

**DECISION RECORD**

**RRT CASE NUMBER:** 071917225

**DIAC REFERENCE(S):** CLF2005/47630

**COUNTRY OF REFERENCE:** Russian Federation

**TRIBUNAL MEMBER:** Ann O'Toole

**DATE DECISION SIGNED:** 3 April 2008

**PLACE OF DECISION:** Sydney

**DECISION:** The Tribunal remits the matter for reconsideration with the following directions:

- (i) that the first named applicant satisfies s.36(2)(a) of the Migration Act, being a person to whom Australia has protection obligations under the Refugees Convention; and
- (ii) that the second and third named applicants satisfy s.36(2)(b)(i) of the Migration Act, being the dependants of the first named applicant.

## **STATEMENT OF DECISION AND REASONS**

### **APPLICATION FOR REVIEW**

This is an application for review of decisions made by a delegate of the Minister for Immigration and Citizenship to refuse to grant the applicants Protection (Class XA) visas under s.65 of the *Migration Act 1958* (the Act).

The applicants, who claim to be citizens of the Russian Federation, arrived in Australia and applied to the Department of Immigration and Citizenship for Protection (Class XA) visas. The delegate decided to refuse to grant the visas and notified the applicants of the decision and their review rights.

*[Information deleted in accordance with section 431 of the Migration Act 1958].*

The delegate refused the visa application on the basis that the first named applicant is not a person to whom Australia has protection obligations under the Refugees Convention.

*[Deleted in accordance with section 431 of the Migration Act 1958]*

### **RELEVANT LAW**

Under s.65(1) a visa may be granted only if the decision maker is satisfied that the prescribed criteria for the visa have been satisfied. In general, the relevant criteria for the grant of a protection visa are those in force when the visa application was lodged although some statutory qualifications enacted since then may also be relevant.

Section 36(2)(a) of the Act provides that a criterion for a protection visa is that the applicant for the visa is a non-citizen in Australia to whom the Minister is satisfied Australia has protection obligations under the 1951 Convention Relating to the Status of Refugees as amended by the 1967 Protocol Relating to the Status of Refugees (together, the Refugees Convention, or the Convention).

Section 36(2)(b) provides as an alternative criterion that the applicant is a non-citizen in Australia who is the spouse or a dependant of a non-citizen (i) to whom Australia has protection obligations under the Convention and (ii) who holds a protection visa.

Further criteria for the grant of a Protection (Class XA) visa are set out in Parts 785 and 866 of Schedule 2 to the Migration Regulations 1994.

### **Definition of ‘refugee’**

Australia is a party to the Refugees Convention and generally speaking, has protection obligations to people who are refugees as defined in Article 1 of the Convention. Article 1A(2) relevantly defines a refugee as any person who:

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

The High Court has considered this definition in a number of cases, notably *Chan Yee Kin v MIEA* (1989) 169 CLR 379, *Applicant A v MIEA* (1997) 190 CLR 225, *MIEA v Guo* (1997) 191 CLR 559, *Chen Shi Hai v MIMA* (2000) 201 CLR 293, *MIMA v Haji Ibrahim* (2000) 204 CLR 1, *MIMA v Khawar* (2002) 210 CLR 1, *MIMA v Respondents S152/2003* (2004) 222 CLR 1 and *Applicant S v MIMA* (2004) 217 CLR 387.

Sections 91R and 91S of the Act qualify some aspects of Article 1A(2) for the purposes of the application of the Act and the regulations to a particular person.

There are four key elements to the Convention definition. First, an applicant must be outside his or her country.

Second, an applicant must fear persecution. Under s.91R(1) of the Act persecution must involve “serious harm” to the applicant (s.91R(1)(b)), and systematic and discriminatory conduct (s.91R(1)(c)). The expression “serious harm” includes, for example, a threat to life or liberty, significant physical harassment or ill-treatment, or significant economic hardship or denial of access to basic services or denial of capacity to earn a livelihood, where such hardship or denial threatens the applicant’s capacity to subsist: s.91R(2) of the Act. The High Court has explained that persecution may be directed against a Person 1s an individual or as a member of a group. The persecution must have an official quality, in the sense that it is official, or officially tolerated or uncontrollable by the authorities of the country of

nationality. However, the threat of harm need not be the product of government policy; it may be enough that the government has failed or is unable to protect the applicant from persecution.

Further, persecution implies an element of motivation on the part of those who persecute for the infliction of harm. People are persecuted for something perceived about them or attributed to them by their persecutors. However the motivation need not be one of enmity, malignity or other antipathy towards the victim on the part of the persecutor.

Third, the persecution which the applicant fears must be for one or more of the reasons enumerated in the Convention definition - race, religion, nationality, membership of a particular social group or political opinion. The phrase "for reasons of" serves to identify the motivation for the infliction of the persecution. The persecution feared need not be *solely* attributable to a Convention reason. However, persecution for multiple motivations will not satisfy the relevant test unless a Convention reason or reasons constitute at least the essential and significant motivation for the persecution feared: s.91R(1)(a) of the Act.

Fourth, an applicant's fear of persecution for a Convention reason must be a "well-founded" fear. This adds an objective requirement to the requirement that an applicant must in fact hold such a fear. A person has a "well-founded fear" of persecution under the Convention if they have genuine fear founded upon a "real chance" of persecution for a Convention stipulated reason. A fear is well-founded where there is a real substantial basis for it but not if it is merely assumed or based on mere speculation. A "real chance" is one that is not remote or insubstantial or a far-fetched possibility. A person can have a well-founded fear of persecution even though the possibility of the persecution occurring is well below 50 per cent.

In addition, an applicant must be unable, or unwilling because of his or her fear, to avail himself or herself of the protection of his or her country or countries of nationality or, if stateless, unable, or unwilling because of his or her fear, to return to his or her country of former habitual residence.

Whether an applicant is a person to whom Australia has protection obligations is to be assessed upon the facts as they exist when the decision is made and requires a consideration of the matter in relation to the reasonably foreseeable future.

## CLAIMS AND EVIDENCE

The Tribunal has before it the Department's file relating to the applicants. The Tribunal also has had regard to the material referred to in the delegate's decision, and other material available to it from a range of sources.

The first named applicant appeared before the Tribunal to give evidence and present arguments. The Tribunal hearing was conducted in the English language.

The applicants are a mother and her children from Russia, who arrived in Australia in the mid 2000's and the following month they lodged an application for a protection visa. Only the first named applicant has made specific claims under the Refugees Convention, her children relying on their membership of her family. For convenience, therefore, I will refer to the first named applicant as the applicant, unless otherwise required.

In her protection visa application, the applicant made the following claims:

- She is a business woman who has lived in Moscow for a number of years. She is divorced and has children. She was a manager of a business which supplied appliances both wholesale and retail. She was also the director of her own company, called Company A. She was successful in her business. She claimed that the main Company B was a supporter of the political party Yabloko and that it made financial donations to it. The applicant also claimed that she is a supporter of Yabloko.
- She claimed that the March 2004 elections were unfair and that opposition parties, including Yabloko were severely disadvantaged by policies imposed by the pro-Putin United Russia Party, which dominates the Kremlin. Because of its support of Yabloko, Company B attracted adverse attention from the Russian authorities, in particular from a government authority. Documents were seized by officers without a warrant and some were never returned. Warehouses were raided and suppliers, contractors and even drivers were questioned.
- *[The applicant's claims from a government authority regarding alleged illegal activities by her company have been removed in accordance with s431 of the Migration Act 1958 as this information could identify the applicant.]*
- The applicant claimed that this adverse attention occurred because the government wanted to send a message to supporters of Yabloko. *[Information deleted in accordance with section 431 of the Migration Act 1958].*
- The applicant's adviser argued that a clear Convention nexus existed and although the applicant may not have suffered persecution, her experiences cumulatively amounted to persecution. He argued that she faced a 90% chance of being jailed like Person 1. He stated

that she was elected to the city administration of a town for a specific period. The applicant was threatened and her colleague was a victim of an accident, sustaining serious injuries. The adviser stated that documentary evidence supporting the applicant's claims was not available because she had "fled Russia with one suitcase". However, he relied on country information reports in support of her claims, in particular:

- A report by the International Helsinki Federation discussing human rights developments in 2003;
- Amnesty International's *Report 2005* on Russia;
- Human Rights Watch *World Report 2005*, discussing developments in Russia 2004; a report entitled "Attacks on the Press 2004" from the Committee to Protect Journalists.

The delegate refused the visa and the applicant applied for a review by the Refugee Review Tribunal. The applicant appeared before the Tribunal. She provided the Tribunal with a business card, naming the applicant and her position for a large business.

*[Deleted in accordance with section 431 of the Migration Act 1958]*

### **Tribunal File (071917225)**

The Tribunal invited the applicant to attend a hearing. The applicant provided the following material to the Tribunal prior to the hearing:

- DVD of SBS documentary "The Putin System" (Folio 14);
- Excerpt from the St Petersburg Times dated 29 January 2008 reporting that "The most outspoken Kremlin opponent in Russia's Presidential contest was denied a spot on the ballot Sunday by election authorities who said tens of thousands of signatures on his nominating petitions were forgeries. Former Prime Minister Mikhail Kasyanov angrily rejected the official claims and accused President Vladimir Putin of ordering his removal from the March 2 election" (Folio 40);
- Documents downloaded from the Internet relating to unfair elections, human rights abuses, the killing of Farid Babaev (first candidate on Yabloko's Party List for the Russian State Duma elections in the southern Russian republic of Dagestan) on 22 November;

- Reference to a former politician who is facing embezzlement and other charges and claims that he has been deliberately denied medical treatment as punishment for refusing to testify against his former bosses
- A report regarding Yabloko increasing its opposition to President Putin (Folio 54);
- Original document and translation of a Power of Attorney relating to the applicant and authorising a stated person to take control of the applicant's share in Company A.
- Country information request to DFAT regarding applicant's company. The response refers to a Chamber of Commerce which has a record for a company called Company A and the records list two persons as General Managers of the company. The records indicate that the applicant was General Manager for a two year period and the other person became General Manager following her.
- Translation of letter from Director of Company B stating that he received a call from the applicant indicating that he had told the Australian Embassy in Moscow that he had not signed any certificates relating to the applicant as an employee of Company B. He stated that he did receive a telephone call from the Australian Embassy in relation to the applicant, but he never stated that he had not signed any certificates and stated that that issue was not discussed at all. He told the Australian Embassy that he knew the applicant well as Director of Company A, which was part of the Company B commercial network. He provided his telephone number and address (Folio 59);
- Letter addressed to the Department of Immigration and Multicultural Affairs requesting that documents be provided to the applicant (Folio 62);
- Letter from Person 2 of Company C stating that the applicant has been an associate of his since a particular date and that they worked closely together and with others since she was based in Russia. He stated that while in Russia she represented Company A, one of Company C's largest export customers. He stated that in all of his professional

dealings with her, he found her to be “one of the most honest and caring people” he had encountered (Folio 64);

- Documents relating to Company B and Company A (Folio 65-80);
- Written submissions from the applicant (Folios 81-85);

In her submissions the applicant stated that as the sole owner of Company A she had never given her consent to the appointment of the General Manager referred to as being in the position since the mid 2000's. She stated that she did not even know who that person was and noted that he became the General Manager about one month after she had arrived in Australia. eHeShe stated that the Russian authorities will continue to persecute her if she returns to Russia. She stated that many businesses which were ready to assist Yabloko became frightened because they would lose their businesses.

### **Tribunal Hearing**

The applicant appeared alone before the Tribunal. She did not require the assistance of an interpreter and was happy to give her evidence in English. She provided further country information reports, regarding Russia (Folios 87-93). She also provided her passport and a copy has been placed on the Tribunal file. Her passport indicates that she entered Australia on a temporary visa

The applicant graduated in the late 1970s. Between 1994 and 1995 she worked as an academic. She held a political position for several years. She and the father of her children divorced around that time. She stated that she has always supported a democratic style of life. She also held a senior position for one year. She also held another senior position in her district.

In the late 1990's she moved to Moscow. She was a single mother with two children She wanted to earn some money as her salary was not enough. She commenced working with a company and obtained her first business position in the late 1990's. In the early 2000's she went to work for Company B. A few years later she set up her own company. It was a very successful company supplying various products.



I asked the applicant if she knew where Person 3 was. She stated that she had no idea of his whereabouts and suspected that he had suffered serious harm. She stated that she did not know what happened to him and would try to find out.

The applicant stated that during a meeting in the early 2000's several people attended the main office of Company B. It was decided that executives would donate a percentage of their gross profits to the Yabloko Party. The applicant made her first contribution in the early 2000's and further donations in later months of the same year. She stated that her accountant organised the payments through Company A's bank account. In the early 2000's Person 1 was arrested. The election took place in December 2003.

I asked the applicant why she could not obtain some documentary evidence regarding these financial transactions. She stated that in the late 2000's she sent an email to Yabloko in Moscow asking for any evidence they might have in relation to her donations. She received no response. The applicant was unable to say to which bank she used to make the donations, as she had various accounts. She stated that the accountant was in charge of the financial side of the business.

She stated that in the mid 2000's she and her employees were at Company A's office, when several men arrived. They did not announce who they were and they would not allow anyone to speak to them. They were at the office for a few hours and seized folders containing documents. Some of the documents were returned a few days after the raid and the applicant's accountant went through them and realised that some documents were missing. When asked what documents were missing, the applicant stated that shipping invoices and contracts and details of remittances to Yabloko disappeared. She could not say how many documents were missing. I confirmed with the applicant that her last donation was around a particular time. In December 2003 Yabloko won about four seats in the election. After the raids the applicant spoke to her lawyer and he told her that she should not worry.

In the mid 2000's other companies were raided in a similar way. There were a number of companies involved. She stated that she knew some of the directors and

she was told about others. Their documents were also taken. She stated that these companies no longer exist.

In the mid 2000's Company B warehouse was raided and closed. The premises are very large and stored Company B and Company A's products. The premises were closed for about a month. The following month they opened again. The company lost a lot of money. The applicant stated that many people suffered financially. Staff had to be paid but there was no money coming in. Shortly after business returned to normal.

*[Details deleted in accordance with s431 of the Migration Act 1959 as this information may identify the applicant].*

The next day she again attended the same offices and was spoken to by the same man. He told her that if she agreed to testify against Person 3, charges against her would be dropped. She was told that if she refused to testify, she would be imprisoned. I asked the applicant if she could obtain some documentary evidence from her lawyer in Moscow about her dealings with this government authority. She stated that it is very difficult to get any documents from Russia because people are afraid of the authorities. She stated that people are very reluctant to provide any information.

Later, she received another call from the man and was told that he wished to see her again. She told him that she would refuse to testify. She stated that she refused to testify because on the evening of the previous meeting she had spoken to her lawyer and she was advised not to testify. Prior to leaving Russia she did not have any further contact from this person. She stated that she obtained visas to travel to Australia and these were granted in the mid 2000's. The following month she had health problems and continues to take medication for her condition. She had planned to travel overseas for business reasons. However, the adverse attention from the authorities frightened her and she felt she had to flee Russia.

In the mid 2000's she received an invitation from Company C inviting her to visit Australia. I asked the applicant when she booked her flights. She stated she booked the flights in the mid 2000's and paid for the tickets in cash. She stated that the raids

continued and she realised her life and the lives of others were in danger. She made a decision to flee. Her shop continued to be the subject of harassment by various authorities. Her business was accused of infringing certain regulations. She stated that it was clearly harassment. She stated that trade inspectors stated her goods were not displayed properly. There was criticism of the instruction manuals for certain products. Any explanation from her staff fell on deaf ears. She stated several raids took place and she was present for a few of them.

She stated that she did not close her office because she decided to flee to Australia. As soon as she arrived in Australia she informed her staff that she had decided to close the business and phoned her secretary about it. She tried to contact Person 3 but could not contact him.

I asked the applicant to whom she was referring when she stated that her colleague was also spoken to by the authorities. She stated she was referring to her accountant. I asked the applicant if any inquiries had been made in Russia about her whereabouts. She stated on one occasion her apartment was visited by someone who wished to speak to her. She stated no letters were sent to her apartment. She owns her apartment in Moscow and a friend is currently living there.

She stated that she came to Australia seeking protection. She stated that her relative was threatened by the authorities and because of those threats she signed a Power of Attorney authorising her removal from her company. She stated that fabricated charges will not disappear and that the Russian authorities are very smart. She stated they would know she would apply to the European Human Rights Court. She stated she would be happy to return to Russia but the political situation has deteriorated and democracy does not prevail. She is convinced she will be charged with fabricated charges and imprisoned. She enjoyed a very good life in Russia and would not have left if she had not been persecuted. She was a prominent businesswoman, with a lavish lifestyle and financial security. Her life in Australia is desperate from a financial point of view. I asked the applicant how she is managing financially. She stated that her child is working and she manages to do some consultancy work.

I told the applicant that it was of concern to the Tribunal that she provided very little documentation in relation to the authority's interest in her. She stated that she would try to find some more documentation.

### **Post Hearing Submissions**

The applicant stated that the evidence she submitted, both before and during the hearing was "fully consistent" with her claims. She mentioned the Tribunal's request for her to contact her lawyer in an effort to verify her claims and stated that after careful consideration, she formed the view that he would not provide any material in relation to this matter because of a fear of the Russian authorities. She referred to a document provided at the Tribunal which stated the following:

*"Another of [Person 1's] lawyers says he has been told to leave Russia or face arrest. "If I am not on a plane by 5.00pm today I will be arrested", he told [news agency, day] He has been an outspoken critic of the Kremlin, maintaining that the case against his client had been politically motivated."*

The applicant contacted the General Manager of Company A and was told that he had no idea where the former Company B's lawyer may be. He also told the applicant that most of the people who used to work for Company B are no longer involved in the business. The applicant provided this gentleman's telephone number, should the Tribunal wish to speak to him.

### **FINDINGS AND REASONS**

The Tribunal accepts that the applicants are citizens of the Russian Federation.

The applicant claims that if she returns to Russia she will face persecution for reasons of her actual or imputed political opinion because of her support of the Yabloko Party. In assessing the applicant's Convention claims, the Tribunal is required to determine whether she has a well-founded fear, and if so, whether what she fears amounts to persecution for a Convention reason.

The Tribunal notes that the delegate accepted that the applicant may have suffered *"what amounts to harassment at the hands of the authorities in Russia, and that this*

*harassment may have occurred because of her company's association with the Yabloko Party.*" The delegate did not accept that any of the experiences claimed by the applicant, even if considered cumulatively would amount to persecution within the meaning of s.91R(2) of the Act. The delegate also had further difficulties with the application because of a lack of detail and dates in the written claims. Another difficulty was that the applicant had not supplied any documentary evidence in support of her claim and the delegate gave little weight to the adviser's suggestion that the applicant had to flee Russia with only one suitcase. The delegate noted that the applicant was granted a visa to travel to Australia yet did not leave Russia until several weeks later. The delegate also noted that the applicant had travelled to Australia over a year earlier and did not seek protection at that time. She returned to the Russian Federation.

The applicant claimed that she made financial contributions to the Yabloko Party. This claim was not referred to in her protection visa application and the fact that it was first mentioned before a hearing at the Tribunal. The applicant previously stated she believed her claims made a reference to the fact that she had supplied money to the Party. She also stated that she believed she would be interviewed by the delegate and would then be in a position to expand upon her claims.

The applicant appeared before the Tribunal and was questioned at length by the Tribunal. The Tribunal is of the view that the applicant is a credible witness. However, material supplied to the Tribunal in the interim period supports the applicant's claims as to her involvement with the company. As a consequence the Tribunal is satisfied that the applicant is truthful about her work related claims.

In the present application, the Tribunal is satisfied that the applicant has a well founded fear of persecution for reasons of her actual or imputed political opinion and sets out its reasons below.

### **Persecution**

Based on the applicant's lengthy claims and evidence, (ie months of harassment by the Russian authorities, interviews with government authority investigators, threats of being prosecuted and imprisoned for tax avoidance if she refused to give evidence

against the president of Company B and economic loss because of harassment by various government agencies) the Tribunal is satisfied the harm the applicant is claiming to fear would at least constitute significant physical harassment of the person or significant physical ill-treatment of the person (see s.91R(2)(b) and (c) of the Act). Accordingly, the Tribunal is satisfied the harm the applicant claims to fear is sufficiently serious to constitute persecution for the purposes of the Refugees Convention.

### **Convention Ground**

The claimed fear of persecution must be for reasons of one of the grounds set out in the Refugees Convention. The applicant claims to fear persecution for reason of her actual or imputed political opinion. It is accepted by the Tribunal that the applicant has been a supporter of the Yabloko Party for some years prior to departing Russia. Information provided by the applicant and researched by the Tribunal indicate that some supporters of the Yabloko Party have been arrested, detained and in one instance, a Party candidate was murdered. Research also revealed that individuals and businesses who donated funds to the Party were targeted by a government authority and other financial institutions. *[Deleted in accordance with section 431 of the Migration Act 1958]*

The Tribunal is satisfied that the applicant was singled out by the Russian authorities and suffered harm as claimed. Accordingly, the Tribunal accepts that the applicant fears persecution for reason of her actual or imputed political opinion because of her support of the Yabloko Party.

### **Well founded fear**

The Tribunal now needs to consider whether the applicant has a real chance of being subject to the persecution feared. A real chance is not a remote chance; there needs to be a real substantial basis that an applicant will be subjected to the persecution feared.

The Tribunal is not satisfied that all Yabloko Party supporters in Russia have a real chance of persecution because of their support. In the present case, the applicant was a successful businesswoman in Russia. She came to visit business counterparts from Company C in Australia and returned to Russia. The delegate was concerned that her

returning to Russia at that time and not lodging a protection visa application indicated that she was not in fear of persecution. The applicant in her evidence explained that at that time she did not fear persecution from the Russian authorities. Her fear increased after she had been summoned to a government authority and threatened with prosecution and imprisonment if she did not carry out their request. It was her evidence that in the mid 2000's she made the decision to flee to Australia. The Tribunal is satisfied that the applicant came to Australia because she held a fear of persecution. During the previously constituted Tribunal hearing, the applicant was asked why she did not consider going to other countries. She explained that she wished to go somewhere with her children which was as far away as possible. The Tribunal accepts that explanation.

The applicant was forced to close her business because of the constant harassment from the Russian authorities. The applicant has also suffered financial hardship as a consequence. The Tribunal accepts that the applicant holds a deep fear about returning to Russia and is convinced that the Russian authorities will prosecute her and imprison her on fabricated charges. The Tribunal is satisfied that the essential and significant reason the applicant would face persecution is for reason of her actual or imputed political opinion. The Tribunal cannot exclude as remote and insubstantial the chance that if she returned to Russia she would face persecution for a Convention reason. The Tribunal is therefore satisfied that there is a real chance the applicant would be persecuted for a Convention reason if she returned to Russia.

### **Relocation**

The Tribunal is satisfied that relocation is not a safe option for the present applicant. Accordingly, the Tribunal is satisfied the applicant has a well founded fear of persecution for a Convention reason in Russia.

### **CONCLUSIONS**

The Tribunal is satisfied that the first named applicant is a person to whom Australia has protection obligations under the Refugees Convention. Therefore the first named applicant satisfies the criterion set out in s.36(2)(a) for a protection visa and will be entitled to such a visa, provided she satisfies the remaining criteria.

No specific claims were made by or on behalf of the other applicants. The Tribunal is satisfied that they are the dependants of the first named applicant for the purposes of s.36(2)(b)(i). The fate of their application therefore depends upon the outcome of the first named applicant's application. They will be entitled to protection visas provided they satisfy the criterion set out in s.36(2)(b)(ii) and the remaining criteria for the visa.

## **DECISION**

The Tribunal remits the matter for reconsideration with the direction that the applicants satisfy s.36(2)(a) of the Migration Act, being persons to whom Australia has protection obligations under the Refugees Convention.

The Tribunal remits the matter for reconsideration with the following directions:

- (i) that the first named applicant satisfies s.36(2)(a) of the Migration Act, being a person to whom Australia has protection obligations under the Refugees Convention; and
- (ii) that the second and third named applicants satisfy s.36(2)(b)(i) of the Migration Act, being the dependants of the first named applicant.

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

Sealing Officer's I.D. prrt44