CATCHWORDS

IMMIGRATION - refugees - application for refugee status by Russian national - refusal by Refugee Review Tribunal - whether a "real chance" of persecution for Convention reasons if applicant returned to Russia - applicant was detained in psychiatric institutions in former USSR for her political opinions - whether Tribunal ignored non-preferred material that indicated psychiatry in Russia still subject to political abuse.

Judiciary Act 1903 (Cth) - s 39B

Migration Act 1958 (Cth) - s 476, s 481

Administrative Decision (Judicial Review) Act 1977 (Cth) - s 5

1951 Convention relating to the Status of Refugees - Article 1A(2)

Morato v *Minister for Immigration, Local Government and Ethnic Affairs* (1992) 39 FCR 410

Chan Yee Kin v *The Minister for Immigration and Ethnic Affairs* (1989-1990) 169 CLR 379

Minister for Immigration and Ethnic Affairs v *Mok Gek Bouy* (1995) 55 FCR 375

Wu Shen Liang v *Minister for Immigration and Ethnic Affairs* (1995) 130 ALR 367

Guo Wei Rong & Anor v *Minister for Immigration and Ethnic Affairs* (Unreported; 26 February 1996; Full Court - Beaumont, Einfeld and Foster JJ)

Corlette& Anor v *Mackenzie & Ors* (1995) 95 ATC 4578

Blackwood Hodge (Aust) Pty Ltd v *Collector of Customs (NSW) (No 2)* (1980) 47 FLR 131

OLGA DENISSENKO v *CHRISTINE HASKETT (sitting as the Refugee Review Tribunal) and MINISTER FOR IMMIGRATION AND ETHNIC AFFAIRS*

No. NG 509 of 1995

CORAM: FOSTER J

DATE: 29 MAY 1996

PLACE: SYDNEYIN THE FEDERAL COURT OF AUSTRALIA)

)

NEW SOUTH WALES DISTRICT REGISTRY) No. NG 509 of 1995

)

GENERAL DIVISION)

BETWEEN: OLGA DENISSENKO

Applicant

AND: CHRISTINE HASKETT

(sitting as the Refugee Review Tribunal)

First Respondent

MINISTER FOR IMMIGRATION AND ETHNIC AFFAIRS

Second Respondent

JUDGE MAKING ORDERS: FOSTER J

DATE: 29 MAY 1996

PLACE: SYDNEY

MINUTE OF ORDERS

THE COURT ORDERS THAT:

1. The application be dismissed

2. All parties bear their own costs.

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules.IN THE FEDERAL COURT OF AUSTRALIA)

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NEW SOUTH WALES DISTRICT REGISTRY) No. NG 509 of 1995

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GENERAL DIVISION)

BETWEEN: OLGA DENISSENKO

Applicant

AND: CHRISTINE HASKETT

(sitting as the Refugee Review Tribunal)

First Respondent

MINISTER FOR IMMIGRATION AND ETHNIC AFFAIRS

Second Respondent

CORAM: FOSTER J

DATE: 29 MAY 1996

PLACE: SYDNEY

REASONS FOR JUDGMENT

HIS HONOUR: The amended application for an order of review in this matter seeks orders pursuant to s 5 of the Administrative Decision (Judicial Review) Act 1977 (Cth) or in the alternative s 476 of the Migration Act 1958 (Cth) ("the Act") or s 39B of the Judiciary Act 1903 (Cth). Any questions of jurisdiction that might have arisen, have been avoided by agreement that the application for review is based solely on s 476(1)(e) of the Act. It is not contested that the decision of the Refugee Review Tribunal ("the Tribunal") is a judicially-reviewable decision within the meaning of the section; it is asserted by the applicant that, as such, within the meaning of s 476(1)(e), it "... involved an error of law, being an error involving an incorrect interpretation of the applicable law or an incorrect application of the law to the facts as found by the person who made the decision ...".

BACKGROUND

The applicant is a Russian National of approximately 33 years of age. She entered Australia on 22 August 1992, having been granted an entry permit valid until 23 November 1992. She made an application for refugee status in 1993 on the grounds that she had a well-founded fear of persecution, on the basis of her religion, should she return to Russia. This application was rejected. It has played no part in these proceedings or in the proceedings appealed from, and there is no need to mention it further.

I shall refer to the facts leading up to the applicant's departure from Russia in more detail later in these reasons. There appears, however, to be no contest that, immediately prior to leaving Russia, she was immured in an asylum for the mentally ill to which she had been committed for an indefinite period. Her paternal uncle had travelled to Russia from Australia and was successful in obtaining her temporary release from the asylum, on the basis that she was to visit relatives in Kiev in the Ukraine. Instead of this he brought her to Australia, having effected her departure by means of bribery of officials at the border. How all this was accomplished remains shrouded in mystery, so far as the material placed before the Tribunal and this Court is concerned. It seems clear, however, that the applicant's uncle was actuated by genuine concern for her well-being in Russia, and brought her to Australia as a means of escaping the intolerable conditions in her place of confinement. This gentleman provided a statutory declaration dealing with these matters which was part of the evidence before the Tribunal. It appears, also, that although she was received and cared for in her uncle's home in Australia, the applicant was eventually forced to depart because of difficulties with her uncle's wife. Whatever may have been the position in regard to her mental state when in Russia, she is now a diagnosed schizophrenic, whose mental condition has made it difficult to clarify aspects of her evidence.

The applicant made a second application for the grant of refugee status on 16 June 1994. This application was rejected on 19 August 1994. She then made an application for review of this rejection to the Tribunal in accordance with the relevant provisions of the Act. That application was lodged on 22 August 1994, and a decision rejecting the application was made by the Tribunal on 19 June 1995. It is this decision that is the subject of this application to the Court. I note in passing that the applicant has been provided with Legal Aid in relation to these applications.

Australia is a party to the 1951 Convention relating to the Status of Refugees as amended by the 1967 Protocol relating to the Status of Refugees. As a party to these international instruments, Australia has protection obligations to persons who are "refugees". The relevant definition of a "refugee" is to be found in Article 1A(2) of the Convention which 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."

In short, the applicant's claim to be a refugee is founded upon assertions that at various times between 1985 and 1992 she suffered persecutory treatment in Russia (or the Soviet Union) through being arrested, detained and seriously mistreated in various mental institutions. This treatment resulted from her involvement in various political demonstrations. She asserted a well-founded fear of persecution, should she be returned to Russia, because of her political opinions or because of her membership of a particular social group, namely the mentally ill. Such persecution would take the form of being returned to a mental institution and suffering the inhuman and degrading treatment which had been inflicted upon her previously. She also asserted that she had suffered persecution in Russia by being prevented from working in her chosen field in which she was qualified, namely the specialised field of metallurgy, and that, should she be returned to that country, persecution of this type would also be inflicted upon her.

It is necessary to observe how these particular matters were developed in the case that she brought in support of her application. It is not necessary to consider, for this purpose, the course of her application before the primary decision-maker, as the subject of this review is a decision of the Tribunal consequent upon the primary decision-maker's rejection of the application.

THE CASE BEFORE THE TRIBUNAL

The applicant's case before the Tribunal was based upon an abundance of material. So far as I can ascertain, all this material has been reproduced and placed before this Court in a large bundle of documents contained in an arch file. Although advised in the hearing that it would not be necessary to have regard to all of them, I have found it necessary to read and consider all the documents in order to obtain an appreciation of the case that the Tribunal was asked to evaluate and determine. I do not intend to make any detailed reference to this documentation. Broadly speaking it consists of a series of reasoned submissions made on behalf of the applicant, first to the original decision-maker and, after an adverse decision had been received and appeal brought from it, to the Tribunal. There are tape recorded records of interview held with the applicant which would appear to demonstrate a degree of thought disorder on her part, but also a fixed fear of return to Russia. This fear appears to be based upon treatment of a particularly inhuman and degrading kind received by her in various mental institutions to which she had been allegedly committed for expression of unacceptable political views, and for taking part in equally unacceptable political demonstrations.

There are various documents from apparently authoritative outside sources dealing with the utilisation, by Russian authorities in the Soviet period, of psychiatry and psychiatric institutions as a means of political repression, and also dealing with the topic of violation of human rights in general in that period. Other documents deal with improvements since the end of the Soviet era, and the cessation of the use of psychiatric institutions as prisons for political dissidents. Such documents also deal with the continuing problems confronting the Russian authorities, mainly finance based, in introducing improvements in the standard of care in such institutions. The documents include, for example, a report "on human rights practices for 1993" relating to Russia, submitted to the Committee on Foreign Affairs of the U.S. House of Representatives and the Committee on Foreign Relations of the U.S. Senate. There is also a lengthy paper presented in 1992 at the Annual Meeting of the American Psychiatric Association in Washington D.C., headed "From the USSR to the Independent States: Where the Former Soviet Psychiatry Will Go". This was given by, apparently, a highly qualified Russian from the Russian Academy of Sciences. There are also documents from Amnesty International, including a lengthy "Review of Punitive Psychiatry since January 1987" in the USSR. This document is dated April 1988. I have mentioned only a few of the documents, but sufficient to provide an indication of the general material that was before the decision-maker in this regard.

There was also available a statutory declaration from the applicant's uncle confirming the conditions in which the applicant was confined in Russia and the steps that he had taken to obtain her entry into Australia. It appears, also, that the Tribunal made inquiries from the Australian Embassy in Moscow as to the state of psychiatry and psychiatric institutions in Russia. In reply the Tribunal received a cablegram providing information on 25 January 1995, to which I will make reference later.

Apart from this background material and the records of interviews with the applicant herself, the Tribunal was in receipt of, as I have already indicated, a series

of written submissions made by the relevant officer of the Australian Legal Aid Office in support of her application. These included submissions which had previously been made to the primary decision-maker.

From this material and also from relevant parts of the Tribunal's reasons, it appears that the applicant's case to be accepted as a refugee may be summarised as follows.

Before coming to Australia she had suffered significant persecution in the USSR. Her father had been a political protester, was arrested by the KGB and imprisoned. He died in prison when the applicant was only three years of age. Her mother had held different and, apparently, orthodox political opinions, had despised the applicant's father and had denounced him. After his death she remarried. The applicant, when a schoolgirl, was discriminated against because of her father's known political beliefs and imprisonment. She was a member of the Russian Orthodox Church but had to conceal her beliefs and religious activities when at university. She graduated in metallurgical engineering but had difficulties in retaining employment because of her opinions and had to accept work which was below her level of ability.

About the end of 1986 the applicant attended a demonstration organised by the Russian Orthodox Church in Moscow. She was arrested at this demonstration and held in detention for about two weeks in a building known as "Lefort Prison" in central Moscow. She underwent degrading, humiliating, and violent interrogations. From there she was taken to a psychiatric institution known as "Kastchenko Psychiatric Hospital No 1" where she was held for a period of four months. She was physically abused by the hospital's employees and given medication which had an adverse effect upon her. She was eventually released but kept under close surveillance by the KGB. She obtained employment but this was downgraded with a salary reduction because of her political opinions. She was later dismissed from employment and was harassed by KGB officers in various ways.

In November 1988 she took part in a demonstration organised by Jewish friends demanding freedom for Jews in Russia. She made a speech at this demonstration about denial of human rights to Jews in Russia. She was, consequently, arrested by the KGB and taken to the same prison where she underwent inhumane interrogation. A week later she was transferred again to the Kastchenko Psychiatric Hospital where she was kept until September 1990. She related how she was the victim of degrading treatment of various kinds which could clearly be classified as persecutory.

She was, in effect, rescued by her uncle and brought to Australia in circumstances where she had not been effectively released from the psychiatric institution. Her case really amounted to an assertion that, if returned to Russia, she feared that she would be once again the victim of such persecutory activity on the basis of her political opinions and because of mental illness. It was asserted that this fear was "well-founded". It was also asserted that she had a "well-founded" fear of persecution through being denied her right to work in accordance with her qualifications on the basis of her political opinion.

She was interviewed by the Tribunal. Fairly extensive reference is made to the course of the interview in the Tribunal's reasons. The Tribunal states that, in view of the fact that the applicant was a diagnosed schizophrenic, there was difficulty in conducting the interview in a controlled way, and that her answers had to be considered in the light of the fact that she was suffering from mental disturbance. During the course of the interview, considerable material was put to her from the documentary data to which I have made reference. It would appear that, in response to any suggestion that the situation in Russia had improved to the extent that people were no longer committed to psychiatric institutions for the expression of dissident political opinion, she made vigorous refutations, asserting, in effect, that if she were returned to Russia she would die in a mental institution. It also appears that she held the belief that her mother, who was hostile to her, would, in effect, ensure that she was sent to a mental hospital.

As already indicated, the case was supported by extensive written submissions made from time to time by the relevant Legal Aid officer. In a letter dated 5 January 1995, that officer, after reviewing a number of publications on the state of psychiatry in Russia generally indicative of the fact that, despite changes for the better, the standards still fell below what would be regarded as acceptable in Western medical circles, presented the following arguments in favour of the applicant:-

"All this information is supportive of Ms Denissenko's claims to be recognised as a refugee. Ms Denissenko makes two principal claims: one is that as a political activist she will be forcibly detained in a psychiatric institution for expressing her opinions in the manner in which she has done previously. Her second claim is that she is a member of a particular social group, namely the mentally ill, who if forced to return to Russia will be detained in a psychiatric institution similar to one she escaped from prior to coming to Australia.

In dealing with the second of these arguments, there is copious material before the Tribunal which says that conditions in psychiatric institutions in Russia have not changed in any substantial or material way over the last two years and that these conditions would be in flagrant disregard of fundamental freedoms and human rights, amounting to `persecution' under the 1951 Convention. Nor does the material before the Tribunal support the view that in the reasonably foreseeable future the situation in Russia will substantially change. There is evidence before the Tribunal to conclude that Ms Denissenko would be unable to access the medicines in Russia which she requires, and would in fact be kept in a tranquillised state detained in some Gothic building enduring Dickensian standards of `care'. Again, this treatment must rise to the level of persecution."

These arguments were considered by the Tribunal in her reasons to which I shall now make reference.

THE TRIBUNAL'S REASONS

The Tribunal had regard to the definition of "refugee" set out above, noting that it contained various elements. Having regard to the ground of appeal relied upon, it is apposite to set out the passage from the Tribunal's reasons in which she set out the test which she understood herself to be applying in determining, on the facts, whether the applicant could properly claim to be a "refugee". The Tribunal made the following statement:-

"... an applicant must have a `well-founded fear' of being persecuted. The term `well-founded fear' was the subject of comment in *Chan Yee Kin v. The Minister for Immigration and Ethnic Affairs* (1989-1990) 169 CLR 379 (Chan's case). It was observed that the term contains both a subjective and an objective requirement. `Fear' concerns the applicant's state of mind, but this term is qualified by the adjectival expression `well-founded' which requires a sufficient foundation for that fear (at 396).

The Court in Chan's case held that a fear of persecution is well-founded if there `is a real chance that the refugee will be persecuted if he returns to his country of nationality' (at 389; see also 398, 407, and 429). It was observed that the expression `"a real chance" ... clearly conveys the notion of a substantial, as distinct from a remote chance, of persecution occurring ...' (at 389) and though it `does not weigh the prospects of persecution ... it discounts what is remote or insubstantial' (at 407). Therefore, a real chance of persecution may exist notwithstanding that there is less than a 50 per cent chance of persecution occurring (at 398).

Whether an applicant has a fear of persecution and whether that fear is well-founded, must be determined upon the facts as they exist at the date when a determination is required (at 386-387). However, the circumstances in which an applicant has left his or her country of nationality remain relevant and these are ordinarily the starting point in ascertaining the applicant's present status (see Chan's case at 386-387, 399, 405-406).

Thirdly, an applicant must fear `persecution'. The term `persecution' is not defined by the Convention, but not every form of harm will constitute persecution for Convention purposes. The Court in Chan's case spoke of `some serious punishment or penalty or some significant detriment or disadvantage' if the applicant returns to his or her country of nationality (at 388). Likewise, it stated that the `notion of persecution involves selective harassment' whether `directed against a person as an individual' or `because he or she is a member of a group which is the subject of systematic harassment', although the applicant need not be the victim of a series of acts since a single act of oppression may suffice (at 429-430). The harm threatened may be less than a loss of life or liberty and includes, in appropriate cases, measures `"in disregard" of human dignity' (at 430) or serious violations of core or fundamental human rights. Indeed Hathaway defines persecution `as the sustained or systemic violation of basic human rights demonstrative of a failure of state protection': see Hathaway, *The Law of Refugee Status* (Butterworth Canada Ltd, 1991), pp. 104-105.

Fourthly, the applicant must fear persecution or be at risk of serious harm for a Convention reason, viz. for reasons of `race, religion, nationality, membership of a particular social group or political opinion'. If the harm suffered is related solely to some other reason, such as economic conditions, Convention protection is not available.

The phrase, `particular social group', in the fourth Convention reason, means `a recognisable or cognisable group within a society that shares some interest or experience in common' (see *Morato v. Minister for Immigration, Local Government and Ethnic Affairs* (1992) 39 FCR 401 at 416), such as `the nobility, land owners, lawyers, novelists, farmers, members of a linguistic or other minority, even members of some associations, clubs or societies' (ibid). However, to establish persecution for reason of membership of a particular social group, it must be shown `that persecution is feared for reasons of *membership* of that group' (at 405, see also 416). `The social group referred to in the Convention and Protocol is intended to encompass groups of people who share common social characteristics and might be the target of persecution but who do not fit into classifications of race, religion or political opinion' (at 416)."

The Tribunal then recited the factual basis of the applicant's claim in terms similar to those which I have set out above. She then recorded the substance of the questions asked and answers given by the applicant in the interview with the Tribunal, a matter to which I have already made reference.

The Tribunal also made reference to a psychiatric opinion which had been obtained on her behalf from a reputable psychiatrist chosen by her representative. She summarised the contents of that report as follows:-

"Dr. Sochan concluded that the Applicant was an isolated woman and thought that she had created a fantasy world concerning her dead father. Her thought disorder became most noticeable when detailing the time of her first employment as a metallurgist; her explanations became vague. Events were not clearly demarcated. She was adamant that her experiences of imprisonment and psychiatric hospitalisation did not leave her disturbed.

His diagnosis was that she suffers from a Schizophrenic illness which he suspects started during the time of her first employment and prior to her first arrest, imprisonment and hospitalisation. There was no evidence of a Post-Traumatic Stress Disorder. He was of the opinion that the Applicant will require ongoing psychiatric treatment and medication, although she believed she has no psychiatric condition, thus making compliance unlikely and her prognosis poor."

The Tribunal went on to say that the applicant's legal representative "presented many conscientiously argued submissions". In essence they could be summarised as being the two "principal claims" which I have already set out from the letter of 5

January 1995. The Tribunal rejected these submissions. In so doing she provided reasons which may be summarised as follows.

She noted that there were several discrepancies in the history given to the Department, the legal representative, and to the psychiatrist Dr Sochan. These, for the most part, related to periods of detention in hospital and in prison. She found that the applicant's account was influenced by her psychiatric condition.

The Tribunal did not, in fact, make any positive findings as to the matters alleged by the applicant prior to her departure from Russia although, it can be said, in my view, that the general tenor of her reasons indicates an acceptance that there was a real possibility that the applicant had suffered some or all of the persecutory treatment she asserted.

The Tribunal was able to reach a decision in the matter without coming to any conclusion as to what had occurred in Russia. She did so in the following way.

She first addressed the question whether the applicant was a member "of a particular social group, namely the mentally ill, which makes her differentially at risk of persecution". After considering the meaning of the phrase "membership of a particular social group" as established in *Morato* v *Minister for Immigration, Local Government and Ethnic Affairs* (1992) 39 FCR 410, she accepted that "people diagnosed as suffering from the mental illness of schizophrenia are members of a particular social group for the purposes of the Convention". Having so found, she then proceeded as follows:-

"There is evidence that the standard of health care for people in Russia in general is poor. Russians, no matter what their medical needs, may have difficulty getting proper care. As well, information from the Geneva Initiative on Psychiatry (see above) referring to the poor state of affairs in psychiatric hospitals in Russia stated that,

`Besides, psychiatry was always treated poorly with state funds because it is a very unpopular topic and, to be honest, the country has bigger problems to solve than just backwardness within psychiatry.'

Thus, the evidence before the Tribunal establishes that people with a mental illness may be denied even the level of care available to those with other illnesses on account of their membership of a particular social group."

She then considered whether this denial could amount to "persecution". She referred again to *Chan Yee Kin* v *The Minister for Immigration and Ethnic Affairs*

(1989-1990) 169 CLR 379. She referred particularly to what McHugh J said in that case at 430:-

"As long as the person is threatened with harm and that harm can be seen as part of a course of systematic conduct directed ... against that person as an individual or as a member of a class, he or she is `being persecuted' for the purposes of the Convention."

She then considered other statements of principle which I need not set out here, including Article 25 of the Universal Declaration of Human Rights, and expressed the view, which has not been challenged, that neither that international instrument nor the International Covenant on Economic, Social and Cultural Rights, nor the Declaration on Rights of Disabled Persons went so far as to imply that "all mentally ill people have the right to a level of medical assistance such as may be provided to some in Australia and other relatively prosperous countries". She then went on to say:-

"The principle of non-discrimination does not require that everyone be treated alike. Distinctions should not be regarded as discriminatory if they are not arbitrarily made and do not have the purpose or effect of denying or restricting the equal enjoyment of human rights. It is the Tribunal's view that the bulk of the evidence put to the Applicant about current conditions in Russian psychiatric hospitals indicates that conditions in the last few years have changed enormously, such that the Applicant would be protected from exploitation, abuse and degrading treatment (see the cable from the Australian Embassy in Moscow of 25 January 1995, the Geneva Initiative on Psychiatry, the British Medical Journal, The Guardian, and the World Press Review referred to above).

The Tribunal is mindful of the fact that the cable from the Australian Embassy in Moscow quotes unknown sources who give their views as to whether the treatment likely to be experienced by a person suffering a schizophrenic illness would be `persecutory.' The Tribunal notes that this determination is for the Tribunal to decide and does not rely on the judgment of unknown sources in making this assessment. As well, the Tribunal notes that the cable states that one unknown source described Russian psychiatric clinical practice as `correct.' Again, the Tribunal is of the view that only a qualified psychiatrist can properly make this assessment and is aware of the need to be careful in the conclusions drawn from the information in the cable.

It is clear from the cable that views were provided by unknown sources about the facilities in some of the hospitals mentioned by the Applicant. These sources support the view that two out of the three psychiatric hospitals mentioned by the Applicant as being hospitals where she had received treatment were highly regarded, and provided some of the best health care available in Moscow, servicing the needs of the diplomatic community. It may be that she had access to the very best medical

facilities because of her claim that her mother, her grandmother and her uncle worked for the KGB, although she clearly did not regard her treatment in this light. There was no suggestions from the information before the Tribunal that the Applicant, as a person with a mental illness, would be stigmatised or disadvantaged in the care available, simply because of the nature of her illness. Although one must treat with scepticism the unknown sources, given their apparent consistency with the views stated in the British Medical Journal and The Guardian (see above), the Tribunal finds that there is no evidence that the Applicant's access to medical care and treatment would be actively denied or that actions amounting to an effective denial would occur, so as to amount to persecution."

She also found that the evidence before her indicated "that the Russian Government is concerned for the welfare of its mentally ill citizens and is taking action to help them". In these circumstances she made the following finding:-

"The Tribunal therefore rejects the suggestion that the Applicant would, upon return to Russia, face a real chance of anything amounting to persecution because of her membership of a particular social group, being the mentally ill. Consequently the Tribunal finds that she does not have a well-founded fear of persecution in Russia on this Convention ground."

The Tribunal then turned to consider the question whether "whether as a political activist she will be forcibly detained in a psychiatric institution for expressing her opinions in the manner in which she has done previously". In this regard the Tribunal took into account, as she was entitled to do, that whatever might have been the position as to the applicant suffering from mental illness whilst in Russia, it was established that at the time of the application she was suffering from schizophrenia. In this context the Tribunal expressed the view that:

"... when political behaviour is manifested by persons with mental illness in societies that are tolerant of political dissidence the prospect of persecution, such as physical mistreatment or extended deprivation of liberty, is remote".

In relation to "the particular circumstances of this case" the Tribunal went on to say as follows:-

"... the Applicant claims she was interrogated, detained and sent to mental hospitals in Russia. She says it was because of her political views. It is possible that her behaviour may have been a significant factor in bringing her to the attention of the authorities and that she was investigated and held because her behaviour aroused suspicions that could not easily be laid to rest. ... However, if the Applicant were to engage in public behaviour arising out of her political opinion if she returned to Russia, she would not come to the attention of the authorities as a consequence because Russia now allows freedom of speech, freedom of assembly and

association and the Russian people have the right to change their Government (see above US Dept. of State *Country Reports on Human Rights Practices for 1993*). As well, the bulk of the evidence from the Geneva Initiative on Psychiatry, the Australian Embassy in Moscow, the British Medical Journal, The Guardian, the US Dept. of State *Country Reports on Human Rights Practices for 1993*, and the World Press Review (see above) states that psychiatry in Russia is safeguarded from political abuse because of the new laws; that mental hospitals are no longer used as prisons for political dissidents and there are no known political prisoners in Russia. In those circumstances, there is not a real chance of her encountering serious harm, such as a beating or prolonged detention, because of her political opinion.

In considering all of the circumstances of this case, the Tribunal finds that the Applicant does not face a real chance of persecution because of her political views if she were to be returned to Russia."

The Tribunal noted that representations to the contrary had been put before her. She said, however, that it was her view that conditions in psychiatry and increases in freedom in Russia had changed, "both in law and in practice". She said that "in making this assessment the Tribunal is of the view that the sources consulted above are reliable and based on authoritative advice".

She also expressed the view in relation to aspects of the applicant's evidence alleging rape attempts and sexual violence in psychiatric hospitals, that "if such things did happen to her in the past ... they would not happen if she were to return to Russia because of the changes that have occurred in the past few years in Russian psychiatric hospitals". She also expressed the view that if the applicant's claims to have been imprisoned in the past were true "she would not be imprisoned for a Convention reason if she were to return to Russia".

The Tribunal, consequently, found that the applicant could not be regarded as a "refugee" within the meaning of the Convention. She, therefore, affirmed the previous delegate's decision to refuse to grant the applicant a protection visa.

THE CASE ON APPEAL

It was submitted on behalf of the applicant that the Tribunal had erred in law in not applying the correct tests in determining whether or not the applicant qualified as a "refugee" under the Convention definition. It was noted that the Tribunal had accurately set out the passages in *Chan* in which the meaning of relevant words in the definition was explained, and guidelines provided as to how they should be applied. Reference was also made in argument to later cases in this Court in which those tests and guidelines have been the subject of further consideration and refinement. These cases are *Minister for Immigration and Ethnic Affairs* v *Mok Gek Bouy* (1995) 55 FCR 375; *Wu Shen Liang* v *Minister for Immigration and Ethnic Affairs* (1995) 130 ALR 367; *Guo Wei Rong & Anor* v *Minister for Immigration and Ethnic Affairs* (Unreported; 26 February 1996; Full Court - Beaumont, Einfeld and Foster JJ). It may be stated, in general terms, that these cases gave consideration to the approach that should be adopted in determining whether "a real chance" of persecution for Convention reasons had been established. *Wu*, which followed the reasoning in *Mok* has been the subject of appeal in the High Court of Australia. A decision has not yet been given. *Guo*, the Court was informed, is also to be the subject of an application for special leave to appeal to the High Court.

It may be said, compendiously, that the question raised in these cases was the propriety or otherwise of making decisions of fact as to future events and, in *Guo*, past events by applying the "balance of probabilities" test. In arriving at an ultimate determination as to whether there was a "real chance" or "significant possibility" or some similarly formulated criterion, a Court could not ignore material that relevantly pointed towards the existence of such a possibility on the basis that it had a preference for material that pointed the other way. In determining the existence or otherwise of the relevant possibility, the non-preferred material could not be left out of account. If this were done, the resultant decision was vitiated by error.

For reasons which I shall shortly give, I am of the view that this case does not require an entering into of those considerations. Although no precise finding was made by the Tribunal, it may be assumed for present purposes that the applicant established the subjective requirement of the definition. Namely, she had a fear of

persecution on the grounds alleged should she be returned to Russia. The question before the Tribunal was whether that fear was "well-founded". She had to determine whether, objectively, there was a "real chance" of such persecution occurring. Whatever may be said as to the shifting of evidentiary onuses in the course of the hearing and determination of an administrative review of this kind (and, indeed, as to whether a consideration of "shifting onuses" is an appropriate concept to be applied to such proceedings), it must remain the position that the applicant for refugee status carries the overall onus of establishing to the satisfaction of the decision-maker that the relevant chance or possibility exists. The question cannot be approached in a purely mechanical way. An evaluative process is involved in the course of which a decision-maker may, after giving proper consideration to relevant material, nevertheless, reject it as providing no significant assistance in the determination of whether the relevant possibility exists.

The applicant's main contention, in this appeal, was that the Tribunal "had made findings concerning changes in the practice of Russian psychiatry while ignoring material from the applicant and other sources pointing to, at the very least, the possibility that no significant change had occurred". In other words in approaching this critical question in the case, the Tribunal had simply applied the "balance of probabilities" test and had not considered whether, even though experiencing a preference for countervailing material, she should, nevertheless, acknowledge, on the basis of non-preferred material, that a relevant possibility of persecution existed.

I have set out above the passages from the Tribunal's reasons which have attracted this criticism on behalf of the applicant. In one passage the Tribunal expressed the view "that the bulk of the evidence put to the applicant about current conditions in Russian psychiatric hospitals" indicated that, in view of changes since she left Russia, she would now be protected from persecutory treatment. It will be observed from the passage that she had regard to certain material which she refers to specifically. She then went on to discuss other material suggestive of a contrary view, and finally expressed the view that there was "no evidence" that, in effect, the applicant would suffer persecutory treatment.

In a similar passage, cited above, dealing with the issue of possible persecution on the basis of political opinion, the Tribunal speaks of "the bulk of the evidence" indicating that "psychiatry in Russia is safeguarded from political abuse ...". Again, the applicant's counsel relied upon this statement as indicative of the Tribunal having erroneously applied the "balance of probabilities" test in determining the existence or otherwise of the relevant possibility.

It is appropriate to recall that decisions of this Court have established that a Judge, in reviewing a decision of an administrative official, should not be over-astute in searching for error, but should pay due regard to the effect of the reasons read as a whole. In the case of *Corlette & Anor* v *Mackenzie & Ors* (1995) 95 ATC 4578, Beazley J, at first instance, said (at 4582):-

"The court is not concerned with `looseness [of] language' or `unhappy phrasing' used by a Tribunal or decision maker. Nor does it approach the construction of a decision `minutely and finely with an eye keenly attuned to the perception of error': see *Collector of Customs v Pozzolanic Enterprises Pty Ltd* (1993) 43 FCR 280 at 287; *Yim v Immigration Review Tribunal* (1994) 54 FCR 186 at 189; *Politis v F C of T* 88 ATC 5029 at 5030; (1988) 16 ALD 707 at 708."

[See also *Blackwood Hodge (Aust) Pty Ltd* v *Collector of Customs (NSW) (No 2)* (1980) 47 FLR 131 at 145 per Fisher J (the Court "should adopt a restrained approach").]

I am quite satisfied that, reading the Tribunal's reasons as a whole, she has not decided relevant matters on the balance of probabilities but has properly evaluated the evidence keeping in mind that the ultimate question is whether, in accordance with *Chan*, there is established a "real chance" that the applicant will suffer relevant persecution if she returns to Russia. In my view, she has not ignored relevant material pointing to the contrary of that proposition. She has, in effect, rejected it. In my view, she was entitled to do this. Accordingly, in my opinion, no reviewable error has been demonstrated in this regard.

The applicant also asserted that an error of law had occurred in the Tribunal's decision in respect of her claim that she would suffer relevant persecution through denial of employment. This claim relied, at least in part, upon allegations of persecution in the workplace, downgrading of her position, etcetera whilst she was in Russia. The Tribunal said in relation to this claim:-

"Given that the Applicant's work record indicates that she left her job voluntarily, it seems likely that the Applicant's mental illness was the cause (see Dr Sochan's report where he suspects that her schizophrenic illness started during her employment and prior to her first arrest, imprisonment and hospitalisation). It is also probable that she receives an invalid pension because of her mental illness and not because she has been discriminated against in her employment. Accordingly, the Tribunal finds that the Applicant's loss of her professional specialisation was not a result of persecution in Convention terms."

In relation to this passage, in my view, the applicant's claim that the "balance of probabilities" test has been applied would appear to have more substance. On the face of it the passage does not, in terms, reject the contrary account given by the applicant. However, the last sentence, when considered in light of the Tribunal's strictures on the applicant's credibility, indicates to me that she did not accept the applicant's evidence as raising a relevant possibility. In any event, the applicant has plainly been diagnosed as schizophrenic. The existence of this mental disability would, while she remains afflicted by it, preclude her from undertaking "her professional specialisation". The Court has a discretion under s 481 of the Act. I

would not set aside the Tribunal's decision on this ground alone, even if I were satisfied that error of law had been demonstrated in the approach taken.

The Tribunal at the conclusion of her reasons indicated sympathy for the applicant on humanitarian grounds. I feel it appropriate that the Court should express the same sympathy. However, the appeal against the Tribunal's decision must fail.

Accordingly, the Court orders that:

1. the application be dismissed

2. all parties bear their own costs.

I certify that this and the preceding twenty-five (25) pages are a true copy of the reasons for judgment herein of the Honourable Justice M. L. Foster.

Associate:

Date: 29 MAY 1996

A P P E A R A N C E S

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THE FIRST RESPONDENT FILED A SUBMITTING APPEARANCE

DATE OF HEARING: 22 MARCH 1996

DATE OF JUDGMENT: 29 MAY 1996