REFUGEE STATUS APPEALS AUTHORITY
NEW ZEALAND

REFUGEE APPEAL NO. 2155/94

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AT AUCKLAND

Before:	E M Aitken (Chairperson) S Joe (Member)
Counsel for Appellant:	Appellant represented self
Representative for NZIS:	No Appearance
Date of Hearing:	23 October 1996
Date of Decision:	10 April 1997

DECISION DELIVERED BY S JOE

This is an appeal against the decision of the Refugee Status Branch of the New Zealand Immigration Service (RSB) declining the grant of refugee status to the appellant, a national of the Russian Federation.

INTRODUCTION

The appellant arrived in New Zealand on 5 November 1993 and subsequently applied for refugee status on 9 November 1993. He was interviewed by the RSB on 7 December 1993. By letter dated 28 February 1994, the RSB declined this application. It is against this decision that the appellant presently appeals.

In a letter dated 30 September 1996, the Secretariat, on behalf of the Authority, confirmed the hearing date to the appellant, enclosing a numbered copy of the immigration file currently held by the Authority. The appellant was instructed in the letter to bring this file to the hearing.

The appeal was initially set down for hearing at 10am on 23 October 1996. The appellant appeared before the Authority at the designated time, but without a copy of the Authority's file which had been sent to him. It soon became clear, in the course of making preliminary enquiries, that the appellant, having changed his residential address in September 1996, never received the Authority's letter of 30 September 1996. He therefore did not receive a copy of the Authority's file.

In the interests of fairness to the appellant, a further copy of the Authority's file was made available to him. With his consent, the appeal hearing was re-set and held later in the afternoon of that same day to allow the appellant the opportunity to peruse the contents of his file. The appellant's primary claim to refugee status was based on his having been conscripted, in his absence from home, as a reservist to serve in the military, a matter which the appellant considered would likely result in his being called to fight in Chechnya.

At the conclusion of the hearing, the appellant was granted a further 28 working days within which to lodge any further submissions he wished to make in respect of the material contained in the Authority's file, and/or any further documents in support of his claim. Subsequent to the hearing, and under cover of the appellant's letter dated 26 November 1996, the Authority received an original newspaper clipping, together with its English translation, reporting on conscription into the Chechnyan War. Also enclosed were three further articles dealing with similar topics published in "Time" magazine, two of which are dated 11 October 1993, and one dated 6 May 1996.

Subsequently, by letter dated 24 February 1997, the Secretariat on behalf of the Authority, forwarded to the appellant for his comment a copy of its recent decision Refugee Appeal No. 2442/96 Re DVK (20 February 1997). The appellant in that decision had expressed similar fears that he would be conscripted to serve in the Russian Federation army in the Chechnyan conflict, but had been declined by the Authority on the basis that his fear was not well-founded. The appellant was granted 21 days leave within which to lodge further written submissions in light of this decision, and in particular, the Authority's finding in that case, based on the country information available, that there was no real chance of the appellant being placed at risk of being required to perform military service in Chechnya. The appellant was also invited to submit any information he had as to the likely punishment of having failed to respond to a summons to present himself to the military for the purposes of conscription. In response to the Authority's request,

the appellant, under cover of his letter dated 20 March 1997, made further submissions to the Authority, enclosing a selective English translation of articles 328 and 331 of the Criminal Code of the Russian Federation, the provisions dealing with offences in breach of military service obligations.

All of the information referred above has been duly considered by the Authority in determining this appeal.

A helpful summary of the Chechnyan conflict can be found in the Authority's previous decision, Refugee Appeal No. 2442/95 Re DVK (20 February) at pages 9-11.

THE APPELLANT'S CASE

The appellant is a 27 year old, single man born in Vladivostok, in what is now known as the Russian Federation. Prior to leaving the Russian Federation, he worked at sea as a navy operator.

His father died in June 1996. His mother presently remains living in Vladivostok. The appellant has no siblings. He has been a practising Christian since 1991-1992.

The appellant attended maritime college from August 1985 until 1990, when he graduated with a radio technical engineering degree. While the appellant was able to defer his military service while undergoing studies at the maritime college, upon graduation he became a military officer "in reserve". He was issued with a military passport, in which it is written that he can be conscripted only when total mobilisation of the military forces was declared. However, at no time prior to his departure from the Russian Federation was the appellant ever called to serve in the military.

From April 1991, the appellant served at sea as a second class navy operator for a scientific research company. In March 1993 the vessel to which the appellant was assigned to work was bound for an expedition to New Zealand.

One week prior to leaving for New Zealand, the appellant was confronted by four men in a car as he left port to go home. The four men grabbed the appellant and pushed him at gunpoint into their car. The men made it clear to the appellant that they knew he was going to New Zealand, and told him that since he would have a

lot of money after one year at sea he should bring them back “a good car”. The appellant was told that if he did not do so, he would be killed. The men then let the appellant out of the car before driving off.

Although the appellant did not recognise these men, he believed that they belonged to the mafia, or had connections with them. It is for this reason that the appellant chose not to report this matter to the police, whom he considered were corrupt and also to have connections with the mafia.

The appellant left the Russian Federation, bound for New Zealand in March 1993. Approximately one month before the trip to New Zealand ended, the appellant came to know of an Order issued by the Minister of Defence relating to the conscription of reservists in to the Russian Federation military. The appellant had learned of this news from receiving the transmission in his capacity as radio operator on the ship.

In support of this aspect of his claim, the appellant submitted a copy of the official statement which was later published in the local newspaper for the Central Primorsk region, dated 10 February 1994, the translation of which is as follows:

> “**Conscription (of officers) Under Way**
>
> Vladimir Kobilinskii,
> Vladivostok
>
> **Pursuant to the July Presidential Decree and the August Decree of the Minister of Defence of the Russian Federation, the conscription of reserve officers has begun in Primorye**.
>
> Any male living within the territory of the Primorye region up to twenty-seven years of age who holds reserve officer rank may be called up on a “voluntary-compulsory” basis and posted anywhere in the country for a period of twenty-four months’ service as an officer. Graduates of military faculties at civilian tertiary education establishments will be given contracts, under which they will receive regular officers’ pay. But unlike the latter, conscript officers will not be able to be discharged at their own request.
>
> If they decide not to perform their duties and prefer to drink and live it up, then their punishment will be not dismissal “for conduct unbecoming of an officer”, but time spent in prison or a correction establishment for common criminals, since no officers’ penal battalions have yet been formed.
>
> Since 1 February, the military registration and enlistment offices have been giving officer cadets written instructions concerning their dismissal from their places of work, and within a month they are required to be “under arms”.
>
> Lieutenant-Colonel Dainis Barkans, Deputy Director of the Department III of the Primorye Regional Military Registration and Enlistment Office, said that precise figures for the 94 call-up are not available but from several indirect sources of

> information it would appear that the Office has around 100 men in its sights, and the same number are currently being sought by the police and the Enlistment Offices.
>
> Final tertiary students and recent graduates should note the following: that fee-paying enrolment at an institution subject to a subsequent mandatory period of work does not qualify them for a deferral. Such deferrals will granted only in the same circumstances as for those in the ranks. However, women who have received the rank of Lieutenant in the Medical Corps don't have to look forward to the prospect of trying on a soldier's tunic and stripes for size: they are not being called up.
>
> Newspaper published at the IPK "Dalpress", GSP, Prospekt "Krasnogo Znameni", 10, 690600 Vladivostok, ph250-545
>
> Issue went to press 5pm, 10 February 1994."

The appellant explained to the Authority that the expression "voluntary-compulsory" in the Order meant that if you did not volunteer to serve, you would be compulsorily required to do so. The failure to respond to the call would be considered a criminal offence, and would be noted on one's criminal record accordingly. The appellant also noted that for such an offence one would be detained with other criminal offenders and not in any special group where military offenders would be held. The appellant also claimed that he had asked his mother and friends to make enquiries on whether this law still applied or whether it had since been cancelled. Six months prior to the appeal hearing, when the appellant last made enquiries, the law still applied.

The appellant was disturbed by this news, particularly as it came about when the Chechnyan conflict had become more serious. He thus feared that he, too, would be called upon as a reservist to serve with the Russian army in the Chechnyan conflict if he returned to the Russian Federation. The appellant, due to his religious and moral convictions, did not wish to do so.

The Authority discussed with the appellant at some length during the appeal hearing the nature of his objections to being conscripted as a reservist. The appellant considered that whilst the government of the Russian Federation had the right to defend its territory, he did not agree that the military should be used for the purposes of aggression, as in the case of the Chechnyan conflict and other conflicts between the Russian Federation and former Soviet Republics such as Georgia. The appellant made the distinction between those persons whose natural instinct was, when under attack, to fight for one's survival, and those persons who served with the Russian army in the Chechnyan conflict, killing and

attacking helpless civilians. The Russian Federation had attacked Chechnya and declared war against them first. The war was primarily against civilians, and in the appellant's view, more than half of the casualties in the war were civilians. As an officer, the appellant did not want to be in charge of other soldiers and be responsible for their killing innocent civilians.

The appellant considered that since becoming a Christian, one of the principles of life that he subscribed to was to live in peaceful co-existence. His beliefs were such that he could not allow himself to kill defenseless people who were struggling for independence.

The appellant gave evidence that he had discussed these issues with other ship-mates on board, and considered that his views were commonly known to them.

At the same time, the appellant was also troubled by the incident that occurred just one week prior to his departure from the Russian Federation, and knew that if he did not return from New Zealand with a car, he would be killed. The appellant discussed both reasons for not wanting to return home with his captain, who subsequently accused him of being a traitor to his country. On 5 November 1993, when the ship finally docked in New Zealand, the appellant jumped ship, leaving behind his seamen's passport in the captain's possession.

In 1994, the appellant's parents received various visits from a representative of the Military Department enquiring about the appellant's whereabouts. The appellant told the Authority that he had received news that the military officials had visited his parents' house enquiring about him a number of times, saying that when he returned he would be either conscripted to serve in the army, or punished for staying in New Zealand.

Recently, the appellant received news from home that his father had died in June 1996. In his absence, the men whom the appellant believed were connected with the mafia, had come to his parents' house. When they learned that the appellant had not returned with the ship, they threatened his parents that their blame of the appellant would be shifted to them. The appellant believed that his father was killed by one of these men.

On the issue of military conscription, the appellant fears that if he returned to the Russian Federation, he would be subject to more severe punishment, given that

he has remained in New Zealand and has not returned home to respond to his military call-up, which he assumes has been made. Given that the call up was made during the time of the Russian Fedeation's military intervention in Chechnya, the appellant feared that his failure to appear would be regarded as a treasonous act, equivalent to desertion in time of war. The appellant told the Authority at the hearing that the Chechnyan war would soon resume. The main proponent of the peace accord, General Lebed, had since been demoted out of government office. The appellant considered that President Yeltsin had not agreed with the peace initiative, and that for these reasons, the Chechnyan conflict would not be at an end.

As previously noted, subsequent to the hearing the appellant submitted an English translation of an extract of various provisions contained in the Russian Federation Criminal Code. Article 328 of the Code specified:

> "The failure to report for military service when called up, in the absence of legitimate reasons for exemption from these obligations-
>
> shall be punishable by a fine from two hundred to five hundred times the minimum [monthly] salary or other income of the person convicted for a period of from two to five years, or by detention for three to six months, or by a prison sentence of up to two years."

Further, article 331 of the Criminal Code provides that:

> "3. Criminal liability for offences committed in breach of military service obligations in wartime or in combat situation shall be determined by the wartime legislation of the Russian Federation."

The appellant also feared that the fact he had jumped ship would also be regarded as treason. The appellant claimed that the captain was aware that he left the ship because he did not want to serve in the military, and had even accused him of being a "traitor". The appellant claimed that in accordance with standard procedure, a written report would have had to have been made detailing why the appellant jumped ship to remain in New Zealand. The appellant speculated that the report compiled on his ship-jumping would refer to his not wanting to be killed during military action in Russia as one such reason. Further, as an officer, the appellant considered he would be regarded as part of the government apparatus. Thus, the act of ship jumping, for the reason claimed, would be perceived by the government as an act in opposition to the government's current policies. This was despite the appellant's acknowledgement that, in terms of the Constitution of the Russian Federation, political freedoms were guaranteed.

Finally, the appellant expressed a fear that, in light of his father's death, and the earlier threat made to his own life, he too, would be killed by the mafia. The appellant conceded to the Authority, however, that this particular aspect of his claim did not relate to any one of the five Convention grounds as set out in the Refugee Convention.

THE ISSUES

The Inclusion Clause in Article 1A(2) of the Refugee Convention relevantly 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."

In terms of Refugee Appeal No. 70074/96 Re ELLM (17 September 1996), the principal issues are:

1. Objectively, on the facts as found, is there a real chance of the appellant being persecuted if returned to the country of nationality?

2. If the answer is yes, is there a Convention reason for that persecution?

ASSESSMENT OF THE APPELLANT'S CASE

We first consider the issue of the appellant's credibility. The Authority found the appellant to be a credible witness. He gave frank responses to the Authority's questions and made no attempt to embellish his claim. His candid acknowledgment that his fear of the mafia was not a Convention-related claim further reinforced our finding as to the appellant's overall credibility. Indeed, we have no reason to doubt the reasons for the appellant's unwillingness to serve with the Russian army in the Chechnyan conflict.

There was, however, a slight inconsistency in the appellant's evidence as to whether he had, *in fact*, been conscripted to serve in the military as a reservist. Whereas the appellant gave evidence at the hearing that representatives from the military had expressed to his family *an intention* to do so, in his letter to the Authority dated 20 March 1987, the appellant stated that he had *in fact* been called up during the Russian military intervention in Chechnya. Given our finding that we are satisfied with the appellant's credibility for the reasons stated above, we are prepared to give him the benefit of the doubt and accept, for the purposes of this appeal, that subsequent to his arrival in New Zealand, he was conscripted by the military authorities sometime in 1994.

1. MILITARY CONSCRIPTION

The Authority accepts that there is a real chance that, having been conscripted, the appellant would be liable to face prosecution due to his failure to present himself to the military authorities when called. It is clear from the country information available, that the failure to comply with military conscription is a criminal offence, punishable under article 329 of the Russian Federation Criminal Code by payment of a fine of between two and five hundred times the appellant's minimum wage or salary for a period of two to five years, detention for between three and six months, or by a prison sentence of up to two years.

In reaching this conclusion, however, the Authority makes the distinction between its finding that there is a real chance of the appellant being prosecuted for a "criminal" offence, and the appellant's submission that he would be persecuted for a Convention-related reason. For it is only the latter category that, if applicable to the appellant, would result in him being recognised as a Convention refugee on this ground.

The appellant has clearly articulated to the Authority his reasons for his unwillingness to serve in the military, due to both his religious and moral convictions. For the appellant's appeal to succeed, however, he must show firstly, that the Russian authorities are aware of his reasons for refusal, secondly, that there is a real chance the particular punishment likely to be meted out to him is of sufficient severity as to amount to *persecution* and finally, that such persecutory punishment would be imposed *by reason of* either his race, religion, nationality, membership of a particular social group or political opinion.

Even assuming that the authorities were aware of the appellant's reasons for not presenting himself to the military, (which is far from clear in this case), there is no evidence before the Authority to suggest that those who evade the draft on the grounds of conscience are, when compared with those who evade for other reasons, being differentially treated or subject to disproportionately more severe penalties under the Criminal Code.

The punishment provided for draft evasion under the Criminal Code is not, in the Authority's view, in itself persecutory. Nor is the Authority satisfied on the facts of this case, that there is a sufficient nexus between the harm feared and the

appellant's civil or political status. The obligation to serve in the military in the Russian Federation is a universal one, having equal application to all male citizens of the Federation being of conscription age. Equally, so, are the provisions contained in the Criminal Code which provide for the punishment of all persons so drafted who attempt to evade the conscription call, regardless of their reasons for so doing.

In summary, the Authority finds that while there is a real chance the appellant would face legitimate prosecution for a criminal offence, there is no real chance that he would face either *persecution,* or persecution for a *Convention reason*.

2. MAFIA

The Authority has considerable sympathy for the appellant's plight in being targeted by the Mafia who have threatened him with death, should he fail to return to the Russian Federation with an overseas-assembled car. Even assuming however that the appellant's fear in this regard was well-founded, this aspect of the appellant's appeal claim must still fail, as there is, once again, no nexus between the harm feared by the appellant and his civil or political status. The appellant himself conceded before the Authority that his claimed fear in this regard could not be said to be by reason of any one of the five Convention grounds in terms of the Refugee Convention. The Authority has also previously held that such claims by Russian ship-jumpers based on a fear of the mafia were found wanting, the harm feared not being based on a Convention ground. See for example Refugee Appeal No. 2446/95 re RNS (21 June 1996) at page 5 in which the Authority held:

> "Similarly, fears held by the appellant of further harassment from members of criminal gangs do not relate to a Convention ground. His occupation as a seaman, which prompted the harassment suffered in the past, does not amount to a social group within the meaning of the Convention. The interest shown in him and other seamen by criminals stems not from his occupation as such but because of his being seen as someone who might have, or be able to obtain foreign currency or goods. Kasheyev v Minister of Immigration and Ethnic Affairs (1994) 50 FCR 226."

(See also Refugee Appeal No. 2481 re VD (7 June 1996); Refugee Appeal No. 2467 re AM (7 June 1996).)

3. SHIPJUMPING

The appellant also claims to fear returning to the Russian Federation, given that he has jumped ship and that his captain, who is aware of his reasons for doing so,

in the heat of the moment accused him of being a traitor. However, there is no real chance, in the Authority's view, that the appellant would face persecution due to his having jumped ship. In its previous decision Refugee Appeal No. 2442/95 re DVK (20 February 1997) at page 15, the Authority held:

> It may well be that the appellant, because of his actions in failing to return with his crew, will find obtaining further employment as a seaman difficult. He may also be liable to his employer under the terms of his employment contract or incur some other type of penalty. There is though, no evidence that ship jumping is still treated as a criminal offence under Art. 64 of the Criminal Code of the Russian Federation which made flight abroad or refusal to return from abroad a treasonable offence punishable by a lengthy period of imprisonment. Even in the period prior to the break-up of the former Soviet Union, there were few reports of such prosecutions with only one recorded by Amnesty International in 1991. Refer to Refugee Appeal No. 58/92 re SAP (12 August 1992). The situation would appear to be even more certain given that on 20 December 1995 the Constitutional Court of the Russian Federation held that Art. 64 of the Criminal Code of the Russian Federation is contrary to the constitution of the Russian Federation and therefore, illegal. (Information is supplied to the RSAA by Professor YUG Sharikov). In a memorandum received from the UNHCR's representative in Canberra on 2 August 1996, it is also noted that the new draft of the Criminal Code now pending in the Russian Parliament does not contain Art. 64".

Accordingly, we find that the appellant's fear of persecution for shipjumping is not well-founded. It may well be that he could be liable for some technical offence for his conduct, but any such punishment could not be said to be in itself persecutory, nor for a Convention reason.

CONCLUSION

Accordingly, for the reasons given, the Authority finds the appellant is not a refugee within the meaning of Article 1A(2) of the Refugee Convention. Refugee status is declined. The appeal is dismissed.

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Member