

0802817 [2008] RRTA 265 (18 July 2008)

DECISION RECORD

RRT CASE NUMBER: 0802817

DIAC REFERENCE(S): CLF2000/23077 CLF2003/14091

COUNTRY OF REFERENCE: Ukraine

TRIBUNAL MEMBER: Denis O'Brien

DATE DECISION SIGNED: 18 July 2008

PLACE OF DECISION: Sydney

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

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration and Citizenship to refuse to grant the applicant a Protection (Class XA) visa under s.65 of the *Migration Act 1958* (the Act).
2. The applicant, who claims to be a citizen of Ukraine, arrived in Australia and applied to the Department of Immigration and Citizenship for a Protection (Class XA) visa. The delegate decided to refuse to grant the visa and notified the applicant of the decision and his review rights.
3. The applicant sought review of the delegate's decision and the matter is now before the Tribunal.

RELEVANT LAW

4. Under s.65(1) of the Act a visa may be granted only if the decision maker is satisfied that the prescribed criteria for the visa have been satisfied. In general, the relevant criteria for the grant of a protection visa are those in force when the visa application was lodged although some statutory qualifications enacted since then may also be relevant.
5. Section 36(2) of the Act, as in force before 1 October 2001, provided that a criterion for a protection visa is that the applicant for the visa is a non-citizen in Australia to whom Australia has protection obligations under the 1951 Convention Relating to the Status of Refugees as amended by the 1967 Protocol Relating to the Status of Refugees (together, the Refugees Convention, or the Convention).
6. 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'

7. Australia is a party to the Refugees Convention and, generally speaking, has protection obligations to people who are refugees as defined in Article 1 of the Convention. Article 1A(2) relevantly defines a refugee as any person who:
owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear, is unwilling to return to it.
8. 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.

9. Sections 91R and 91S of the Act qualify some aspects of Article 1A(2) for the purposes of the application of the Act and the regulations to a particular person. Those provisions were inserted on 1 October 2001 and apply to all protection visa applications not finalised before that date.
10. There are four key elements to the Convention definition. First, an applicant must be outside his or her country.
11. Secondly, 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, if 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 unable to be controlled 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 (see *Chan per McHugh J* at 430; *Applicant A per Brennan CJ* at 233, *McHugh J* at 258).
12. 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.
13. Thirdly, 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.
14. Fourthly, 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 he or she has genuine fear founded upon a “real chance” of persecution for a Convention stipulated reason. A fear is well-founded when 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.
15. 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.

16. 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

17. The Tribunal has before it the Department's files 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.
18. The applicant appeared before the Tribunal to give evidence and present arguments. The Tribunal hearing was conducted with the assistance of an interpreter in the Ukrainian and English languages.
19. The applicant was represented in relation to the review by his registered migration agent.

Evidence before the Tribunal

20. The applicant's evidence may be summarised as follows:
 - The applicant was born in Ukraine and is an ethnic Ukrainian of the Greko-Catholic faith. He works in a position where he visited neighbouring countries and travelled to Country A on many occasions. He obtained his passport in the late 1990's. He was employed as a in this position until he left Ukraine in the early 2000's.
 - The applicant, in his application to the Department for a temporary visa, informed the Department that he was employed by the RUKH political party. The purpose of his visit was stated to be to visit the Ukrainian community in Australia and to participate in a Catholic Church event.
 - The applicant had been a member of the Christian Democratic Party of Ukraine (CDPU) since the late 1990's and actively participated in political life there.
 - Before that (from around the early 1990's) he had been a member of the RUKH, a party which is ideologically similar to the CDPU. As a member of the RUKH he supported Mr V Chernovil in the 1995 presidential elections. The applicant was attacked distributing leaflets in an anti – Kuchma campaign run collectively by a number of parties, including the RUKH and the CDPU.
 - The applicant did not submit his protection visa application initially on his arrival in Australia as he thought the situation in Ukraine would improve. Later he received information from the regional branch of the CDPU that the government persecuted political activists who actively agitated against one candidate.
 - Between the mid 1990's and the late 1990's the applicant was singled out by presidential security agents as an agitator and accused of being a traitor. In the mid 1990's he was involved in street agitations and protests. He was physically attacked by members of the internal intelligence service (SBU). He reported the matter to the police but they did not take the matter further. When he reported a further attack the police told him to stop his political activities as he was exposing himself to further attacks. He claimed that security agents were

harassing all minority political parties even those, like the CDPU, who were aligned to a particular party.

- The fact that the parliamentary CDPU had given its support to a particular candidate was explained by the party's policy to support anti-communist government factions. This person only retained his position by virtue of the support of the CDPU and RUKH parties in western Ukraine.
- The applicant also claimed that he was called to the office of the SBU and told that if he persisted with his agitation he would end up in jail without a job. He later found out that other members in the area had also been threatened in a similar fashion and threats were made to deregister their branch and seize all their funds and property. Due to their activities in seeking an inquiry into the death of one man, they were continually harassed by the authorities and a number of their members were arrested in the late 1990's because they had publicly implicated a prominent person in the death of this man. The applicant personally agitated and protested to the police about these arbitrary arrests and detentions and was threatened by the police.
- Person A, who held a prominent position, was shown a file about the applicant. He advised the applicant that it was unsafe for him in Ukraine and he should give serious consideration to leaving the country. The applicant worked as a voluntary aide to Person A
- The applicant and his partner had a business. In the mid 1990's the business' goods were stolen by the police internal security. False documents were used to steal them. The general prosecutor's office investigated and commenced a criminal case. A couple of the people involved were imprisoned. The applicant never found out if a couple of others involved were sent to the prosecutor's office. During the case in relation to the stolen goods the applicant and his immediate family were given security. The security staff accompanied the family members on outings. When the case was closed the security stopped. Then his partner's relative was killed in Russia in the late 1990's. They told the applicant and his partner that it might have been connected to the relative's religion.
- In response to questions by the Tribunal about the reason for his travels to Country A (indicated in his passport) the applicant stated that in the late 1990's he drove his partner to and from Country A He transported goods and sold them from one area to another. He collected political literature from Country A and smuggled it into Ukraine hidden amongst the goods he was delivering. He said that he went to Country A a few times. He gave the leaflets to a town.
- From the mid 1990's for a few years he lived off his savings and worked in a position where he visited neighbouring countries. His partner was not able to work as a result of frequent audit checks. She left Ukraine at the end of the 1990's and entered Country B seeking residence as a refugee. Her other immediate family left Ukraine for Country B in the early 2000's
- The SBU came looking for documents in the late 1990's, asking about the whereabouts of his partner

- The applicant found it hard to find work. When he was able to find it, usually after about a couple of weeks the SBU would come to his place of employment and make enquiries of the employer as to his certificates of mental health and drug use. This occurred frequently.
- In the late 1990's the applicant together with some others distributed political posters around the city. They were beaten up by the police a couple of weeks before the elections. They went to the police and complained and the police just laughed. The police would not listen. The police detained him for several hours. The next day the police came to his home and seized some electronic equipment. He complained to the Police Department and they came and took him to the police station and kept him for a few hours and took his photo. Then the election came and Kuchma won.
- When he was leaving Ukraine the authorities kept him at the airport and went through his things.
- When the Tribunal put to the applicant that in his temporary visa application he stated he came to Australia as a member of the RUKH political party he stated that he gave his passport to the Secretariat of the Supreme Rada (parliament) and later collected his passport from the Secretariat.
- He feared returning as the people involved with the goods were being released. They were SBU agents.

21. The applicant also submitted to the Tribunal the following documents:

- Written statement of the applicant
- Medical Certificate stating the applicant does not suffer mental disease
- Court certificate stating the applicant does not pay alimony
- Certificate stating the applicant was not an alcoholic or a drug addict
- Internet Article 'A Second Front Against Kuchma Is Being Prepared in America'
- A translated copy of what the applicant said was his CDPU membership card
- A letter, purportedly from Person A, asking the Australian Department of Immigration to help the applicant "to obtain a right to officially reside in Australia." The letter states that the applicant was a member of the CDPU, but makes no mention of any persecution experienced by the applicant. (As mentioned by the Tribunal later, though dated some several days before the protection visa application was lodged, and several days before the date of the decision under review, the letter does not appear to have been submitted to the Department.)
- A reference from the Ukrainian Department of Passport Registration and Migration Services stating that the applicant had not been involved in any crimes or appeared before any court in the region.

22. At or just prior to the first hearing, the applicant also submitted several other documents in the Ukrainian language, but without translations. Each is headed by a word which, in other documents, has been translated as "reference." Some of these documents were

copied and returned to the applicant. The others appear to be copies certified in Ukrainian as true copies of other documents. The Tribunal is satisfied that some of the documents are the certificates from which the translations relating to “mental disease”, “alimony” and “drug addiction”, referred to above, were taken.

23. Certain other documents were supplied to the Tribunal later. Those documents included:
- a document on CDPU letterhead the translation of which showed it to be a Christmas greeting message sent to the applicant in Australia from the CDPU;
 - a document from the Public Prosecutor’s Office obliging the Department of Internal Affairs, to return to the applicant certain items, documents (including a CDPU membership card) and cash that were “unlawfully seized” by two named officers and resolving to conduct an official investigation of the circumstances of the case;
 - a document also from the Public Prosecutor’s Office in Ternopil, resolving that SBU identity cards issued to two named officials be returned.

Further evidence before the Tribunal

24. At the second hearing, the Tribunal explored with the applicant several issues arising out of his earlier evidence. In relation to the incident involving the theft of the goods, the applicant said that the business was his former partner’s. He was merely her assistant in the business. He said that the goods were taken from the business by police internal security officers who used fraudulent documents to take them. The applicant believes the goods were taken and sold overseas. He further believes that very important people in the SBU and the police were involved in the crime. The officer investigating the theft became scared to continue his investigation and advised the applicant he should forget the whole thing.
25. The Tribunal asked the applicant why he considered he faced a threat of harm arising out of this incident. He said that he was actively involved with students in organizing political protests against the Kuchma regime and representatives of the police force had threatened to break his business. Non-uniformed police had stopped him in the street and more than once he had been beaten by them. They had spread rumours that he was crazy and he was required to go to hospital to get a certificate as to his mental condition. The taxation office also conducted checks. He and his partner were being treated like criminals. He and his immediate family were given security during the investigation of the theft but the applicant believed the security was provided merely so that his movements could be monitored. The applicant said that the persons who were charged as a result of the theft were minor players. The important people involved were not charged.
26. The applicant said that, if he were to return to Ukraine, he would face harm from these people. They were in positions of influence and were capable of framing him for possession of drugs or other crimes. The Tribunal asked the applicant why these people would still have an interest in harming him after all this time. He said that he knew through friends that representatives of the authorities were still asking about his whereabouts. He was a witness to the theft and knew how it had been organized. Those

involved knew that the applicant had political connections and connections to the press and that, if he returned to the country, he was in a position to give information to the press.

27. The applicant said that he had had some guarded telephone discussions with Person A who was still his very good friend and was in another country last time the two of them spoke. On that occasion Person A had hinted that the telephone line was bugged. The applicant told the Tribunal that he was not sure if Person A still held his position but believed that he did.
28. The Tribunal asked the applicant why it was that the letter written by Person A on the applicant's behalf and addressed to the attention of the Australian Department of Immigration did not mention persecution that the applicant allegedly had suffered in Ukraine. The applicant said that he did not know. Perhaps Person A had thought that what he said in the letter would be sufficient to support an application by the applicant to reside in Australia. The applicant said he did not ask for the letter. It was volunteered by Person A in a conversation so that the applicant would not have to return to Ukraine.
29. The Tribunal put to the applicant that the political regime in Ukraine was now very different from when the applicant left. President Yushchenko was now in power and the parliamentary elections in September 2007 had resulted in Yulia Tymoshenko becoming Prime Minister. The Tribunal quoted from an internet article from Human Rights Watch (21 January 2005), included amongst several news and other articles supplied to the Tribunal by the applicant, in which a reporter was reported as saying in connection with Yushchenko's election that the election "was a vivid example of the importance of respect for human rights" and that "People in Ukraine were able to choose their leader because the government did not interfere with the rights to freedom of expression and peaceful assembly, and because ultimately it upheld the rule of law". The applicant agreed that there were initially high hopes about the regime but said that the recent information was that things in Ukraine had seriously deteriorated in relation to human rights. The regime had strengthened the police and the SBU.
30. The Tribunal also asked the applicant what relevance his claims of corruption in Ukraine had to his claimed fear of persecution. He said that the system of personal registration which operated in Ukraine was open to corruption in that anyone could get access to an individual's personal information and could track the individual. Those who were involved in the theft incident would therefore be able to track the applicant and cause harm to him. The applicant said that his difficulties all began when he started providing assistance to the CDPU. The police said that they would ruin the applicant and his family, and they were successful in doing that.
31. The applicant said that his former partner had obtained refugee status in Country B. Her other family member is still with her. The applicant has not had contact with them for a couple of years.
32. Under cover of a letter the applicant supplied to the Tribunal:
 - various news articles concerning the political environment in Ukraine;
 - a Christmas greeting to the applicant from the CDPU, similar to that which was previously provided to the Tribunal;

- a declaration of the Labour Collective of the NOVA Ternopilska Gazeta Newspaper addressed to President Yushchenko, the Chairman of the Rada and others.
33. Certain other documents were given to the Tribunal at its recent hearing. Amongst them were copies of the first few pages of a travel document relating to the applicant's former partner. On one of the pages is a typed entry in Language A which appears to confirm the grant to her of refugee status in Country B. If the accompanying other family member referred to on another page of the travel document is the family member of the applicant's former partner, the document appears to indicate that the other family member was a teenager when the document was issued.
 34. The applicant's Ukraine passport, supplied to the Tribunal for the purposes of the review, contains entries showing numerous journeys to Country A in the late 1990's. That passport also shows that the applicant's visa to enter Australia was issued by the Australian Embassy in Moscow.

Independent country of origin information

35. The United States Department of State, Ukraine Country Report 2007 (released 11 March 2008) includes the following in relation to Ukraine:

Ukraine...is a republic with a mixed presidential and parliamentary system, governed by a directly elected president and a unicameral Verkhovna Rada (parliament) that selects a prime minister. Preterm Verkhovna Rada elections were held on September 30. According to international observers, fundamental civil and political rights were respected during the campaign, enabling voters to freely express their opinions. Although the Party of Regions won a plurality of the vote, President Viktor Yushchenko's Our Ukraine-People's Self Defense Bloc and former Prime Minister Yulia Tymoshenko's Bloc formed a coalition, and established a government with Tymoshenko as the prime minister. Civilian authorities generally maintained effective control of the security forces.

Problems with the police and the penal system remained some of the most serious human rights concerns. Problems included torture in pre trial detention facilities; harsh conditions in prisons and pre trial detention facilities; and arbitrary and lengthy pre trial detention. There was also continued violent hazing of military conscripts and government monitoring of private communications without judicial oversight.... Serious corruption in all branches of government and the military services also continued. The judiciary lacked independence

....

During the year politicians and politically active businessmen were the victims of sometimes fatal attacks that may have been politically motivated; however, business, government, and criminal activities were intertwined to such an extent that it was often difficult to determine the motives

....

In response to President Yushchenko's 2006 order to open a new inquiry into the 1999 death of prominent nationalist and Ukrainian People's Movement leader Vyacheslav Chornovil, PGO special investigator Ihor Krynin announced in March that he had not

found any proof that a crime had been committed and the inquiry was on-going at year's end.

....

The law prohibits the abuse of psychiatry for political and other non-medical reasons and provides safeguards against such abuse, but on a few occasions, according to the UAHRB, persons involved in property, inheritance, or divorce disputes were wrongfully diagnosed with schizophrenia and confined to psychiatric institutions. Persons diagnosed with mental illness risked being confined and treated by force, declared not responsible for their actions, and stripped of their civil rights and property without being present at the hearings or notified of the ruling.

....

The Constitution and law provide for an independent judiciary, but in practice the judiciary remained subject to pressure from the executive and legislative branches and also suffered from corruption and inefficiency.

....

The Constitution includes procedural provisions intended to ensure a fair trial, including the right of suspects or witnesses to refuse to testify against themselves or their relatives; however, these rights were limited by the absence of implementing legislation, which left a largely Soviet-era criminal justice system in place. The defendant is formally presumed innocent, but the system maintains high conviction rates, similar to that of the Soviet era.

....

The Constitution provides that human and civil rights and freedoms are protected, and that citizens have the right to challenge decisions, actions, or omissions of the national and local government and its officials in court.

The law protects the rights, freedoms, and interests of individuals against violations by the government and public officials and allows for court hearings in cases involving illegal government activities or failure to enforce legal protections. The law allows a potential victim to file a collective lawsuit against legislation that may violate basic rights and freedoms without requiring them to show that they are directly affected. Citizens may appeal to the human rights commissioner of the Verkhovna Rada and, after exhausting all domestic legal remedies, may take cases to the appropriate international bodies, such as the European Courts of Human Rights (ECHR) and the UN Human Rights Committee, of which the country is a member or participant.

....

f. Arbitrary interference with Privacy, Family, Home or Correspondence

Although the Constitution prohibits such actions, in practice authorities infringed citizens' privacy rights. By law, the SBU may not conduct intrusive surveillance and searches without a court-issued warrant; however, there were reports that elements within the government arbitrarily continued to monitor the private communications and movements of individuals.

....

Section 2 Respect for Civil Liberties, Including:

a. Freedom of Speech and Press

The Constitution and law provide for freedom of speech and of the press; the authorities generally respected these rights in practice. There were no reports that the central authorities attempted to direct media content; however, there were reports of intimidation of journalists, including by local officials. Continued dependence by some media on government resources may have inhibited investigative and critical reporting.

Individuals could criticize the government publicly and privately without reprisal and the government did not attempt to impede such criticism.

....

Freedom of Association

The Constitution and the law provide for freedom of association; while the government generally respected this right in practice, some restrictions remained. Registration requirements for organizations were extensive, but there were no reports that the government used them during the year to disband existing legitimate organizations or prevent new ones from being formed.

....

Section 3 Respect for Political Rights: The Right of Citizens to Change Their Government

The Constitution and the law provide citizens the right to change their government peacefully through periodic elections, and citizens exercised this right in practice through periodic elections held on the basis of universal suffrage.

....

Government Corruption and Transparency

Corruption remained a serious problem in the executive and legislative branches of the government, including the armed services. The SBU reported that its special units and other law enforcement bodies launched 131 criminal investigations of bribery during the first nine months of the year. The media reported that, as of mid-year, there were 2,721 cases in the courts involving civil servants charged with corruption, 15 percent more than in 2006.

....

36. Agence France Presse reports in an article dated 7 June 2008, "Defections threaten Ukraine's pro-West government", that the government may have lost its majority with the defection of two members from its ranks:

The coalition parties of Prime Minister Yulia Tymoshenko and President Viktor Yushchenko, partners in the 2004 Orange Revolution, lost one deputy each, destroying their majority of one, the speaker of parliament said.

....

Ukraine has experienced continued political volatility since a 2004 popular uprising known as the Orange Revolution, when Yushchenko surged to power on the promise of a pro-Western course including NATO membership.

Submissions

37. The applicant's agent made submissions to the Tribunal. Those submissions were supplemented by oral submissions at the hearing. In summary, it was submitted that:
- The applicant fears that if he returns to Ukraine he will be detained by the SBU or the police and that he will suffer persecution while in detention or be framed on a false criminal charge. His fear should be regarded as well founded as it is based upon the fact that he has been detained and harassed many times by State officials in the past.
 - The applicant fears the ramifications of his involvement in the proceedings in connection with the theft of the goods which resulted in the imprisonment of a couple of State officials.
 - The Ukraine State condoned the circumstances which permitted the theft or failed to put in place a system that may have prevented the harm caused to the applicant arising from the theft. The harm caused to the applicant was directly connected to his profile as a known political agitator.
 - The various measures the applicant was subjected to combined with adverse factors arising from corruption and the infringement of citizens' rights in Ukraine justified the applicant's claim to a well founded fear of persecution on "cumulative grounds" (see UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status*, para 53).
 - The change of government in Ukraine has not caused a significant change in the political climate. Corruption is still widespread within governmental bodies.
 - Because communications are monitored in Ukraine, state authorities would be aware that the applicant has sought protection in Australia and this would be regarded as betrayal of Ukraine, as the applicant has made allegations of political corruption against the state.
 - Account needs to be taken of the fact that the applicant's former partner has been granted protection as a refugee in Country B.

FINDINGS AND REASONS

38. [Information deleted in accordance with s431 of the Migration Act as this information could identify the applicant].
39. [Information deleted in accordance with s431].

40. Findings made by the Tribunal must be made with great care, mindful of what is at stake for the individual applicant. As has been said by the Second Circuit Court of Appeals in the United States:

Asylum petitions of aliens seeking refuge from alleged persecution...are not to be disposed of improvidently...We should not forget, after all, what is at stake. For each time we wrongly deny a meritorious asylum application, concluding that an immigrant's story is fabricated when, in fact, it is real, we risk condemning an individual to persecution. (*Ming Shi Xue v Board of Immigration Appeals* 439F 3d 111 (2006), Calabresi J)

41. In the present case, however, the Tribunal is not satisfied that the applicant is a person to whom Australia has protection obligations under the Convention.
42. The applicant travelled to Australia on a Ukrainian passport and claims to be a citizen of Ukraine. In the absence of any evidence to the contrary, the Tribunal finds that he is a citizen of Ukraine.
43. In his protection visa application the applicant said that, if he returned to Ukraine, he would be persecuted because of his political activities during the presidential election because "President Kuchma does not tolerate opposition" The election in 2005 of the pro-Western Viktor Yushchenko as President means that the applicant could no longer be regarded as having a well founded fear of persecution on the basis stated in his protection visa application because Kuchma or those associated with him are no longer in a position to persecute the applicant. Accordingly the applicant did not put his claims in this way to the Tribunal.
44. Putting the applicant's reformulated claim as best the Tribunal can, it now seems that the applicant says that, if he returns to Ukraine, he will suffer persecution arising from his involvement in the proceedings in connection with the theft of goods from his then partner's business. He puts this claim on the basis of his allegation that high ranking officials within the SBU and the police were involved in the crime, on the basis that he has been harmed by officials within those organisations in the past because of his political activities and on the basis that corruption and the infringement of citizens' rights are such in Ukraine that the State will be unable to protect him.
45. The Tribunal does not accept this claim. Although persons involved in the theft of the goods may have been government officials, the Tribunal does not accept that those persons were acting on behalf of the authorities. The applicant's evidence is that a criminal investigation was undertaken by the authorities. That investigation may have been flawed or incomplete but a couple of persons were convicted and imprisoned for their involvement in the crime. The documents from the Public Prosecutor's Office, which the applicant supplied to the Tribunal (referred to at paragraph 23 above), are further evidence of the authorities having taken steps to investigate the crime.
46. The applicant claims that he fears that, if he returns to Ukraine, the SBU and the police who were implicated in the theft may still wish to harm him, even though more than a decade has now elapsed since the crime took place. He asserts that, through friends, he is aware that representatives of the authorities are still asking about his whereabouts. He further says that he will face harm from these people because they know he is politically active and has connections with the press.

47. The Tribunal accepts that the applicant was a member of the CDPU. His evidence that he was a member of that party is supported by the reference written to the Department of Immigration on his behalf by Person A, by the Christmas greetings messages to him in Australia from the party and by the mention in the document from the Public Prosecutor's Office, of the return of the applicant's CDPU membership card.
48. However, the independent country of origin information does not suggest that membership of the CDPU would provide a reason for the infliction of harm under the present political environment in Ukraine, even for someone who had a more significant role in the party than the applicant has had. In any event, the Tribunal finds that the applicant's political opinion does not constitute the "essential and significant reason", as required by s. 91R (1)(a) of the Act, for the persecution the applicant claims to fear. Rather, the essential and significant motivation for any persecution feared is the fact that the applicant was a witness to the theft of the goods and asserts that he has knowledge of those implicated in the theft.
49. Even if the Tribunal were to accept, which it does not, that the applicant's claimed fear of persecution was for a Convention reason at the time his protection visa application was made, the change in the political environment in Ukraine that has occurred since then makes the claim no longer tenable. The regime of Kuchma, of which on the applicant's account he was a political opponent, has been replaced by the pro-Western regime of Yushchenko, who has sought to make the country more democratic. The Tribunal accepts that, as the independent country of origin information and the many media articles to which the applicant directed the Tribunal's attention indicate, significant problems of corruption, restrictions on the press and infringement by authorities of citizens' privacy rights continue to exist in Ukraine. However, when the circumstances are that the persons wielding political power whom the applicant opposed are no longer in power, the Tribunal cannot see how these governance deficiencies, however significant they may be, might impact adversely on the applicant for reasons of political opinion or any other Convention ground.
50. An attitude of resistance to systematic corruption of, and criminality by, government officers can fall within the description of "political opinion": *V v Minister for Immigration and Multicultural Affairs* (1999) 92 FCR 355. Accordingly, the Tribunal has considered whether the applicant has a well founded fear of persecution for reasons of his stance against corruption. Again, the Tribunal has concluded that he does not have a well founded fear on this basis. As mentioned above, the essential and significant reason for the persecution the applicant claims to fear is his status as a witness to the theft of the goods. In any event, the independent country of origin information does not suggest that exposure of corruption will lead to persecution in Ukraine. On the contrary, that information gives details of law enforcement bodies taking steps to prosecute civil servants charged with corruption.
51. As to the applicant's claim that he will face persecution because of having sought protection in Australia, there is no evidence before the Tribunal to support the applicant's belief that the authorities in Ukraine would be aware that he has sought such protection or to support his assertion that this would be adversely regarded by those authorities. The Tribunal therefore does not accept that the applicant would face persecution in Ukraine because he had sought protection in Australia.

52. Finally, the Tribunal does not accept that the refugee status granted in Country B to the applicant's former partner has any bearing on the Tribunal's consideration of the applicant's claims. The Tribunal has no knowledge of the basis of her claims so the basis on which a refugee status determination was made in her favour lies entirely in the realm of speculation.
53. For the above reasons, the Tribunal finds that the applicant does not have a well founded fear of persecution in Ukraine for a Convention reason.

CONCLUSIONS

54. The Tribunal is not satisfied that the applicant is a person to whom Australia has protection obligations under the Refugees Convention. Therefore the applicant does not satisfy the criterion set out in s.36(2) for a protection visa.

DECISION

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

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

Sealing Officer's I.D. prrt44