

REFUGEE STATUS APPEALS
AUTHORITY
NEW ZEALAND

REFUGEE APPEAL NO 76136

AT AUCKLAND

<u>Before:</u>	A R Mackey (Chairman)
<u>Representative for the Appellant:</u>	The appellant represented himself
<u>Appearing for the Department of Labour:</u>	No Appearance
<u>Date of Hearing:</u>	26 October 2007
<u>Date of Decision:</u>	26 November 2007

DECISION

[1] This is an appeal against the decision of a refugee status officer of the Refugee Status Branch (RSB) of the Department of Labour (DOL), declining the grant of refugee status to the appellant, a national of the Czech Republic.

INTRODUCTION

[2] The appellant is in his mid-30s. He was born in what is now the Czech Republic. He was educated there and soon after completing his schooling, he incorporated a company ("C") which he appears to have operated until shortly before coming to this country in 1999. He entered New Zealand on a visitor's visa. In late November 1999, he lodged an application for refugee status. As a result of that application, he appears to have obtained a work permit. He was not called for an interview by the RSB until August 2001. The interview ultimately took place on 4 September 2001. At that time, he was presented by the law firm of Vallant Hooker & Partners.

[3] A copy of the report from the RSB was prepared on 28 September 2001 and sent to the appellant for comment. His representatives responded to that report but, shortly afterwards on 15 November 2001, the appellant withdrew his refugee application. Approximately one month earlier, he had lodged an application for residence in this country, on the basis of his same sex relationship with a New Zealand permanent resident.

[4] The residence application was ultimately declined by the DOL on the basis that evidence had been provided to them, by the Czech national police headquarters, that the appellant had been convicted of tax fraud (which allegedly took place in 1994) relating to his C company. He was sentenced to five years' imprisonment by the Supreme Court in Prague on 30 October 2001. As a result, his application for residence was declined under s7 of the Immigration Act 1987. The appellant attempted to appeal that decision to the Residence Review Board but that appeal was refused as it was both out of time and the Board had no jurisdiction to consider an application refused under s7(1) Immigration Act 1987. The appellant then appears to have remained in the country illegally.

[5] An application for refugee status was lodged by him on 31 July 2007. The appellant did not attend interviews that were offered to him by the RSB on 22 and 27 August 2007, stating that he was awaiting documentation and legal representation. On 27 August 2007, the RSB wrote to the appellant, declining his application and noting that he had been offered two interview opportunities which he had failed to attend. After noting s129H(5) Immigration Act 1987, the RSB concluded:

“Having considered all the information available to the RSB regarding [your] claim to refugee status and in the absence of [the appellant], no findings of credibility or fact can be made. As such, it cannot be determined whether [you] are a refugee within the meaning of Article 1A(2) of the 1951 Convention Relating to the Status of Refugees (the Convention) as amended by the 1967 Protocol.”

[6] For those reasons, the appellant was found not to be a refugee. The appellant then appealed to this Authority. He attended the hearing, without representation, on 26 October 2007. An interpreter was provided although the appellant stated that his standard of English was reasonable. The interpreter was used for most of the hearing.

[7] The appellant's claim is based primarily around his prediction of being persecuted on return to the Czech Republic. He claimed he had been attacked by “Russian mafia (“Russians”) and the Czech police” on three occasions between

1997 and 1999 and, although he claimed he had settled his tax affairs with the tax authorities in the Czech Republic before or soon after leaving for New Zealand, the prosecution for tax fraud had been brought against him by co-operation between the “Russians” and the Czech police. He fears being immediately sent to prison on his return and/or being maltreated by the “Russians”.

[8] The appellant did not present any formal submissions at the hearing but provided two documents to the Authority, both dated April 2003. The first of these was a declaration from his tax advisor/accountant, JZ, and the second was a declaration from NJ, a former officer of the Czech revenue authority in P. At the end of the hearing, the appellant offered to present additional objective country of origin material when the Authority noted that it did not appear he had presented any evidence of possible corruption or relationships between “Russian mafia” and the Czech police. He submitted material within the two weeks provided. All of the material received has been taken into account in this decision.

THE APPELLANT’S CASE

[9] From his evidence given before the Authority and the information on his file, including the original RSB interview in 2001, the outline of his case can be established.

[10] The appellant commenced employment in 1989 in the town of P. In 1992, he commenced employment with a construction company owned by his father and worked in that capacity for some seven years. In 1994, along with a partner, his company became involved in motor vehicle trading but later it also undertook renovation of hostels in P, which housed foreign workers, mainly from the Ukraine. He began to employ some of those Ukrainians as labourers.

[11] In December 1996, he received a telephone call from an unknown person with a Russian accent, who informed him that he was required to pay money for the Ukrainian workers. He took no notice of this threat. However, a number of calls were received from the same individual, demanding money. He questioned his Ukrainian employees about this and was told it was common practice and that such “rackets” were widespread. He chose not to report the incidents to the police at that time. The threats continued in 1997 and through concern for his own safety, he contacted a lawyer.

[12] In September 1997 approximately, while taking his dog for a walk, two men approached and unleashed their dogs upon him. He was bitten and sustained lacerations to his leg.

[13] In early 1998, while driving in P, he was stopped, along with several of his employees, by the local police. He was taken to the police station and questioned about his association with the Ukrainian community. Also about that time, an officer had approached him and asked him if he was making payments to the "Russians".

[14] In approximately September 1998, he was meeting with his lawyer one evening when they received a visit from an unknown person wielding a hand gun. They were told that if they continued to ignore their demands, or they approached the authorities, they would be killed. The appellant's lawyer immediately contacted the police. The same people, approximately six months later, entered the appellant's property and attacked him, giving him a strong warning. The appellant again contacted his lawyer who in turn reported the matter to the police. He was told that the chances of arrest were remote, since he could not identify the assailants.

[15] Because the appellant thought the situation had become too dangerous, he set about plans to leave the country altogether. For the last three months of his time in P, he experienced no further problems. He left on 15 June 1999, arriving in New Zealand two days later.

[16] At the time of his first interview with the RSB, information relating to a possible taxation fraud by the appellant was disclosed to him, including records that showed a warrant was issued for his arrest on 27 September 1999.

[17] An interview took place between the appellant and the DOL relating to his application for a residence permit on 3 December 2002. At that time, reference was made to a possible extradition application by the Czech Republic, the arrest warrant and the proceedings before the Czech courts.

[18] Before the Authority, the appellant explained the predicament he was in. He said that in the second part of the 1990s, he was contacted by Russian speakers in the Czech Republic who asked him to pay money to them. He refused; he was attacked and threatened to the extent that he felt no longer safe in the Czech Republic; he decided to leave and so closed down his business

activities. He then approached the finance department of the Inland Revenue in P, explaining he was going to close his business. They carried out an audit of his accounts, found money (Value Added Tax - VAT) was owing to them and asked the appellant to pay it. Unfortunately, he did not have enough money to cover it so he paid some of it in cash and stated that he entered into an agreement to pay the balance in kind from goods that he would transfer to the authorities. When this arrangement was cleared with the tax department, he left to come to this country. All the documentation on this was left with his lawyer.

[19] During this time in 1999, he stated that he tried to stall the "Russians", as he could not afford to pay them. After he had arrived in New Zealand, he was informed by his parents that the police in P had searched his parents' home and also his lawyer's office in Prague.

[20] The "Russians" also contacted his father and threatened that they would destroy the appellant if money was not paid to them. Shortly thereafter, the house the appellant had left in P was burgled on two occasions and material was stolen from it. He thought these burglaries had taken place in approximately 2001. A further incident he related involved the mysterious killing of his dog.

[21] His father, when contacted and threatened, had informed the "Russians" that he did not know where the appellant was. He had however reported the incident to the police.

[22] When the appellant's father had informed the police of the trouble with the "Russians", they accused the appellant of fraud with the tax department and stated that they had evidence from a witness, AA, who would give details of the fraud. The appellant stated that AA was an unreliable person who himself had been charged and jailed.

[23] Just before the appellant left in 1999, he had been asked many questions about his business activities by a police officer who had come to his home. After he had left for New Zealand, the police started looking for him again and began more detailed investigations. Because it was confusing to the appellant he contacted the local tax department in P from New Zealand, to see if there was any money outstanding by him or otherwise. He was told that nothing was outstanding and that they would issue a clearance in writing. On the file, presented to the DOL in May 2003, are two documents, both dated April 2003. They are both in Czech and have translations attached. The first of these is an extract from the company

register for C, which has a registered office in P in the Czech Republic. This states that the company was founded by the appellant in June 1992 for the purchase and sale of goods, and that the appellant was the executive and had paid the basic capital. It states:

“Information about bankruptcy:

On 22 December 1999 File No [...] there was by resolution of the Regional Court in P declared bankruptcy to the property of the business of C and official receiver appointed. The bankruptcy became effective on [...] 1999.

Official receiver:

The Court releases BC [whose address and details are then set out] from position of official receiver of the company C and to the date of [...] 2002.

The failure of bankrupt C company [full details of street address etc] is being cancelled from the date of [...] 2002, after fulfilling distributing resolution.”

[24] The document is then apparently signed off by the Regional Court.

[25] The second document appears to be addressed to the appellant and sets out his birth certificate number and then states:

“Confirmation

Upon your request of [...] 2003 under reference number [...] and pursuant to the provisions of section 62 clause 7 and section 23 clause 3 of the Tax and Charges Administration Act number 337/1992 Coll. As amended the above-mentioned Tax Administrator hereby confirms that as of [...] 2003 you have no tax arrears falling due to the Territorial Financial Authority of the Czech Republic.”

[26] This document is issued by the Revenue Office in P, dated [...] 2003 and states that it is issued for immigration purposes.

[27] The appellant presented two additional declarations to the Authority which, he said supported this situation, the first of them being from his tax advisor, AZ, and the second from the former revenue authority officer, MJ. The declaration from AZ, dated [...] 2003, states that he had worked with the appellant in respect of the company, C, from 1992 and had kept the books and prepared the tax returns for the revenue authority in P. It states that the appellant always submitted necessary documents for administration and/or accounting paperwork reliably on time and in accordance with the Czech legal requirements. Entire returns were submitted to the tax authority in P without comments from the tax administration. It also states that, as tax advisor, he participated in a “tax control” at the company in 1995 and that the tax administration expressed compliance with the Czech laws at the time. AZ claims that his activity continued until 1996.

[28] The declaration from MJ is stated to have been made at the request of the appellant's father and, although undated, appears to have been interpreted on [...] 2003. It states that MJ had worked as an officer in the revenue authority in P from 1998/1999 and that, after a "financial control" was done for the appellant, additional charges were imposed upon him. The charges were not paid within the given term of 30 days. The appellant apologised that he had insufficient cash and offered to pay part of the payment in another way. MJ took this to his superior, noting that the appellant had offered to pay the tax authorities "by goods he has in store". MJ then proceeded to the store and listed everything and, after consultation with his superior, accepted computer systems only and part of the payment in cash. They were not interested in other goods because they were unable to store them. MJ states that he was informed by the appellant he was leaving the country because he did not feel safe and contact was provided with the appellant's father in case of need. The letter concludes:

"I have met [the appellant] for several times in 1998-1999. He made an impression of serious man and as officers of the revenue authority we had no problems with him during negotiations."

[29] However, in spite of this evidence, the police had proceeded with fraud charges against him over the period 1999 to 2001. This ultimately concluded in the judgment of the Supreme Court where he was convicted and sentenced to five years' jail. He claimed that this had taken place because "Russian" people were connected with the police and, between them, they had set out to destroy the appellant because he had not co-operated with them and had not paid the "Russians" in the way that he should have. For this reason, the "Russians" then made up a story which they presented to the police who in turn investigated it and charged the appellant.

[30] The appellant's lawyer also tried to investigate what was going on but was told that he must stop his involvement. From that time on, the police ignored the lawyer completely and failed to communicate with him. The appellant claimed that at the hearing before the Court, his own lawyer was unable to appear on his behalf but the Court appointed some form of "public defender" to represent him. Additionally, he claimed the telephone in his father's home had been bugged and that this had only been found out when the case came before the Court and the judge said that the telephone had been bugged. His father and his original lawyer had attended the hearing but only as observers.

[31] The Authority asked why he had not personally pursued his defence in the Czech Republic and the appellant claimed that as the police were so corrupt, it was impossible to pursue justice. This was particularly so, once his lawyer had been stopped from communicating effectively with the police, and that his house and his father's house and the lawyer's office had been searched.

[32] When asked why he had not returned to the Czech Republic in 2003 when he became fully aware of the judgment of the Supreme Court, he stated that, because he had a residence application underway in New Zealand at that time, he did not wish to return and that it would not have been safe for him to do so because of his fear of both the police and the "Russian" people.

[33] When asked what would be the situation if he returned at this time, the appellant claimed that he would be sent to jail and could be subjected to physical violence from the Russian mafia community, if he was not in jail.

[34] The original witness, AA, who had been used in the prosecution against him had now been released from prison and had contacted the appellant's father and advised him that he had been used by the police so that he (AA) could obtain benefits in relation to his own case.

[35] The appellant advised the Authority that he would like to re-open his own case and be fully and legally represented, although he had not been in a position to do so as he did not have the funds. However, his father had now contacted another lawyer and the possibility that the case could be re-opened by this new lawyer was presently being investigated. In addition, he stated that his original lawyer had now retired.

[36] The appellant stated that he was aware that the Czech Republic was now fully part of the European Union and that in addition to all the rights enshrined in the Czech constitution and the European Convention on Human Rights, he was entitled to legal representation and could indeed take cases to all the Czech courts and to the European Court of Human Rights in Strasbourg.

THE ISSUES

[37] The Inclusion Clause in Article 1A(2) of the Refugee Convention provides that a refugee is a person who:

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

[38] In terms of *Refugee Appeal No 70074/96* (17 September 1996), the principal issues are:

- (a) Objectively, on the facts as found, is there a real chance of the appellant being persecuted if returned to the country of nationality?
- (b) If the answer is yes, is there a Convention reason for that persecution?

ASSESSMENT OF THE APPELLANT'S CASE

CREDIBILITY

[39] While there were some minor problems with the appellant's evidence, particularly by comparison with the original interview given in 2001, serious discrepancies are not apparent. Because the issues relating to the "tax fraud" and ultimate judgment from the Supreme Court in Prague are detailed and the appellant was clearly not in the Czech Republic over the vast majority of the time when it appears that these *in absentia* convictions proceeded, it is difficult to reach conclusions on the credibility or otherwise of the appellant's position in relation to these tax-related claims or indeed, the details of the grounds upon which the prosecutions were ultimately obtained.

[40] On the evidence before the Authority, there was no basis to challenge the appellant's credibility in relation to his version of the tax fraud prosecution and evidence behind it. This is not to say that the Authority accepts the judgment of the Czech court is flawed by fabricated evidence and a police prosecution which has been carried out through the use of corrupt practices. Clearly, that would require a complete re-opening of the case by the Czech courts and the appellant to present his own story in open court, with the assistance of witnesses and other material he may now have available to him. Indeed, it appears the appellant is

now taking steps, through his father, to commence that process. It may well be that a miscarriage of justice has occurred, when the Authority notes the objective country material set out below.

[41] The appellant's claim, however, as was pointed out to him in some detail, must be considered within the jurisdiction of this Authority. His claim for refugee status must be determined in manner set out in the Issues above.

[42] The Authority went to some lengths to explain that it was necessary for the appellant to establish he had a well-founded fear of being persecuted on return for one or more of the five Refugee Convention reasons, which were explained to him.

[43] The appellant claimed that he would be persecuted and/or imprisoned on his return because of his membership of a particular social group. He stated that social group was that of "businessmen". The Authority explained that, in simple terms, the jurisprudence of the Authority. This was, in accordance with internationally recognised jurisprudence on this issue, that membership of a particular social group was assessed by: comparison with the other four reasons, noting a group could not be defined by the persecution the so-called group may fear, that the characteristics of the group had to be innate or incapable of being changed by the claimant member of the group, and that they should not be required to change them if it would require them to give up core human rights to do so. The example of the family unit was given.

[44] The appellant was unable to assist further on this issue.

[45] The lack of supporting objective evidence to show any link, at this time, between the Czech police and Russian mafia elements in the Czech Republic, was also raised with the appellant. The Authority undertook to consider any objective information of this nature that the appellant could present within two weeks from the date of the completion of the hearing. In addition, reputable and well-recognised country of origin material on this issue, if available, would be searched for by the Authority.

[46] From the Authority's own research, it accepts that Russian mafia did operate in the Czech Republic at the time when the appellant claims. They were involved in financial crime and the illegal trafficking of weapons. This is confirmed by a Research Directorate report from the Immigration and Refugee Board,

Ottawa, 10 March 2002, CZE38677.E. Furthermore, the country information shows that corruption in the official sectors was widespread. The same Canadian report quotes a Transparency International report of 2001 which stated:

“Corruption is rampant in the police, the public administration offices, the judiciary, health and education.”

[47] In order to carry out the necessary requirements for accession to the European Union, the Czech government passed many resolutions and laws to deal with corruption in the public sector and the police signed the Council of Europe Criminal Law Convention on Corruption. The government has committed to programmes to address organised crime.

[48] The Authority has also noted the United States, Department of State *Country Reports on Human Rights Practices 2006: Czech Republic* (published 2007) and notes from that government corruption and the abuse of power do remain as major problems. However, this report does not set out any reports of co-operation between the police and the Russian or any other type of mafia. Under the section relating to the role of the police, it is stated that police corruption was a problem, although the government continued to implement police reforms that included oversight measures, improved methods for reporting corruption and better education and training for the police. Impunity was not a problem.

[49] In February 2006, the biggest criminal trial in history in the country took place in the Municipal Court in Prague. Thirty-six members of the so-called Berdych gang, including five police officers, were convicted and sentenced. The constitution and law provide for an independent judiciary and judicial independence is generally respected. It is, however, stated that “judicial effectiveness continued to be hampered by political interference, structural and procedural deficiencies, and a lack of training and resources”. There were allegations of judicial corruption, particularly surrounding bankruptcy and commercial courts.

[50] The same report states that the Ministry of Justice operated a hot-line for citizens to report suspected judicial corruption. It also states that there is a significant backlog of cases, although in certain areas, the situation has improved. During 2005, the European Court of Human Rights received approximately 1,000 complaints from citizens, mostly related to the extended length of court proceedings.

[51] It is further stated that the government maintains an independent and impartial judiciary in civil matters. Access to the courts to bring law suits seeking damages for, or cessation of, human rights violations is not impeded. Administrative and judicial remedies for alleged wrongs are available.

[52] The news reports submitted by the appellant after the date of hearing are from the websites of *Radio Prague*, a news journalist who writes under www.cibulka.net, the *Prague Post* (www.praguepost.com), the *Prague Daily Monitor* (www.praguemonitor.com) and from *Czech Radio* (www.radio.cz).

[53] Relevant information that gave a general background to the appellant's claim was contained in this material. The Authority now sets out the items of any significance.

[54] In a report relating to the NGO, *Transparency International* (TI) March 2004, the corruption index in the Czech Republic was set at 54 out of 133 countries. The Czech Republic was stated to be sinking lower each year. TI reported problems with corruption of countries joining the European Union that were seen as much worse than EU evaluation report and that the clean-up process has been long and slow due to the economic immaturity of some countries. It stated that the situation should improve with the formation of financial police who would prosecute the worst cases; see www.novinky.cz/pu.

[55] A report in *Radio Prague* of 25 October 2006 states:

“Organised crime has an increasing number of contacts amongst the judiciary in this country - that's according to a new report released by the Czech counter-intelligence service BIS this week. Given its severity, the 2005 annual BIS report has not gone unnoticed, though its content leaves some specifics unanswered.

On Tuesday, the Czech counter-intelligence service, BIS, released its annual report for 2005. Included are some serious accusations. For example, the report states that influential businessmen have crossed ethical lines in privatisation schemes, and the Czech Republic is dealing with a high number of spies posing as diplomats - the Russian Federation and North Korea are named as particularly problematic in this regard. According to BIS estimates, of the 60 Russians posted as diplomats in the Czech Republic, half may be in the service of the Russian intelligence.

However, [...], arguably the most serious aspect of the report states that organised crime in the Czech Republic is paying off people working in the judiciary, as well as the police and the state administration. According to the report, members of the mafia operating in the Czech Republic also use scare tactics against civil servants, and they try to manipulate the outcome of parliamentary negotiations regarding new laws.

Although the report does not disclose names of suspected corrupted judges, it does state that district courts are most susceptible to corruption. For example, judges may accept payment in exchange for lightening prison conditions for those

found guilty of crimes. The justice minister, Jiri Pospisil, has reacted by saying that the accusations are very serious and that BIS chief Jiri Lang should put forth concrete information regarding corrupt judges.

The president of the judges' union, Jaromia Jirsa, has also reacted sharply to the BIS report. Mr Jirsa points out that he's been hearing about judicial corruption in the Czech Republic for the past 15 years, but that with one exception, no action has ever been taken. Mr Jirsa too wants BIS to present concrete proof of their suspicions, so that there is not a black cloud hanging over all the judges.

Where the growing influence of the mafia organisations on the police and state administration is concerned, the BIS report does cite two particularly problematic regions: the Moravian-Silesian highlands, and the region of Zlín [...] southeast Moravia. The BIS concludes that mafia groups from the Caucasus are making inroads in these parts of the country, with Armenian organised crime being particularly effective in paying off accomplices within the police and state structures."

[56] A further report from *Radio Prague*, dated 6 April 2007, "Czech Justice Minister unveils anti-corruption plan" states:

"No issue has plagued post-communist governments in the Czech Republic so much as corruption. Every prime minister in office has pledged to resolve the problem but so far none have met with success. Now the new Civic Democrat justice minister Jiri Pospisil has unveiled a proposed amendment to the Penal Code which should help him succeed where his predecessors failed."

[57] The report goes on to state that TI notes the Czech Republic is the fifth most corrupt state in the European Union and has pledged reform. The tough new measures proposed are higher prison sentences for accepting a bribe, offering one or even for those who know about but fail to report a serious case of corruption. The amendment proposed to the Penal Code envisages special training for judges, the establishment of special anti-corruption panels and anti-corruption agents, and a special hot-line for anyone who wishes to report a case. The proposed anti-corruption plan is based on three pillars - prevention, transparency and punishment. The chances of the new law gaining approval in the Lower House are stated as considerable.

[58] Of somewhat ironic interest is the statement in the report relating to TI itself, which states:

"Probably the only totally independent entity of this kind is the Czech branch of Transparency itself, which has unfortunately just been tarred with the same brush and is having to explain how it used a 30m crown subsidy in 2001. Transparency says it is a trumped up accusation aimed at undermining its credibility, but in a country where corruption has more or less become the norm - it will need more than words to clear its name."

[59] In a website report from "cibulka" of 2 March 2004, there are extensive reports of Russian mafia bosses working in the Czech Republic and the police

covering up some of the crimes. In particular, it refers to the “Russians building illegal buildings and nobody doing anything to stop them”.

[60] A report from a survey firm “Donath Burson Marsteller” (DBM) “Corruption in Czech Republic: Politicians’ and Managers’ Perceptions” (www.dbm.cz) states that the survey carried out in 2007 involved 2,296 politicians and 5,865 subscribers from which 548 politicians and 646 managers responded. This showed the main findings were that corruption was just as widespread in 2006 as it was in 2001, it was evenly distributed throughout the Czech Republic, and bribes were most frequently requested by civil servants of the central government, cities and Prague. Corruption is most widespread in construction and state-awarded contracts. Corruption is a consequence of a high degree of bureaucracy and unethical behaviour of civil servants who request bribes.

[61] A report of 16 October 2007 (www.novinky.cz) states that detectives from the organised crime-fighting unit arrested another four people from an extortion gang who had used violent methods to take control of several businesses in the Carlsbad region. The detectives also uncovered corruption tendencies in local government.

[62] A further *Radio Prague* report of 2 February 2006 “Mafia boss Berdych and gang appear in court” sets out that this is one of the biggest cases in Czech criminal history and that the mafia boss and 35 members of his gang were in the Prague court to stand trial on 34 crimes, including armed robbery, kidnapping and murder. The report goes on to state:

“The Czech Republic is generally a pretty placid place, but under the peaceful exterior is a seedy world of criminal gangs, corrupt policemen and brutal crimes. At the top of the heap is, or rather was until recently, one David Berdych, who allegedly commanded a 35 member criminal gang responsible for kidnapping and in several cases, killing businessmen. Several policemen were involved in the gang.”

[63] As can be seen, the level of corruption in the Czech Republic is still at a significant and concerning level. The appellant’s claim that the Russian mafia and working in co-operation with the Czech police and government authorities is also given a level of support by the COI information. On the other hand, it is also clear that some steps are being taken at the government level to diminish the level of corruption and prosecute those involved at all levels.

[64] The appellant’s credibility therefore was assisted by the background information although, as noted above, it is not of assistance in reaching any

reliable conclusion on the credibility or otherwise of the prosecution and conviction made against him by Czech tax authorities.

CONCLUSION ON THE ISSUES

[65] As was explained to the appellant at the hearing, even if it were proven that he was at a real risk of being persecuted on return, it was necessary for him to establish that that fear of being persecuted was for one or more of the five Convention reasons. In this case, that simply is not established. The appellant is not at risk of being persecuted for reasons of his race, his religion, his nationality or his political opinion. The particular social group that he identified as “businessmen” is clearly one that does not fall within a particular social group as intended or interpreted in terms of the Refugee Convention.

[66] The Authority’s jurisprudence in relation to particular social group has been definitively set out over several years. The principal decision is *Refugee Appeal No 1312/93 Re GJ* (30 August 1995). In that determination, detailed analysis of the issue is carried out, confirming the conclusion reached above. Later decisions of the Authority such as *Refugee Appeal No 70146/96* (30 August 1996) confirm the Authority’s position. Of particular reference in this case is the decision in *Refugee Appeal No 73386/01* (18 October 2002). That decision had several similarities to this case. It related to a Czech national who had had problems with the Russian mafia and had been contacted by a special branch of the city police investigating economic crime. In that case, the Authority accepted that the clamant had become involved in a tax evasion scheme with some corrupt police officers and that the Russian mafia operated in the Czech Republic and was involved in financial crime at that time. However, relevantly, the Authority, at [22] and [23] of that determination, stated:

“[22] The appellant’s case fails convincingly to establish the required nexus between the harm feared and any of the five Convention grounds. The appellant has been threatened by fraudsters because of his knowledge of their criminal activities. They want to ensure his co-operation and silence and have threatened him because of his prior participation and knowledge of their fraud. They threatened to harm him not for his race, religion, nationality, membership of a particular social group or political opinion, but because they believe his knowledge of their activities poses a threat to them.

[23] The Authority asked the appellant for submissions concerning the Convention ground on which his claim is based. He argued that he should be considered a member of a particular social group namely a private businessman who has been targeted by criminals and corrupt officials. To accept a group so described as a particular social group would be to define the group by the

persecution. It is well established refugee law that a particular social group must exist independently of and not be defined by the persecution (see *Refugee Appeal NO. 71427/99* [2000] NZAR.545). There is no element of any Convention ground in the reason for which the appellant fears harm from fraudsters. Equally there is no element of any Convention ground in the reason for which he might be denied state protection namely that he might reveal the corrupt practices of police officers.”

[67] The reasoning in the above case is adopted and confirmed.

[68] The second issue framed above therefore must be answered in the negative and the appellant’s claim cannot succeed.

[69] The well-foundedness of his fear that is set out in the first Issue is not now relevant to the determination of this appeal as it fails on the second issue. However, because the Authority traversed the first issue in some depth with the appellant at the hearing, and it is not otherwise recorded, the Authority’s findings on that issue are set out.

[70] The appellant’s predicament on return which is at the base of his claim, arises from non-state actors, the Russian mafia in the Czech Republic. Additionally, he now fears the Czech authorities and the term of imprisonment imposed on him by the Czech court following, what he claims to be, a trumped up tax fraud prosecution against him, carried out between 1998 and 2002. As is noted above, from the evidence the appellant credibly provided to the Authority, it does appear that he has the basis of an arguable case to challenge the “*in absentia*” decision of the Czech court in relation to the tax fraud prosecution. It is, of course, impossible for the Authority to be conclusive on this issue.

[71] As is well recognised in refugee law, there are two elements required to establish the requirement in Article 1A(2) of the Refugee Convention of “being persecuted”. These are “serious harm” and “failure of state protection”. Both those two elements must be established at the standard of a real chance for there to be persecution. In this case, while before the Czech Republic’s accession to the European Union, both elements may have been established at the level of a real chance, as of now, it is the Authority’s view however that the appellant would be able to access meaningful state protection. That protection, in the ultimate, may require him to pursue the re-opening and re-hearing of the tax prosecution against him all the way to the European Court of Human Rights (ECtHR) in Strasbourg. Noting the country of origin evidence set out above, that there is unfortunately still a continuing level of corruption in the Czech judiciary, the

appellant and his representatives may be forced to take the matter to the level of the ECtHR.

[72] The appellant has apparently, at this time, already instructed, through his father, a new lawyer to take up his case. Pursuant to his rights under the European Convention on Human Rights (particularly Article 6), the appellant has the right to pursue that claim not only through the courts in the Czech Republic but ultimately, if required, to the ECtHR. It is also possible, as a Czech citizen, that he could pursue such a claim without physically returning to the Czech Republic but possibly basing himself in another country within the European Union.

[73] At this time, therefore, while it unnecessary to be fully determinative on this first issue and the appellant, understandably, was unable to provide sufficient evidence for the Authority to reach conclusive findings on this point, the Authority is satisfied that, on the evidence before it, there would not be a failure of state protection and thus his claim would also not succeed under the first issue.

CONCLUSION

[74] The appellant cannot establish that he has a well-founded fear of being persecuted for any one or more of the five Refugee Convention reasons. Accordingly, he is not a refugee within the meaning of Article 1A(2) of the Refugee Convention. Refugee status is declined. The appeal is dismissed.

"A R Mackey"

A R Mackey
Chairman