

UNHCR RO Moscow
Analysis of the courts practice in the Russian Federation
as pertaining to refugee status determination

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“A refugee is a non-citizen of the Russian Federation who, owing to well-founded fear of being persecuted for reasons of race, religion, citizenship or nationality (ethnic origin), 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, possessing no definite nationality and 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, unwilling to return to it”.

Article 1 para.1 of the RF Law on Refugees of 23 May 1997

Introduction: Scope of the study and basic definitions

This study is devoted to the analysis of the judicial decisions rendered by Russian courts on the appeals against first instance administrative decisions of the regional migration services (RMS) and/or against second instance administrative decisions of the Federal Migration Service (FMS), concerning refugee status determination.

Under the Russian Federation (RF) Law on Refugees of 1993 (amended in 1997), any decision or action (inaction) of migration authorities, related to the implementation of the refugee law, including decisions of the RMS or the FMS on a denial to consider a refugee claim on the merits (rejection on admissibility grounds) or on denial of the refugee claim on the merits, can be appealed by the applicant before the court of law¹. The aim of this study is to identify the general trends in the courts' practice on the interpretation and the implementation of the refugee legislation in the Russian Federation.

Article 120 para.2 of the RF Constitution of 1993 stipulates that “A court of law, having established the illegality of an act of government or any other body, shall pass a ruling in accordance with the law”. The courts of law, being judge of the legality of administrative decisions, do not, in the field of refugee status determination, always decide themselves upon refugee status recognition. However, in the exercise of their controlling power, they proceed to a broad analysis of the work of the administration. Not only do they examine the procedural aspects of the case but, when assessing the application by the refugee authorities of Article 1 of the law, on the definition of refugee, the courts are led to review the circumstances of the case. In this respect, the courts contribute to refine the interpretation of the Russian refugee law.

1. Limitations to the scope of application of the refugee law

¹ Article 10 of the RF Law on Refugees.

Under Article 2 of the RF refugee law, entitled “Limitations to the scope of the present federal law”, point 2 stipulates that the refugee law “shall not apply to foreign nationals and stateless persons who have left their country of nationality for economic reasons or due to hunger, epidemic, natural or man-made emergencies”. In the case *Muhamad Sadiq Zarguna v. Rostov RMS*, considered by the **Pervomaiski District Court of Rostov-on-Don** (22 November 1999) the applicant, a female Afghan national, came to Russia in 1996 from Uzbekistan and applied for refugee status to the Rostov-on-Don RMS. The RMS rejected her claim, arguing i.a. that the applicant, prior to her arrival to Russia, had sojourned in Uzbekistan for twelve years, where she was legally working, and that it was for economical reasons that she had further travelled to Russia.

The court, after noting that the applicant had stayed in Uzbekistan “on a temporary basis, having been sent there to work under contract”, looked at the substance of the claim, i.e. the reasons alleged for not being able or willing to return to her country of origin. Hence, the court found that the applicant was a refugee “sur place”, 1) being outside of Afghanistan at the time when the communist regime in that country collapsed and 2) not being able to return to her country of origin because of her active involvement in the former ruling political party (PDPA). The court cancelled the RMS decision as being unlawful².

2. The “safe third country” rule

Article 5.1.5 of the RF refugee law, among grounds for denying the substantive determination of a refugee application, mentions the arrival of a person from “a foreign State in whose territory [the applicant] had an opportunity to be recognised as a refugee”.

That is ground commonly used by RMS to reject refugee claims. In its decision of 1 April 1998 on the case *Alam Gul Vassel v. Krasnodar RMS* (the first of this kind, to UNHCR’s knowledge), the **Pervomaiski District Court of the Krasnodar Krai**, after consideration of the facts, found that the applicant fit the criteria of refugee as defined under article 1 of the RF refugee law. RMS officials had argued that, because the applicant stayed in Uzbekistan for about a year before coming to Russia, his refugee claim should be dismissed under Article 5.1.5 of the RF refugee law. The court reminded that back in 1992 **Uzbekistan** was not a party to 1951 Geneva Convention or to the 1967 Protocol and that therefore the applicant could not be recognised as a refugee in that country. This is the reason that is retained by the court to recognise that the “safe third country” rule of article 5.1.5 could not be alleged in this case.

The interpretation of Article 5.1.5 by the court in that case is rather legalistic to the extent that it limits the assessment of safety to the verification of whether or not the third country is a State party to the 1951 Geneva Convention (argument that could be used a contrario)³. However, one should not underestimate the positive step laid by this first decision, to the extent that it initiated a reflection on the concept of the “safe third country” in the Russian asylum system, and indicated to the migration services that the application of inadmissibility

² Interestingly, the RMS, although having raised the clause of non-applicability of the refugee law contained in Article 2.2, nevertheless had also looked at the merits of the case. The court also contested the grounds retained by the RMS to reject the case on the merits; see below.

³ One wished, for instance, that the court further analysed whether, in the absence of ratification of the 1951 Geneva Convention by Uzbekistan, there exists an asylum system in that country which could allow asylum seekers to benefit from international protection. Such analysis would have set a precedent for cases of asylum seekers transiting other Central Asian countries, which are signatories to the 1951 Geneva Convention but where fair and effective access to the asylum procedure is not automatic.

grounds under Article 5 must derive from an analysis (although limited) of the situation in the transit country, rather than the mere verification that the applicant transited one country prior to his/her arrival to Russia.

The analysis of “safety” in a third country was further elaborated in the case of Jamal *Nasir Abdul Aziz v. Moscow Region Migration Service*, of 22 August 2000, judged by the **Presninsky District Court of Moscow**. The court noted that the applicant, Afghan citizen, had resided in **Tadjikistan**, had been granted refugee status in that country, and had not been exposed to any persecution in that country. Subsequently, the court rejected the appeal. One may regret, however, that there was no attempt by the court to balance these facts with other indicators, such as ratification by Tadjikistan of, and overall compliance with, international refugee and human rights instruments.

Such an analysis, concerning **Tadjikistan**, was performed later on, by the **Zheleznodorozhny District Court of Oryol**, in its decision dated 12 March 2002, in the case of *Najibullah Ataulloh v. Oryol Regional migration service*. The applicant, Afghan citizen, was a member of PDPA and fled Afghanistan for Tadjikistan in 2000. The applicant stayed in that country for one month, where he was medically treated for injuries inflicted by the Taliban, before moving to Russia. The court considered that the position of the Tadjik authorities vis-à-vis Afghan refugees had changed to the worse in the course of 2000. In particular, the court referred to various decrees, issued by the Tadjik Government in 2000, which prescribed that asylum-seekers arriving to Tadjikistan from the territory of a third state cannot apply for refugee status in Tadjikistan⁴, that refugees must pay an official fee for the issuance of refugee cards and that asylum-seekers and recognised refugees can only reside in areas designated by the government. The court concluded that the applicant did not have a genuine opportunity to receive refugee status in Tadjikistan. Consequently, the court cancelled the Oryol migration service’s negative decision and obliged the migration authority to re-consider the claim.

In the case of *Shohab Adel Roia v. Orel Migration Service* (27 February 2001), the **Oryol District Court** delivered a remarkable two-fold analysis. The case was of an Afghan female asylum-seeker, former PDPA member, whose refugee application had been rejected by the Oryol migration service on the ground that she had stayed in **Pakistan** from 1993 to 1995, where she could have received refugee status. The court, first, analysed the objective elements relating to Pakistan as a potential safe third country, and noted that it was neither a State party to the 1951 Geneva Convention nor had any refugee status determination procedure in place. The court, then, looked at the specific elements relevant to the case, and further reminded that Pakistan “is an ally and close collaborator of the Taliban movement”, whose representatives are “very active in settlements of Afghan refugees in Pakistan”, before concluding that the applicant, as a PDPA member, faced a “real threat of persecution at the hands of the Taliban movement in Pakistan”⁵.

A benchmark decision was reached, in the scope of analysis of safety offered by third countries, by the **Zamoskvoretsky Municipal Court of Moscow Central District** in the case of *Uvera Jeanne d’Arc & Banieretse François v. Moscow Region Migration Service*, of 21

⁴ This is an interesting analysis, whereby those states applying automatically the “safe third country” rule may be deemed not to be safe third countries themselves (the “domino theory” in reverse).

⁵ A similar analysis with regards to **Pakistan** as a safe third country was made by the same **Oryol District Court** in the case of *Marzia Mohammad Karim Habiri v. Orel RMS* (27 February 2001).

November 2001. The applicants, Rwandese citizens, had reached Russia after having sojourned successively in **Zaire, Tanzania, Kenya and Djibouti**. The Moscow Region migration service had rejected their refugee claim based upon the fact that “they had been staying on the territory of States – parties to the 1951 Convention – where they could have been granted refugee status”. The objective indicator of safety (being party to the 1951 Geneva Convention) being present, the court analysed the reality of protection offered in the countries of sojourn. Regarding Zaire, Tanzania and Kenya the court considered that “according to information provided (...), [these countries] have indeed acceded to international instruments on refugees; however, international norms established in the 1951 Convention and the 1967 Protocol are not observed in the above-mentioned countries, and asylum-seekers arriving in these countries are not accorded any protection”. The situation is different in Djibouti, this country having an established practice of granting refugee status and related protection. However, looking deeper at the practice itself, the court found that “refugee status in Djibouti, with some rare exceptions, can be granted only to refugees originating from countries that are adjacent to Djibouti (...)”.

While upholding the appeal against the negative decision of the migration service denying admissibility, the court further elaborated that “The availability of the right to stay legally in Djibouti, as well as the prolonged stay in that country cannot, as such, be a reason for denying substantive consideration of the refugee claim, since it follows from the applicants’ statements as well as from submitted evidence that the applicants had a well-founded fear of persecution in the third country. The reliability of such evidence could have been established in the course of substantive consideration of the refugee claims by the migration service”. Through this analysis, the court remarkably points out the limits of the “safe third country” concept, when the application of such concept is limited – by law or practice - to the admissibility stage of the refugee status determination procedure, in isolation of elements of the applicant’s personal story that are co-substantial to the refugee claim⁶.

This decision was appealed by the Moscow Region migration service before the second instance court. On appeal, **the Moscow City Court**, in its decision of 22 February 2002, followed on all the points the reasoning of the lower court, and confirmed its decision.

Concerning **Kyrgyztan** as a safe third country (not) and the perverse effect of smuggling (e.g. when an asylum-seeker is restrained in his freedom of movement while transiting third countries), see *Abd hul Khabib Monira v. Moscow Region Migration Service*, case decided by the **Zamoskovretsky Municipal Court of Moscow**, 13 November 2001.

Concerning **Turkmenistan**, an interesting decision was rendered by the **Presninsky District Court of Moscow**, in the case of *Golestani Nasrulla Mohammad Musa and Gouhar Sultan Mohammad Nabi v. the Moscow City Migration Service*, dated 28 November 2001, whereby the court retained the allegation of the applicant according to which he had just transited Turkmenistan, and sanctioned the migration service for having “failed to produce any evidence testifying to the fact that the applicants had arrived in Russia from a State where they could have been recognised as refugees”. In other words, the notion of “safe third country” is not a mere assumption that may be rebutted by the applicant: it is a state of fact that, in each individual case, must be pro-actively investigated and by the migration service.

⁶ The authors of this paper find it remarkable (and encouraging) that the court, through this individual instance case, reaches conclusions that are similar to principles consolidated in the EU *acquis* and/or by the Council of Europe’s organs.

3. The time limit to submit a refugee application

Under Article 5.1.7 of the RF Law on Refugees, the failure to submit a refugee application within 24 hours in case of illegal crossing of the RF State border leads to non admissibility of the refugee application, i.e. refusal by the migration services to consider the application on its merits. Under the same article, however, it is provided that in the event of circumstances beyond the applicant's control, the time limit may be extended, but not beyond the period of the said circumstances.

In the practice, migration services tend to listen to asylum-seekers' justifications for having missed the time-limit and offer them a genuine possibility to overcome the non-admissibility obstacle of Article 5.1.7. The reason possibly lies with the huge size of the country as well as the lack of awareness of the federal border guards as to the referral of asylum claims. This being said, decisions of non-admissibility of refugee applications based on Article 5 of the refugee law (mainly the time-limit to submit a refugee claim and the "safe third country" rule) account for more than 50% of the negative decisions⁷.

The 20 June 2000 decision of the **Kuibyshevsky Federal Court of the Central District of St Petersburg**, in the case *Rakhmatullah Hassan Khan v. St. Petersburg RMS*, is negative, but it delivers an attempt to fairly analyse the various circumstances alleged by the applicant, thus offering some indications as to the notion of "circumstances beyond one's control". Against the negative decision of the St Petersburg migration service, the applicant was arguing that he was unaware of the Russian asylum procedure, had fallen sick after a long and difficult trip and that it was not intentionally that he delayed the moment of submission of his refugee application.

The court retained an accumulation of facts which, put together, constitute, in the opinion of the court, a sufficient indication that it was not beyond the applicant's control to submit an application within the legal time-frame. Hence, the court noted that the (i) applicant did not address the border guards with an asylum claim, (ii) did not apply to any migration service while crossing the territory of the Russian Federation, and that (iii) he remained with Afghan fellow citizens for nearly one month in St Petersburg, before he approached the migration service. In this respect, the court did not consider plausible that the applicant was not informed by his compatriots – some of whom being themselves registered as asylum-seekers - about the refugee procedure.

One may regret the severity of this decision, denying the substantial examination of his refugee claim to an asylum-seeker who, after all, had defaulted the legal dead-line by not more than several weeks. It remains that the court made a genuine attempt to examine all the circumstances of the case, including by questioning various witnesses present at the audience.

In another case, *Mohd Tarik Jahadr Shakh v. Oryol Migration Service*, decided on 3 October 2000 by the **Zheleznodorozhny District Court of Oryol**, the court assessed as being valid the reasons presented by the applicant for not observing the 24 hours deadline. The applicant, Afghan citizen, explained that he had arrived to Russia by train in 1997 without visa, and that he had not approached the migration service because he did not know of this possibility. The

⁷ This estimates is based upon UNHCR's monitoring of the national refugee status determination procedure in Moscow City and Moscow Region, which receive the bulk of refugee applications in the Russian Federation.

court sanctioned the migration service for having rejected the refugee claim without conducting any assessment of the information provided as a justification by the applicant for missing the legal deadline. In the opinion of the judge, the migration service should have investigated the circumstances under which the applicant crossed the border (given the visa free regime in place at that time between the Russian Federation and Central Asian countries).

Concerning the circumstances under which the applicant claimed for asylum once in Russia, the court referred to Article 4 of the Law on Refugees, concerning the modalities of application for refugee status, and in particular Clause 1, paragraph 3 of Article 4, which provides that, in case of illegal border crossing, the refugee claim may be submitted, inter alia, to a local body of interior (within 24 hours). In this regard, the court noted that the applicant had approached several times the Oryol police authorities, in an attempt to legalise his stay. This fact was retained to the credit of the applicant, as an indication of his “good will” in making his plea to the authorities, if not formally claiming for refugee status⁸. Having decided that the non-admissibility clause of Article 5.1(7) was not applicable, the court eventually proceeded with the consideration of the claim on the merits and found that the applicant fell under the refugee definition.

4. Second citizenship or protection of a third state

Under Article 5.1.4 of the RF Law on Refugees, the availability of citizenship in a third state or the right to stay legally in the territory of a third state, entails, in the absence in that third state of the circumstances enumerated in Article 1.1(1) of the law, denial of consideration of a refugee application on the merits. As we see, this article combines two provisions of the 1951 Geneva Convention: the second paragraph of Article 1.A(2), related to the possession of several nationalities, and the non-applicability clause of Article 1.E, related to the enjoyment, in the country of residence, of rights and obligations normally attached to the possession of nationality.

The only case known to UNHCR, where a court was asked to control the legality of the application of Article 5.1.4 is in the above-mentioned case of *Uvera Jeanne d’Arc & Banieretse François v. Moscow Region Migration Service*, of 21 November 2001, decided by the **Zamoskvoretsky Municipal Court of Moscow Central District**. The migration service had made a combined application of points 4 (second citizenship or protection of a third state) and 5 (safe third country) of Article 5 clause 1, to determine that **Djibouti** was both a safe third country and a country where the applicants were enjoying “the right to stay legally”. Other countries through which the applicants had transited or where they had sojourned (Zaire, Tanzania and Kenya) were examined by the migration service only from the perspective of Article 5.1.5 (safe third countries).

The court sanctioned the application by the migration services of both points 4 and 5 of Article 5 clause 1, for having “failed to take into account the considerations presented by the applicants” as well as the documents presented in support of lack of protection in Djibouti, and obliged the migration service to consider the application on its merits. For the legal reasoning of the court, see above under section “The safe third country rule”.

⁸ One may regret that the court did not further envisage whether the responsibility of the local bodies of interior had been engaged, in the present case, under Article 4.4, which provides the obligation for such interior bodies (as well as for border guard authorities) to forward the refugee application to the competent migration service within three working days.

5. Requirement of material evidence or proof

Under Article 3.3 of the RF refugee law, the decision to issue an asylum seeker's certificate, to recognise someone as a refugee or to deny the substantive examination of the claim, shall be taken after completion of a questionnaire on the basis of an individual interview as well as on the basis of examining the credibility of the data obtained about the person and about his or her family members.

There has been a number of decisions by RMS on denial of a refugee claim under Article 3.3 on the ground that the applicant did not present an evidence proving that he/she had a well-founded fear of being persecuted in case of return to his/her country of origin. Courts usually do not support this ground for rejection of a refugee claim, and maintain that there is no such requirement under the law, for the applicant to prove that he has a well-founded fear of being persecuted in case of return to his country of origin.

The basis for this position was laid down by the **RF Supreme Court**, on its review, dated 7 August 1995 of the case *Kakuliya v. Presidium of the Krasnodar Regional Court*⁹ in which the RF Supreme Court determined that a person applying for refugee status does not have to present an evidence that he was forced to leave his place of permanent residence, but is obliged only to present to the relevant State administration information that is necessary for the consideration of his/her refugee application.

In this case, the defendant was arguing that the applicant, a citizen from Georgia, had not presented evidence that he had left the territory of Abkhazia (Georgia) forcefully. The Supreme Court noted that under Article 3 of the RF refugee law, the asylum-seeker is only obliged to present the information that is necessary for the consideration of his or her refugee application. The law does not prescribe any obligation for the asylum-seeker to present any evidence. The Supreme Court further referred to the "Methodological Instructions on the procedure for working with foreign nationals and stateless persons applying for recognition as refugees in the territory of the RF" (approved by Order No.110 of the Government of the RF of 15 July 1993) which does not mention an obligation of the applicant to submit an evidence either. Paragraph 3 of the above-mentioned instructions establishes that the procedure for refugee status determination includes a credibility assessment of the information that is being presented by the applicant. The Supreme Court noted that "There is no indication that in the [present] case the regional migration service performed such an assessment of the information submitted (...). The court did not examine these circumstances on the mistaken assumption that it was [the applicant] who was supposed to submit proof of his forced departure".

Further jurisprudence of the lower courts maintained this interpretation of the refugee law by the RF Supreme Court. For instance, in the case *Hashmatulloh Muhammad v. Perm RMS* (15 October 1996), the **Perm regional Court** stated that under Article 3.3 of the refugee law, the applicant is obliged to provide the information that is necessary to recognise a person as a refugee. A contrario, the court reminds that "it does not follow from the meaning of the law that the applicant must provide proof of a real danger of being subjected to violence or persecution". The refugee status determination procedure includes a credibility assessment of

⁹ The refugee claim had originally been rejected by the Krasnodar Migration Service, the appeal dismissed by the Oktyabrski District Court of Krasnodar, and that ruling was left unchanged by the Krasnodar Regional Court.

the information provided by the applicant, which assessment is the duty of eligibility migration service officers.

In the case *Alam Gul Vassel v. Krasnodar RMS* (1 April 1998), the **Pervomaiski District Court of Krasnodar Krai** followed the same reasoning and cancelled the RMS decision.

In addition to Article 3.3 of the RF refugee law, and in line with the guidance earlier provided by the Supreme Court in this matter, the courts of law sometimes also cite paragraph 3 of the “Methodological instructions on the procedure for working with foreign nationals and stateless persons applying for recognition as refugees in the territory of the RF”. For instance, in the case *Jamal Naser Mohammad v. Rostov RMS*, of 12 July 1999, the **Pervomaiski District Court of Rostov-on-Don** referred, besides Article 3.3 of the RF refugee law, to the above-mentioned methodological instructions to confirm that the applicant is not obliged by law to present material evidence in order to establish his fear of persecution. In particular, paragraph 3 of the Instructions states that the refugee status determination procedure includes an assessment of the credibility of the information provided by the applicant. The court found that, in the case considered, the RMS did not undertake such credibility assessment. The court subsequently declared the decision illegal and sent back the case to the RMS for reconsideration.

A contrario, in another instance, *Gul Shakh Khamid Shakh v. Perm RMS* (decision of 14 February 1997), the **Leninski District Court of the Perm Region** confirmed the RMS negative decision, declaring that the ground for rejection was not the lack of evidence, but lack of sufficient information for recognition of a person as a refugee. Under Article 3 the applicant is obliged to provide information that is relevant for the consideration of his refugee claim. The court, after having considered all the elements of the case, including documents provided by the applicant supporting his claim, rejected the appeal on the basis of contradictions in information provided by the applicant. In the court’s opinion, the contradictions in the refugee claim led to an overall lack of credibility, and gave grounds to consider that the allegation of fear of persecution was not established.

On 22 November 1999, the **Pervomaiski District Court of Rostov-on-Don** had to decide upon the case of a female Afghan asylum-seeker, allegedly member of the Parsham party (*Muhammad Sadiq Zarguna vs. Rostov-on-Don Migration Service*). One of the grounds for the RMS to reject her refugee application was that the applicant had not been able to “present any proof of her party affiliation”. The court invited the RMS to make use of a series of indicators present in that case: First, the Federal Migration Service’s own information notes, according to which “the return of women, especially single women, to Afghanistan is quite problematic since the country’s Sharia law forbids women to appear unaccompanied in public or work in government”. Secondly, the court referred to more specific information published by the Russian Academy of Sciences, concerning i.a. reprisals against Parsham party members (information against which the applicant’s allegations could be cross-checked). Thirdly, the court retained the testimony of witnesses, corroborating the declarations of the applicant. The court cancelled the RMS negative decision and required the latter to reconsider the case “based on established facts”.

In its Bulletin No.5, of May 2000, the **RF Supreme Court** produced an analysis of the judicial practice concerning the implementation of the refugee and forced migrants laws, in which it provided additional guidance to the lower courts. The Supreme Court calls upon the

courts of law to “pay special attention to how the body of evidence has been developed” during the first administrative instance. In particular, it is reminded that the migration service “must prove that, in conformity with Article 3.3 of the RF Law on Refugees, it has duly verified the information provided by the applicant and that it had good cause to refuse him refugee status”. The Supreme Court further refers to the good practice developed by the courts in St Petersburg when, trying to establish the legal circumstances of the cases, they additionally examined information available from international organisations, the Federal Migration Service, media reports and other evidence, including information on the country of origin of the asylum-seekers.

In the case of *Najibullah Ataullah v. Oryol Regional migration service*, the applicant, Afghan citizen, member of the PDPA, claimed that he had escaped from an execution attempt by the Taliban, during which his older brother had been killed. Another brother of the applicant, ex-member of the Najibullah’s secret police, had managed to flee Afghanistan earlier to Russia. The Oryol migration service had rejected the refugee application on the ground that the applicant had not participated in any military activities against the authorities of the country from which he alleged fear of persecution. Referring to Article 3 of the law, the **Zheleznodorozhny District Court of Oryol**, in its decision of 12 March 2002, cancelled the decision of the migration service, for the latter had failed to examine all the circumstances of the claim, to check information provided and to conduct a credibility assessment. In this regard, the fact retained by the migration service that the applicant had not combated militarily the Taliban, without considering and assessing the facts reported by the applicant, was found by the court to be irrelevant.

6. Establishment of facts and fear of persecution

Article 1 of the refugee law gives a definition of refugee that is almost similar to the one of the 1951 Geneva Convention, and refers to “well-founded fear of being persecuted for reasons of race, religion, citizenship or nationality (ethnic origin), membership of a particular social group or political opinion (...)”. The judiciary soon was led to control the interpretation by the migration services of the notion(s) of fear of persecution.

In the case *Mohammad Shoab Abdul Hakim v. Perm RMS*, decided on 19 November 1996 by the **Leninsky District Court of the Perm**, the RMS was arguing that “the applicant had not been subject to violence and persecution in Afghanistan prior to his departure (...)”. The court, after reminding the definition of refugee under Article 1 of the law, examined the profile, former position and activities of the applicant, and concluded to the existence of threats of persecution in case of return to the country of origin.

At this stage, the court had laid the legal reasoning for cancelling the decision of the RMS. However, in an enthusiastic development, the court pushed the argument with an explicit reference to Article 33 of the 1951 Geneva Convention. In substance, the court explained that if the “fear of persecution” had to be appreciated in regards to past persecutions only, the situation could lead to the denial of refugee status to applicants who, although they have serious reasons to fear persecution in case of return, indeed fled their country before being effectively persecuted. Such a restrictive reasoning, pursues the court, would be in blatant contradiction with Article 33 of the 1951 Geneva Convention. Negative decisions based on such misunderstanding of the letter of the law, and because they contain “the request for the applicant to return to his native land”, would lead to a violation of Russia’s obligations under article 33 of the 1951 Geneva Convention.

In the case of *Jamal Naser Mohammad v. Rostov-on-Don RMS*, the migration service had rejected the application of the applicant, Afghan citizen, on the grounds that he had failed to provide information concerning his political affiliation and that, in any case, “convictions different from the Government’s did not, per se, constitute grounds to seek refugee status”. The **Pervomaiski District Court of Rostov-on-Don**, in its decision of 12 July 1999, did not contest the legal reasoning of the migration service concerning the improbability of fear of persecution when the latter is based solely on political convictions that are divergent from the government’s. The court nevertheless further investigated the case and found that the fear of persecution of the applicant could be considered as well-founded. Such analysis was based upon the own declarations of the applicant, upon the PDPA member card that he produced, as well as upon media reports and a letter of UNHCR concerning the situation in Afghanistan of former PDPA members or of persons “who had had anything to do with USSR”.

In the case of *Farid Gulam Dastaghir v. St Petersburg Migration Service*, of 22 June 2000, the **Kuibyshevsky Federal Court of the Central District of St Petersburg** concluded to the absence of well-founded fear of persecution in case of return to Afghanistan, and confirmed the negative decision of the first administrative instance. First, examining the facts presented by the applicant, namely the simple membership within the PDPA at low-ranking level as well as the accomplishment of military service without participating in combat operations, the court considered that they were not sufficient, as such, to establish that the alleged fear of persecution was well-founded. Secondly, the court retained certain objective facts against the applicant: the fact that his elder brothers, who had held more senior posts under the Najibullah’s regime, remained in Afghanistan without being harassed or persecuted, the fact that the applicant was issued a passport in Kabul by the new Government, which was subsequently extended twice in Russia, and finally the fact that the applicant had submitted his refugee claim three years after having entered the Russian territory.

The question of “discrimination” and its relationship to the notion of “persecution” was examined in the case of *Hazim Baker Hussayin v. Moscow Region migration service* of 15 February 2002, which was considered by the **Zamoskvoretsky District Court of Moscow**. The applicant, Iraqi Kurd, claimed that he was persecuted in his country of origin due to his ethnicity. The judge noted that differences in the treatment of ethnic minorities exist in many countries. However, the judge pursued, a “less favourable” treatment targeting an ethnic minority cannot automatically be qualified as “persecution”. In the opinion of the judge, discrimination may amount to persecution when it inflicts a “substantial harm to persons” or groups of persons. For instance, when it results in substantial limitations of fundamental rights, such as the right to employment or to education. Enumerating such rights, the decision expressly quoted paragraph 54 of the UNHCR’s Handbook on Procedures and Criteria for Determining Refugee Status. The discrimination alleged by the applicant was not considered by the court as amounting to persecution.

7. War refugees

Maybe because of the existence, in the Russian refugee law, of a provision (Article 12) foreseeing complementary protection, under the form of temporary asylum, for asylum seekers not falling under the definition of a refugee according to Article 1 of the law, the regional migration services and the courts of law have been reluctant, so far, to grant refugee status to asylum seekers who left their country of origin for reasons related to war or generalised

violence. Such court practice has been developed particularly in relation to Afghan asylum seekers.

This issue has been addressed in the case *Khasmatullo Khasos v. Perm RMS* of 9 September 1996. In this case, the Perm RMS had rejected the refugee on the ground that he was a war refugee. The applicant, an Afghan national, who had studied in the former USSR, was claiming that he would be subjected to persecution in case of return to Afghanistan for reasons of membership in a particular social group and because of his political opinions.

The applicant appealed the Perm RMS negative decision before the court. After consideration of the case on the merits, the **Ochyor District Court of the Perm Region** supported the RMS argument that the applicant was a war refugee. The court stated, in particular, that the applicant was “a person who had to leave his country of origin because of internal and international conflicts, and who, therefore, cannot be considered as a refugee under the 1951 Convention, but shall enjoy protection under the 1949 Geneva Conventions on the protection of war victims and their 1977 Additional Protocol”.

This early decision can be questioned in several respects. First, concerning the relevance of referring to international humanitarian law instruments when determining refugee status. Secondly, the court retained the fact that the applicant had left Afghanistan in 1987 to study in USSR as confirmation of the fact that he was not fleeing persecution at the time of departure, instead of examining whether, for the same reason, he qualified as a refugee “sur place”.

In another case, *Rakhimjhan v. Department of Immigration Control (DIC) for Leningrad Region and St. Petersburg*, the **Kuybishevsky Federal Court of St. Petersburg** in its decision of 20 September 1998, used similar arguments to reject the appeal against the DIC negative decision. The applicant, an Afghan national, was a member of PDPA, had studied at the High School of the USSR Ministry of Interior and had worked in the MOI of Afghanistan. Representatives of the DIC argued that the applicant was an economic migrant who did not fall under the definition of refugee of Article 1 of the RF refugee law.

The court proceeded with the legal analysis of the case and came to the conclusion that the applicant did not fall under the definition of a refugee. The court stated that the applicant did not have a well-founded fear of being persecuted in Afghanistan. To sustain its argument, the court referred to paragraph 164 of the UNHCR Handbook, under which persons forced to leave their country of origin as a result of internal armed conflict usually are not regarded as refugees in the sense of the 1951 Geneva Convention. In this case, hostilities in Afghanistan do not, per se, constitute a ground for granting a refugee status to the applicant.

The **St. Petersburg City Court**, considering the case on second judicial appeal, supported the conclusions of the lower court in its decision of 10 December 1998, according to which hostilities in Afghanistan could not, as such, constitute a ground for granting refugee status since, according to paragraph 164 of the UNHCR Handbook, persons forced to leave their country of origin as a result of an internal armed conflict are not usually regarded as refugees.

The same reasoning according to which persons who left their countries due to internal armed conflicts are usually not considered as refugees under the 1951 Geneva Convention, following the guidance provided in this regard by the UNHCR Handbook (paragraph 164), was followed by the **Kuybishevsky Federal Court of St. Petersburg** in the case *Farid Ghulam Dastaghir v.*

St.Petersburg RMS (22 June 2000), after considering that the alleged fear of persecution was not well-founded, to reject the refugee claim of the applicant.

8. The principle of family unity

The RF Law on Refugees, under Article 3.4, provides that any family member under the age of 18 should undergo refugee status determination. The same article provides that the lack of established circumstances under Article 1.1 for one family member does not preclude granting him/her refugee status on the basis of the principle of family unity. This two-step approach is sensible, as it gives priority to refugee status determination on individual grounds¹⁰.

However, the law does not give a definition of the family and/or of the notion of dependent. In such absence, the courts have been led to fill the legislative gap. In this respect, a very interesting decision was rendered by the **Zamoskvoretsky Municipal Court of Moscow**, on 10 May 2001, in the case of *Sadiya Abdul Kahir v. Moscow region RMS*. A female Afghan asylum-seeker had fled her country of origin to Russia, in 1993, together with her brother and his family, composed of his wife and children. Her refugee application was rejected by the Moscow Region migration service on the basis that she did not meet the criteria led down under Article 1.1 of the law, while her brother was granted refugee status and his nuclear family received refugee status on the basis of the principle of family unity.

The court, using methodology under international private law principles, analysed whether the applicant could be considered as a dependent member of her brother's family. This meant, as far as Afghanistan is concerned, looking at Afghan customary law. The court hence considered that "a single woman in Afghanistan cannot live on her own. She must live with a family headed by a man. A woman in Afghanistan is fully dependent on the head of a family who is responsible for her. A single woman in Afghanistan is not entitled to any rights or security guarantees." The court further noted that the applicant's life "in Afghanistan as well as in Russia was closely linked with her brother's family, where she lives: they had a common household and a single-family budget. Besides, the applicant does not work, she is a housewife and is fully dependent on her brother".

The ground was led to grant the applicant refugee status on the basis of the family unity principle. However, having established the closeness of the family link, as well as the dependency link, the court used this demonstration to analyse whether such links, in the circumstances of the case, could not justify that the applicant had her own well-founded fear of persecution in case of return to her country of origin. Hence the court considered that, because of the brother's high level political activities and the subsequent risk that persecutions by the regime in place could reach all family members, the applicant "had a well-founded fear of being persecuted by the Modjahideens due to her brother's political activities". The court further instructed the Moscow region migration service to grant the applicant refugee status.

9. Temporary Asylum under the RF Law on Refugees

Article 12 of the RF refugee law provides the opportunity for receiving temporary asylum. This complementary protection regime is open to persons who "have no grounds to be recognised as

¹⁰ This can be critical in case, for instance, when a refugee couple would divorce once in the country of asylum. The status of refugee granted to the spouse on individual grounds would be preserved, while it could be withdrawn in case the same spouse had been granted refugee status as a dependent.

refugees (...) but cannot be expelled from the territory of the Russian Federation for humanitarian reasons”. Article 12 further stipulates that the procedure for determining and granting temporary asylum needs to be further established by appropriate governmental regulation. On 9 April 2001 the RF Government approved Resolution # 274 on the granting of temporary asylum on the territory of the Russian Federation. Before then, the relationship between Article 1 of the law, on the definition of refugee, and Article 12, was analysed by the judiciary.

In the case *Alam Gul Vassel v. Krasnodar RMS* (decision of 1 April 1998), the **Pervomaiski District Court of Krasnodar Territory** had to consider the argument where the RMS refused to recognise the applicant as a refugee but acknowledged that he might be eligible for temporary asylum under article 12 of the RF refugee law. The applicant, who was an Afghan national, received a military education in the former USSR. He was a member of the PDPA and occupied successive high-ranking military posts in the Najibullah’s Government. In 1992 the applicant fled Afghanistan for Russia via Uzbekistan. In 1994 the applicant applied to the Krasnodar Migration Service for refugee status. His application was rejected in 1995.

Before the court, the RMS briefly argued that the applicant could not be considered as a refugee, since in general “former PDPA members are not persecuted in Afghanistan”. The RMS insisted that the reason for the applicant’s unwillingness to return to Afghanistan was based upon the economic situation in his country, as well as upon the war situation that prevailed there. The RMS concluded that, on that latter ground, the applicant could be eligible for temporary asylum (i.e. if the procedure for granting temporary asylum was in place).

The court rejected the RMS argument that the applicant can be granted a temporary asylum instead of refugee status, noting in particular that the applicant was unwilling to file such an application for temporary asylum. The court further analysed the claim on the merits and found that there were sufficient grounds for the case to be considered positively under Article 1 of the refugee law on the definition of refugee. The court subsequently cancelled the RMS negative decision.

By this decision, the court seems to have laid down the principle of subsidiarity of Article 12, through which the migration services must approach the question of temporary asylum. Indeed, the court indicates that the migration service must first assess the refugee claim on its individual merits¹¹. In case the applicant does not qualify as a refugee under Article 1 of the refugee law, the migration service must then undertake a consecutive review of the claim in light specifically of Article 12, i.e. the existence or not of “humanitarian reasons”, which might give grant to complementary protection.

The issuance by the RF Government of Resolution No. 274 of 9 April 2001 “On the granting of Temporary Asylum in the Russian Federation”, provided the migration services in the regions of the Federation with procedural instructions on the implementation of the temporary asylum regime. However, logistics constraints, such as availability of blank temporary

¹¹ I.e. in the hypothesis that the applicant would not exclusively ask for temporary asylum. Although theoretical, this situation is nevertheless envisaged by the law: “Temporary asylum may be provided to a foreign national or stateless person if they: (1) have grounds to be recognised as refugees but submit only a written application requesting an opportunity to temporarily stay in the territory of the Russian Federation”; (Article 12.2.1 of the refugee law).

certificates, hampered the smooth implementation of Regulation No.274, and the judiciary was solicited.

In the case of *Lufuluabo Ngoy Jerome v. Moscow City migration service*, decided on 9 November 2001, the applicant had been denied consideration of his temporary asylum claim by the migration service on the ground that the temporary asylum certificate was not available yet¹². The **Presninsky District Court of Moscow** first referred to Article 18 of the RF Constitution, which prescribes that human rights and freedoms are self-executing norms. The judge further reminded that the legal framework for processing temporary asylum applications does exist, as established by governmental Resolution No.274. The court concluded that both the right for temporary asylum as well as the mechanism for its implementation were in place and that, therefore, the denial to consider a temporary asylum claim on the ground that blank forms for its recognition are not available constitutes a violation of the constitutional rights of the applicant. The court's decision obliged the migration service to consider the temporary asylum application.

To its credit, the Moscow City Migration Service, right after this initial decision, ceased such practice and started to process applications for temporary asylum.

10. Failure to submit an appeal within the time limit

Article 239-5 of the RSFSR Civil Procedural Code sets up the following periods for filing a complaint with the court:

- Three months from the day when a person found out about violation of his rights or freedoms;
- One month following notification of the negative decision;
- One month following the filing of the claim, in case of silence by the administration.

Article 10.3 of the RF refugee law sets up the same periods for appeal as the RF Civil Code:

- One month after the receipt by the person of a written notification of the decision or after the expiration of a month's period since the date of the submission of the application if the person received no written reply thereto;
- Three months after the denial of refugee status recognition became known to the refugee.

Under the Civil Procedural Code, these periods can be restored by the court if there is a good excuse for not respecting them. Hence, the party who missed the deadline must provide an explanation and good reasons justifying the violation of the deadline. After evaluation of these reasons, the court may either dismiss the case or accept the reasons as valid ones and proceed with the consideration of the case on its merits.

There were several cases when this issue was raised before the courts. In the decision of 31 August 1999 on case *Lichia Voldegabriel Sibhatu v. Moscow Migration Service*, the **Presnenski Court of Moscow** noted that the applicant received a notification of denial letter in

¹² One may regret this attitude of the Moscow City Migration Service, whereby the failure of the administration to implement the law (non-availability of temporary asylum certificates) is not assumed by the administration itself but has to be suffered by the – law-abiding – asylum-seeker. Moreover, such practice is in contradiction with earlier practice of the same Moscow City Migration Service, whereby for years (until 2000), in the absence of refugee certificates, the migration services, in Moscow and in the regions, were nevertheless issuing decisions on refugee recognition.

June 1998. The applicant filed an appeal with the court in January 1999. The Moscow Migration Service (MMS) argued before the court that, because the applicant missed the deadline for filing a complaint, the appeal should be dismissed. The court found that the applicant did not present to the court any probing element justifying her missing the deadline. Reference to the fact that the applicant filed an appeal against the MMS decision before the FMS Appeals Commission (second administrative instance), in the court's opinion, is not a ground for restoring this period for this is not provided by the law. Besides, the applicant received the letter of denial from the FMS Appeals Commission on 3 December 1998 but the complaint with the court was filed only on 10 January 1999. Therefore, the court found that the appeal was not to be satisfied on its merits because of the missing the one-month deadline.

This court decision is exceptional in many respects. First of all, it can be argued whether the appeal against the first negative administrative decision before the FMS Appeals Commission does not preserve the legal one-month delay to further appeal against the FMS Appeals Commission negative decision before the court of law, for this seems to be the letter and spirit of article 10.3 of the refugee law. Secondly, this court decision further examines the well-foundedness of the fear of persecution in regards to the 1995 Law on Forced Migrants – which primarily applies to Russian citizens and/or former USSR citizens fleeing their former place of residence, generally former USSR countries. Incidentally, the examination by the court of the (non) respect of the legal delays follows a long reasoning on the merits of the case, and the court finally rejects the appeal on both substantial and procedural grounds, which is confusing.

In the decision of 22 November 1999 on the case *Muhamad Sadiq Zarguna v. Rostov RMS*, considered by the **Pervomaiski District Court of Rostov**, the applicant had failed to file an appeal against the RMS decision within the one-month legal period. The court considered it possible to recognise the reason for missing the deadline for the appeal, on the basis that the applicant was a foreign national and did not speak Russian well. The court further noted that the RMS had failed to provide the applicant with necessary legal assistance, by not providing her with an interpreter.

11. Non-exhaustion of the pre-trial procedure

Because the courts are controlling the legality of the administrative decisions rendered by the regional migration services, they do not accept legal arguments that have not been submitted to the first instance administrative bodies. In the decision of 31 October 1997 on case *Salah Mukya Mavlud, Ali Jaaz Abdul Jabar v. Perm RMS*, the **Ochyor District Court of the Perm Region** noted that the applicant changed during the trial his refugee claim (brought under Article 1 of the law) to temporary asylum claim (under Article 12 of the law). The court first noted that the applicant's claim for temporary asylum had not been earlier submitted to the RMS, and that it could not have been submitted either since at the time when the RMS decision was rendered, the law in vigour (RF Law on Refugees of 19 February 1993) did not contain any provision ruling temporary asylum.

The court further observed that under its amended version of 23 May 1997, the law on refugees does contain a provision on temporary asylum, and that applications based upon this provision can be submitted for consideration before the RMS. The court concludes that, "in such circumstances, the appeal must be left unexamined, as [the applicant] has not exhausted the pre-judicial procedure (...)". In its ruling, the court decides that the applicant "shall be advised that he should first bring his claim before the RMS (...) and then appeal to the court again if his application is rejected".

12. The appeal having suspensive effect of the expulsion

Because of existing gaps in the Russian refugee status determination procedure, asylum-seekers often cannot prove to the law enforcement bodies their status of asylum-seekers in the country and, as a result, interior bodies consider them as illegal aliens, with all further consequences. UNHCR is aware of several instances when asylum seekers were subjected to expulsion procedures, while they were still pending in the refugee status determination procedure. Sometimes, lacking financial means to carry-out deportation, local bodies of interior may release the asylum-seekers. In other instances, UNHCR managed to resettle to third countries asylum-seekers pending imminent deportation. In some cases asylum-seekers were eventually deported to their country of origin or to a transit country where from they had entered the Russian Federation.

In the case of *Abdel Nassir Abdel Magid Akhmed v. Saratov Regional Department of Interior*, decided on 26 January 2001 by the **Saratov District Court**, the general principle according to which the appeal has a suspensive effect of the expulsion order was clearly elucidated. The applicant, a Sudanese asylum-seeker, had had his refugee application rejected by the Saratov Migration Service and had appealed this negative decision before the court. In the absence of any asylum-seeker certificate (and, subsequently, of sojourn registration), and while the appeal was pending with the court, the applicant was issued an expulsion order by the Saratov Department of Interior. Such order of expulsion was taken on the basis of Article 31 of the USSR Law “On the legal status of foreigners in the USSR”.

The Saratov Department of Interior was arguing that such expulsion order was taken after the applicant had violated twice the administrative regulations applicable to foreigners: first for staying in Russia without a sojourn registration, and second for not having left the country within the legal delay imparted to him.

Regarding the liability of the applicant for the non-respect of administrative rules on the sojourn of foreigners, the court referred to the Article 31 paragraph 1 of the 1951 Geneva Convention, whereby “The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of Article 1, enter or are present in their territory without authorisation, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence”. In this regard, the court noted that, “regardless of international requirements, administrative penalties were imposed on the plaintiff, although he used to present himself to the Passport and Visa Service [of the department of interior] and to the Migration Service on a regular basis and provided clarification as to why he had to stay in Russia”.

Concerning expulsion, the court referred to Article 13.1 of the RF Law on Refugees, according to which a person notified of the negative decision denying him refugee status, if he/she fails to use the right to appeal against this decision, shall be expelled from the country. A contrario, a person who has exercised his/her right to appeal, may not be expelled. The court also made reference to Article 31 paragraph 2 of the 1951 Geneva Convention, whereby “The Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is regularised (...)”. The court concluded that the Saratov Department of Interior “was not supposed to take a decision on the plaintiff’s expulsion as long as his appeal against the

negative decision [of the migration service] was pending in court". The court obliged the department of interior to cancel the deportation visa¹³.

One may regret that the court, when assessing the legality of the expulsion order, did not make further reference to Article 32 paragraph 1 of the 1951 Geneva Convention, whereby "The contracting States shall not expel a refugee lawfully in their territory (...)", with the term "lawfully" being understood as covering the situation of an asylum-seeker who submitted his refugee application in accordance with the domestic refugee law and who is subsequently entitled to the issuance of an asylum-seeker certificate (and subsequent sojourn registration), irrespective of the failure of the migration service to issue such a document.

The merit of this decision remains that it clearly recalled that sanctioning asylum seekers for their violation of the rules of stay of foreigners in the country while they are still in the refugee status determination procedure is illegal because it would contradict the 1951 Geneva Convention. The court also confirmed that the RF Law on Refugee (Article 13) further prohibits the expulsion of asylum-seekers who have exercised their right to appeal a negative decision.

13. Reconsideration of the case on the basis of newly emerging circumstances

Article 333 of the RSFSR Civil Procedural Code provides for a judicial reconsideration of a case on the basis of newly emerging circumstances. The idea behind the article is that during the trial there was some legal fact relevant to the case but not known to the applicant and therefore to the court. In this case the applicant should file a motion on reconsideration of the case on the basis of newly emerging circumstances. The court, after consideration of the motion, may either refuse to reconsider the case or cancel its previous decision and reconsider the case on the basis of newly emerging circumstances.

In the case *Gul Shah Hamid Shah v. Perm RMS* the applicant filed a motion for reconsideration of the case on the basis of newly emerging circumstances. The applicant invoked the following grounds:

- the adoption of the Federal Law of 23 May 1997 "On amendments and additions to the RF Law on Refugees";
- country of origin information on the military and political situation in Afghanistan;
- the arrival of the applicant's relative, who could stand as a witness in the trial;
- institution of criminal proceedings against some employees of the FMS.

The **Leninski District Court of Perm**, in its decision of 19 September 1997, rejected the motion, considering that the elements invoked do not constitute grounds for the reconsideration of the case on the basis of newly emerging circumstances, as stipulated in Article 333 of the RF Civil Code. In this respect, the applicant "did not point out any relevant circumstances (существенных) which were not known, or could not be known by the applicant and which could constitute grounds for the cancellation of the decision on the basis of article 333.1 of the RSFSR Civil Procedural Code". The court further stated that the presentation by the applicant of additional evidence, including a witness testimony, does not constitute a ground for reconsideration of the case on the basis of newly emerging circumstances. The court dismissed the appeal.

¹³ Eventually, the applicant, a medical doctor, was later on granted refugee status by the court, and is now exercising his profession legally in Russia.

The applicant further appealed this court decision before the **Perm Regional Court** and referred to the following grounds for reconsideration of the case on the basis of newly emerging circumstances:

- the adoption of the Federal Law of 23 May 1997 “On amendments and additions to the RF Law on Refugees”;
- country of origin information on the military and political situation in Afghanistan;

The Perm Region Court, in its decision of 28 November 1997, confirmed that the facts raised by the applicant do not constitute grounds for reconsideration of the case on the basis of newly emerging circumstances, but they may constitute new grounds for a second refugee application to the migration service. The applicant, on the basis of these new facts, may apply for the second time to the Perm RMS with a refugee claim. The negative decision of the lower court on the appeal against the first instance administrative decision does not impede this action.

14. Extraterritorial effect of the determination of refugee status

This issue has been addressed in the decision of 22 November 1999 on case *Muhammad Sadiq Zarguna v. Rostov RMS*, considered by the **Pervomaiski District Court of the Rostov-on-Don region**. The Rostov-on-Don RMS had rejected the refugee status application on the basis that the applicant did not fall under the definition of a refugee as laid down under the Article 1 of the RF Law on Refugees and because, before arrival to Russia, the applicant had stayed in Uzbekistan for several years.

The Court referred to the UNHCR Executive Committee Conclusion No.12 (1978) on the extraterritorial effect of the determination of refugee status to decide that, because the applicant had been recognised as a mandate refugee by UNHCR in Uzbekistan, the Russian authorities must recognise his refugee status as well. The court noted that “once they accede to the 1951 Geneva Convention and the 1967 Protocol, States thereby agree for UNHCR to be a priority agent for providing international legal protection to refugees, with its decisions on refugee status in principle being binding on all States”.

While the EXCOM Conclusion quoted refers to recognition decisions taken by Contracting States and does not refer to decisions made under the mandate of UNHCR, the decision does also recall the obligation States are under, to co-operate with UNHCR, which obligation indeed derives from both the 1951 Geneva Convention (Article 35) and the UN General Assembly Resolution 428 of 1950 adopting the Statute of UNHCR. The role of UNHCR becomes particularly significant in a situation, as the one analysed by the court, where the UNHCR decisions recognising the refugee status was made in the absence of any national refugee status determination procedure, in this case in Uzbekistan, a State not party to the 1951 Geneva Convention.

15. Accession to the Russian citizenship by recognised refugees

According to the Article 19 of the 1992 RF Law on Citizenship, a foreigner can apply for acquisition of citizenship after five years of permanent residence in Russia (or three years, if this permanent residence has been continuous). Point 2 of Article 19 provides that the residence period can be halved in the case of recognised refugees.

Law enforcement bodies restrictively interpret the “permanent residence” requirement as implying possession of registration at the place of residence. Therefore, in the opinion of interior agencies, those who lack registration at the place of residence are not permanently residing in the RF territory and cannot apply for Russian citizenship. Freedom of movement and citizens’ rights to choose their place of sojourn and/or residence is ruled under the eponym federal law of 1993. Problems have occurred with the implementation of this federal law, whereby law enforcement bodies in various subjects of the Federation have turned the registration system into a permission to sojourn/reside (reminder of the USSR “propiska” system), as opposed to a system under which citizens notify the administration of their place of sojourn and/or residence.

It is a common situation for refugees and asylum seekers that they are living in the country since several years, but cannot register at their domicile, either because they do not own a flat or because the landlord of the apartment they rent is unwilling to sign a lease agreement (in order to evade taxes) or to register the lessee at their premises (in order to avoid the cumbersome registration procedure). One of the ways out from this vicious circle, for refugees and asylum seekers, is to establish facts of legal importance (in that case, residence) through the courts.

In the case of *Abdul Kahir Abdul Zahir’s* application on establishment of a legal fact (19 July 2001), the **Moscow Region’s court** considered the applicant’s request to establish the fact of his permanent sojourn in Russia since 1994, which was necessary for the applicant to apply for Russian citizenship. The applicant was a recognised refugee and had been living in Russia most of the time without any sojourn registration. The applicant presented to the court a certification letter from the head of the temporary accommodation centre, where he had been living from 1994 until 1999. In 1999, the applicant had been issued with an asylum-seeker certificate, which remained valid until he was formally recognised as a refugee, in 2001. On the basis of these documents the court established the fact of continuous legal residence of the applicant in Russia since 1994. On the basis of this court decision the applicant would be able to apply for Russian citizenship under Article 19 of the RF citizenship law.

The case of *Alexandrev and company v. Passport and Visa Department of the Kuzminski district of Moscow*, judged on 6 July 2001 by the **Kuzminsky Municipal Court of Moscow**, is somewhat different, to the extent that the appellants were former USSR citizens and, as such, fell under other provisions of the 1992 RF citizenship law. These ethnic Armenian refugees from Azerbaijan had fled to the Russian Soviet Federated Socialist Republic (RSFSR) in 1989-90 and were issued “refugee cards” by the RSFSR Ministry of Labour in 1991. The concerned persons in April 2001 requested the competent Department of Interior of Kuzminsky District (Moscow) to be recognised as RF citizens in accordance with Article 13 of the RF Law on Citizenship, and to be issued RF passports. Article 13 of the RF 1992 RF citizenship law provides that former USSR citizens residing permanently in Russia at the time of entry into force of the law (6 February 1992) are ipso facto Russian citizens. Their request was rejected by the Department of Interior of Kuzminsky District, the latter recommending that they apply for citizenship through the Visa and Registration Department of the Chief Directorate of Interior of Moscow City (i.e. request for acquisition of citizenship through the normal regime provided for under the above-referred Article 19 of the 1992 citizenship law¹⁴).

¹⁴ There are objective advantages with the recognition procedure (as opposed to acquisition by naturalisation) in terms i.a. of retroactive allowances and benefits.

The court noted that there was evidence that the applicants had been permanently residing in the RSFSR since 1990, based upon the fact that the concerned persons had been relocated to that republic by the USSR authorities themselves. Their legal status was further established by the issuance of refugee cards in 1991. For the purpose of assessing “permanent residence”, the court asserted that “the RF Law on Citizenship does not bind acquisition of citizenship to the availability of registration/propiska”. The court concluded that, at the time of entry into force of the RF citizenship law the applicants were permanently residing in Russia and were consequently Russian citizens, in accordance with Article 13 of that law¹⁵.

In the above-mentioned decision, past official governmental actions (evacuation by the Soviet authorities and issuance of a refugee document) allowed establishing the fact of permanent residence, in the absence of residence registration. In its decision of 21 May 2002, the **District Court of Vladikavkaz** (North Ossetia-Alania), in the *case of Mr. Tigishvili*¹⁶, the fact of permanent residence was established through other means, on the basis of indicators of purely private character. Mr. Tigishvili was a South Osset refugee from Georgia, who had fled to Russia in 1991 and found a safe haven in the Republic of North Ossetia-Alania. To consider as established the fact of his permanent residence in North Ossetia-Alania, the court first retained the declaration in court of two witnesses, as well as a certificate from the director of the factory where the applicant was employed, attesting that the latter had been accommodated at the factory’s dormitory from 1991 until 2000. Although, noted the court, the applicant had been staying at the factory’s dormitory “without any registration”, the fact of permanent residence could be considered as established, on the basis of the witnesses’ testimonies and the certificate of the factory’s director.

As a conclusion...

In a way, this latter decision is an implicit acknowledgement of the condition of refugees. The precarious situation of refugees, as persons who lost everything, often requires, on the side of authorities entrusted with the determination of their status, understanding, pro-active investigation and, ultimately, common sense. It is encouraging to note that the courts in the Russian Federation, in the exercise of their independent power, play an increasing and positive role in the protection of refugees, complementary to the one of the migration services, which they guide in the interpretation of the refugee law.

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¹⁵ See also similar reasoning and decision by the **Tverskoi Intermunicipal Court of Moscow Central District**, of 18 January 2001, in the case of *Korsakova and Co v. Moscow City Department of Visas and Registration*.

¹⁶ The purpose of this action in court was to establish facts of legal importance (for subsequent recognition of Russian citizenship), in the absence of any dispute and, therefore, defendant party.