REFUGEE STATUS APPEALS AUTHORITY
NEW ZEALAND

REFUGEE APPEAL NO. 2313/94

AT AUCKLAND

Before:	G J X McCoy (Chairperson) E Aitken (Member) T Gutnick (Member, UNHCR)
Counsel for Appellant:	D Ryken
Representative for NZIS:	No appearance
Date of Hearing:	9 May 1996
Date of Decision:	7 June 1996

DECISION

THE APPELLANT'S CASE

The appellant is a Russian seaman who first arrived in New Zealand on 9 May 1993 on board the vessel N. He is a citizen of the Russian Federation and is an ethnic Kazak.

The appellant married a New Zealand citizen on 12 August 1993. During the course of the appeal the appellant stated that the marriage had failed, that the couple had separated for over a year and that dissolution of marriage proceedings were underway.

THE FIRST CLAIM FOR REFUGEE STATUS

On 7 October 1993 the appellant applied for refugee status. The basis of his claim was essentially: desertion as a seaman was treason and punishable by the death penalty. The appellant also claimed that the Communist system was unfair. Further, the appellant stated that he had married without the permission of his Captain and that he would therefore be liable to severe punishment on his return to Russia.

Notwithstanding these asserted fears, on 24 November 1993, the appellant's then solicitor, Mr Martin Treadwell, informed the New Zealand Immigration Service by letter that the appellant was formally withdrawing his application for refugee status. The appellant withdrew his claim because he acknowledged he had no valid claim to refugee status.

Further and importantly, by a letter of the same day, 24 November 1993, the appellant wrote to the New Zealand Immigration Service stating:

> "I, [the appellant] wish to withdraw my application for refugee status (lodged in Auckland).
>
> I now intend to work for TE on board of B.S. until such time as the vessel sails back to Russia.
>
> I intend to return to Russia on the vessel when it leaves New Zealand."

THE SECOND CLAIM FOR REFUGEE STATUS

But instead, seven months later, the appellant reapplied for refugee status, by an application dated 22 June 1994. In the meantime he had worked as a sailor on the B.S. fishing in New Zealand waters. In support a detailed statement was lodged. It deals in poignant detail with the preceding two generations of the appellant's family. It details the appellant's military service in Siberia at the age of 18 and life under the Communist regime.

In particular the appellant relies upon an incident which was brought to the appellant's attention on 12 April 1994 whilst he was in the port of Bluff. Mr VGK who had worked with the appellant on board the N stated that when the N was in Bangkok having left New Zealand for return to Russia, someone from the ship's crew stole valuable metal parts from the ship and sold them for American dollars. The parts were of brass and some were of aluminium. Even the ship's bell was

stolen and sold for its metal scrap value. Because the stolen parts included parts vital to the ship's engine, the N limped back to Korsakov in Russia in 20 days. It had taken only 10 days to go in the other direction at the commencement of the voyage. There was an enquiry by the Shipping Company. The appellant, who had an alibi because he was continuously in New Zealand, was selected by those responsible as a convenient victim to take responsibility for the crime, because he had failed to return to Russia. The conspirators asserted that the metal parts had actually been stolen in New Zealand when the appellant was still a member of the crew.

The appellant's case was that a local newspaper, The Fisherman of Sakhalin read by 100,000 people in the eastern maritime areas of Russia, carried a news report of the crime on its court page.

The appellant has never seen the newspaper article, even though he had written to a number of his friends on Sakhalin Island for a copy of it, as long ago as 1994, but he accepted that the article did not name him but merely reported the incident. The guilty parties had conspired to make him liable for a crime, for which he told the Authority, he was wholly innocent. His fear was that he would be arrested upon his return to Russia and subjected to an unfair trial and that he could get a sentence of as long as 15 years' imprisonment. The value of the stolen metal parts was estimated to be NZ$10,000.

THE FORMULATION OF THE REFUGEE CLAIM

Before the appellant gave evidence to the Authority, his Counsel was invited to identify the Convention reason under the 1951 United Nations Convention relating to the status of refugees, as amended by the 1967 Protocol, under which it was claimed the appellant's case fell, as *prima facie*, the appeal appeared to raise not an issue of persecution, but one relating to the possible prosecution of the appellant.

Mr Ryken formulated his case on the basis that the totality of the special circumstances relating to the appellant brought the case within the shadow of political opinion, as the fishing company for which the appellant had been employed had opened a file about the theft and that the appellant's role as principal suspect was motivated by certain hardliners within the shipping company

who resented his marriage to a New Zealand woman and his ship desertion. These actions were considered to be contrary to the interests of the Russian state. In substance the claim was expanded to include that the Russian curial process was unfair, and reference was made to the 1996 Human Rights Watch World Report at 227-234.

The appellant admitted that if he were tried for the offence in Russia he would have the services of a lawyer provided by the State. But, he was scathing as to the quality, enthusiasm or motives of any assigned lawyer.

In his closing address Counsel for the appellant acknowledged the difficulties with the appellant's case remarking himself that to link any Convention reason with the appellant's fear "is a problem in this case".

During the hearing it was suggested to the appellant that he could relocate within the vast expanse of the Russian Federation. He replied "I am thinking of going to Ukraine". It was submitted by his Counsel that it was in fact "impossible" for the appellant to relocate as the criminal justice system in Russia had already been engaged as the file had gone to the Procurator. (There was no evidence at all of this last assertion.) The appellant accepted that he had not been charged with the offence and that there was no evidence of the existence of an arrest warrant.

Counsel for the appellant provided the Authority with a helpful Memorandum of Submissions. In the Submissions it is recorded:

> "It is accepted that country information indicates that jumping ship is no longer a serious crime or political crime in Russia."

The Authority will generally not act on concessions made to the potential detriment of an appellant's case, without having made its own investigations. Not all Counsel are as skilful, thorough and experienced as Mr Ryken. But the underlying principle must be that in refugee law the facts are of such critical importance that the Authority has itself a supraditional independent duty to determine the existing and prospective factual matrix of circumstances which constitute contemporary country information. Matters can change very fast. The accepted or proven facts in one decision may have a limited longevity. Precedent factual assessments

cannot be simply transplanted from one case to another without a reassessment of the current factual status and the attendant persecution risk analysis.

However, the Authority itself is wholly satisfied that the concession made is fair and accurate. Indeed the appellant did not dispute the Authority's own information that the Russian Federation now treats ship-desertion as "insignificant". The vigorous Communism of the past that may have treated ship-desertion as a manifestation of treason, is long since obsolescent.

THE ISSUES

The Inclusion Clause in Article 1A(2) of the 1951 Refugee Convention and 1967 Protocol relating to the Status of Refugees relevantly provides that a refugee is a person who:

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

This being a case involving a non-state agent of persecution, the relevant issues are:-

1. Is there a genuine fear?

2. Is the harm feared of sufficient gravity to constitute persecution?

3. Is the harm feared related to any of the five grounds recognised in the Convention, or is it related to other factors?

4. Is the fear well-founded at all?

   If so:

   (a) As to the whole of the country of origin?

(b) As to only part of the country of origin, in which case can the appellant genuinely access protection which is meaningful, and is it reasonable in all the circumstances, to expect the appellant to relocate elsewhere in the country of origin?

In our decision in Refugee Appeal No. 1/91 re TLY and Refugee Appeal No. 2/91 re LAB (11 July 1991), this Authority held that in relation to issue (4) the proper test is whether there is a real chance of persecution. In relation to the issue of relocation, the relevant principles are explained and discussed in Refugee Appeal No. 11/91 re S (5 September 1991), Refugee Appeal No. 18/92 re JS (5 August 1992), Refugee Appeal No. 135/92 re RS (18 June 1993) and Refugee Appeal No. 523/92 re RS (17 March 1995).

The Authority has concluded, but not without some doubt, that the appellant does have a genuine fear of persecution. But the Authority has concluded that the appellant's fear of persecution is not well-founded.

He is a man with no past in the Russian Federation. There is neither an existing charge or arrest warrant in relation to him. Despite the elapse of 2 years he had not obtained a copy of the newspaper which related to the theft. The whole of the evidence pertaining to the theft case is vague and unsatisfactory. The matter is compounded with hearsay and seamen's gossip. There is simply no single piece of substantive and probative evidence before the Authority to justify the claim. The claim if fraught with surmise and speculation. The evidence produced is not reliable. The evidential foundation is simply not satisfactory.

The Authority concludes that the appellant, who gave his evidence with a naïve and honest simplicity, has failed to establish the necessary objective conditions for a well-founded fear of persecution. It is therefore not necessary to deal further with the insuperable impediment to the claim, namely that the claim for persecution is really a matter of prosecution under Russian domestic law and therefore not within the quincunx of protection afforded by the Convention.

Further, the Authority has no doubt that the appellant could relocate within the Russian Federation.

For these reasons, the appeal must fail. Refugee status is declined. The appeal is dismissed.

.....
Chairperson