government deteriorated in the final months of the Akaev administration. The U.S. Ambassador to Kyrgyzstan, Stephen M. Young, strongly criticized the government for not allowing free and fair parliamentary elections. During the March unrest in southern Kyrgyzstan, the U.S. government called for dialogue and expressed hope that political changes in Kyrgyzstan would be non-violent. The United States engaged with the newly-installed Bakiev government on issues ranging from the use of the Manas airbase near Bishkek to the Uzbek refugee issue. In April 2005, a group of visiting senators pledged to support the country's political transition. During the fiscal year 2004 (October 1, 2003 through September 30, 2004), U.S. foreign assistance to Kyrgyzstan was U.S.\$50.8 million. U.S. expenditures to Kyrgyzstan were expected to increase in 2005.

At a summit of the Shanghai Cooperation Organization (SCO) held in Astana in July 2005, Kyrgyzstan joined Uzbekistan, Kazakhstan, Russia, China, and Tajikistan in signing a declaration on strengthening cooperation in the "fight against terrorism, separatism and extremism." Despite an official SCO statement urging the U.S. to set a date for withdrawal from military bases in Central Asian countries, President Bakiev assured U.S. Secretary of Defense Donald Rumsfeld that the U.S. could use the base in Kyrgyzstan for as long as necessary. At the present time, there are more than nine hundred U.S. troops stationed at Manas airbase.

## **FINDINGS AND REASONS**

The applicant is in his late 20s male from a minority ethnicity. He travelled to Australia on a valid Kyrgyz passport issued in his own name and an Australian temporary business visa of one month's duration granted in City A in early 2006. The above documentation is sufficient for the Tribunal to find that the applicant is a national of Kyrgyzstan and the Tribunal will consider the applicant's claims against this country.

The essence of the applicant's claims is that he fears persecution from non-state agents for reason of his ethnicity. He cites five attacks by ethnic Kyrgyz between early 2005 and mid 2006.

The applicant claims that under the previous regime (that of Akaev) he suffered name calling and other insults because he is from an ethnic minority. He states that the regime managed to keep a lid on the kind of violence he suffered after the ousting of Akaev. He claims that nationalism blossomed after Akaev especially as more country people (ethnic Kyrgyz) were flooding in to the cities and jobs were scarce. The animosity was directed at Russians,

Uighurs, Jews and other minorities. The Tribunal accepts that the applicant is from an ethnic minority. The Tribunal accepts the above claims as they are consistent with the available country information. The Tribunal also accepts that the applicant was attacked on the five occasions as he claims. The attacks as described are credible in the circumstances and they coincide with a period of turmoil and reform in the country.

The Tribunal finds that the harm to which the applicant was subjected constitutes serious harm amounting to persecution in terms of the Convention and municipal law. This harm has been perpetrated by non-state agents, they being persons of Kyrgyz ethnicity.

### ***State protection***

The applicant did not seek the intervention of the security forces following any of the incidents described and accepted by the Tribunal; when asked about this he replied in terms that he was sure that nothing would be done about his complaints, that in the case of the attack at the market, it was witnessed by a policeman who did not intervene during the five or six minutes which his beating lasted and that when his sister has suffered similarly and had reported the incident to the police, nothing had been done about it. The applicant argues that no state protection is afforded to people like him.

The Tribunal is cognizant of the approval given to the following statement from Hathaway's *The Law of Refugee Status* (1991) by Hill J in *MIMA v Kandasamy* [2000] FCA 67 [at 30]:

*"... obviously, there cannot be said to be a failure of state protection where a government has not been given an opportunity to respond to a form of harm in the circumstances where protection might reasonably have been forthcoming."*

The above cited 2005 U.S. Department of State report states relevantly:

#### d. Arbitrary Arrest or Detention

The law prohibits arbitrary arrest and detention; however, police at times used false charges to arrest persons and solicited bribes in exchange for release.

#### Role of the Police and Security Apparatus

Law enforcement responsibilities are divided between the MVD for general crime, the SNB for state-level crime, and the prosecutor's office for both types of crime. Corruption, particularly the payment of bribes to avoid investigation or prosecution, was a major problem at all levels of law enforcement. The government took steps to address corruption in the police force, including public commitments to fight corruption and a government decree, effective as of July, increasing the salary of police officers by 50 percent.

Police impunity remained a problem; however, during the year numerous MVD officials were dismissed and prosecuted for various offenses, including corruption, abuse of authority, and police brutality. According to the MVD, during the first 6 months of the year, 13 criminal cases were opened against police officers. Disciplinary actions were taken against 407 MVD employees, 26 employees were

fired, and 43 were demoted. The MVD reported that during the first 6 months of the year, 259 complaints were filed for abuse or illegal conduct by police officials.

The Tribunal finds that in this case, based on the applicant's own experiences and the independent information available, it cannot be said that, in the circumstances, protection would reasonably have been forthcoming had the applicant sought it. The picture which emerges from the information is that the security apparatus is corrupt and unreliable in terms of it carrying out of its duties and without fear or favour. The Tribunal acknowledges that some government decisions have been taken to change this state of affairs but at present there is no evidence available to satisfy the Tribunal that any changes have been either fully implemented or have resulted in substantive changes in the culture of the security forces such that the Tribunal would have confidence in finding that protection would be available to the applicant. The Tribunal finds that, considering the reasonably foreseeable future, adequate state protection is not available to the applicant.

The Tribunal, having considered the applicant's claims individually and cumulatively, finds that there is a real chance that he would be subjected to serious harm for the Convention reason of ethnicity, in the reasonably foreseeable future, should he return to Kyrgyzstan, accordingly it finds that his fear of persecution is well-founded

## **CONCLUSIONS**

The Tribunal is 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 satisfies the criterion set out in s.36(2) for a protection visa.

## **DECISION**

The Tribunal remits the matter for reconsideration with the direction that the applicant is a person to whom Australia has protection obligations under the Refugees Convention.

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

Sealing Officer's I.D.                      rander