IMMIGRATION AND PROTECTION TRIBUNAL NEW ZEALAND **[2012] NZIPT 800151**

AT AUCKLAND

Appellant:	**AC (Russia)**
Before:	B L Burson (Chair) V J Shaw (Member)
Representative for the Appellant:	The appellant represented himself
Counsel for the Respondent:	No Appearance
Date of Hearing:	24 & 25 November 2011
Date of Decision:	26 June 2012

DECISION

INTRODUCTION

[1] This is an appeal against a decision of a refugee status officer of the Refugee Status Branch (RSB) of the Department of Labour, declining to grant refugee status to the appellant, a citizen of the Russian Federation. The appellant also seeks to be recognised as a protected person.

[2] The appellant is a businessman. His claim is set against the general background of pervasive corruption in the Russian Federation and, in particular, the close links between a senior figure within the local office of the federal state security agency and the leader of a powerful organised crime group (OCG) operating in the region he comes from. The appellant's claim centres on an allegation that, having fallen foul of the OCG leader by refusing to transfer his lucrative business into the leader's ownership, he will be killed. The main issues to be determined by the Tribunal is whether the appellant faces anything more than a remote and speculative chance of this occurring and whether he can avoid this harm by moving elsewhere inside the Russian Federation.

[3] Given that the same claim is relied upon in respect of all limbs of the appeal, it is appropriate to record it first.

THE APPELLANT'S CASE

[4] The account which follows is that given by the appellant at the appeal hearing. It is assessed later.

[5] The appellant was born in the early 1970s in what was then the Soviet Union. His early life was uneventful for present purposes. In 1991, the appellant's son was born but the appellant had no enduring relationship with the mother. In 1996 the appellant married his wife and in 1997 his second child was born. A third child was born in 2004.

[6] In the late 1990s, the appellant established with three others a company, ABC Company Ltd, which was engaged in the business of food and alcohol distribution. The appellant was responsible for the alcohol importation and distribution. Initially ABC Company Ltd had a licence to import and sell alcohol only in X town where he lived, but later secured licences to operate in other parts of the Russian Federation.

[7] The appellant explained that, in order to establish this business, he and his partners had to pay bribes to a multiplicity of regulatory agencies. In Russia this is known as *krysha*, which means 'roof'. The appellant explained that there were two basic operating rules to *krysha* payments. First, that if you wished to engage in business *krysha* payments had to be made. Second, the amount of *krysha* was linked to the profitability of the business. The more you earned, the more you paid. The appellant estimated that, by the time he fled Russia, he was paying approximately US$10,000 per month by way of *krysha* payments.

[8] The appellant explained that not only was a *krysha* payment made to the relevant regulatory agency for the issue of the relevant licence, but payments were then paid on a regular basis throughout the lifetime of the licence. The appellant explained that in the event payments were not made, excuses would be found to close the business down or make trading difficult, for example, by making false complaints that the warehouses were infested with rats or other vermin. Included in the list of people to be paid were the local militia and the Federal security forces such as the FSB, (*Federalnaya sluzhba bezopasnosti* – the Russian Federal Security Service) whose local representatives demanded a sum of money to

ensure no “official” problems with the business and to ensure the forces provided their services when needed.

[9] In 2001, the appellant sold his share in ABC Company Ltd for a substantial profit. In the beginning of 2002, he set up a large commercial operation called DEF Company Ltd, of which he was the sole shareholder. By this time, he had established an extensive network of connections in the alcohol importing and distribution areas both within the Russian Federation and within the European Union. Over time, the DEF Company Ltd business expanded to include the transportation and the wholesale distribution of alcohol and the importation and distribution of foodstuffs. He owned a number of warehouses and employed over 20 people.

[10] In 2004, the appellant hired a man called AA as a means of ensuring protection within the various criminal organisations operating in his city. AA was known to be a representative of a crime syndicate called the XYZ group, one of the most influential OCGs in the X town region and which had links to a powerful Moscow-based crime group. The appellant described his approach to AA as choosing the “lesser of two evils” which was a common business practise at that time in Russia. The OCGs all knew each other and, by paying AA, it would become known to the other groups operating in X town that he was now under the “protection” of the XYZ group.

[11] In 2004, the appellant sold the legal name and licensing rights of DEF Company Ltd and established another company called GHI Company Ltd. The business infrastructure such as the warehouses, shops and the like, was retained by the appellant and transferred to GHI Company Ltd. The appellant split his business activities between various companies within the GHI Company Ltd group because it carried less business risk. It was easier for the authorities to shut down a large company operating as a single entity.

[12] In late 2004, local militia officers demanded the appellant pay an additional US$3,000 per month to ensure their services. The appellant refused. Shortly after this, the militia closed one of his warehouses. New locks were placed on all doors. A demand of US$50,000 was made for the ‘problem’ to be solved. The appellant complained to the local militia chief, whose response was to demand US$150,000 from the appellant. The appellant refused, believing this would encourage even more exorbitant demands in the future. Instead, in early 2005, the appellant complained to the Chief Prosecutor for the X town region. He explained that if the warehouse was not opened and heated, the alcohol would freeze and explode.

The Chief Prosecutor replied that he could not do anything until the "official checks" had been completed. A few weeks later, the appellant was arrested by the militia and held without charge for three days.

[13] The appellant was only given the keys to his warehouse in April 2005. Upon opening the warehouse, the appellant found that most of the goods had been stolen. The appellant undertook a stocktake and ascertained that goods worth an estimated US$200,000 had been stolen by the militia. The appellant complained to the Chief Prosecutor but the prosecutor told him he was unable to do anything. He then complained to the senior official in the Prosecutor-General's office in his region but, again, no action was taken.

[14] In late 2005, BB, the local head of another OCG, and two associates came to the appellant's office and demanded he pay them US$300,000. The appellant called the militia who arrested them. The three men were released after a few hours. The appellant lodged a formal complaint about the case but no one was charged.

[15] Approximately three weeks later, the appellant was assaulted at his home by masked men brandishing baseball bats. During the melee, the appellant tore the mask off one of his assailants and recognised him as one of the men who had accompanied BB to his office. The appellant suffered severe concussion, injuries to his vertebra and internal bleeding. He went to hospital for immediate treatment but refused admission to hospital.

[16] The appellant complained to AA about the assault on him but AA told him that he had made a mistake by informing the militia. He was told by AA that, given that the appellant was paying protection money to his group and had been assaulted by another group, according to the law of the criminal underworld, this should have been resolved between the various OCGs. By involving the militia, the appellant had stepped outside the agreed rules between the various OCGs. According to those rules, BB could do what he wanted to the appellant. The appellant asked AA to broker a meeting between himself and BB. This was arranged and the appellant met BB in the presence of a person elected by all the OCGs operating in the X town region to be the arbitrator of disputes between them. It was agreed the appellant would pay US$50,000 to the representative who would divide the money between the various groups.

[17] Towards the end of 2005, legal proceedings were instituted against the appellant on false charges of selling alcohol past its expiry date. The appellant's

trial began in late 2005. In early 2006, while the proceedings were still underway, the appellant was arrested and detained in a remand prison. He was placed in a cramped isolation cell. While in detention, the appellant was visited by DD, a senior officer within the local FSB, who asked the appellant to transfer ownership of the company to DD, the leader of a particular crime syndicate, with whom it was now apparent DD had links. The appellant now came to believe that his earlier problem with the militia in late 2004 – early 2005 had been orchestrated by DD acting for DD.

[18] Soon afterwards the appellant was convicted and sentenced to two-and-a-half years' imprisonment despite having documentary proof that he had all required licences and that his goods were not out of date. The appellant filed an appeal. In May 2006, after a couple of months detention, the appellant was released from detention pending the outcome of his appeal. In early 2007, the appeal court overturned his conviction.

[19] During 2007, DD made threatening demands on a number of occasions that the appellant sign over his business to him. During one such incident, the appellant was told that, if he wished, DD could put him in the boot of the car and bury him under sand and no one would ever find out. On another occasion, a dog guarding one of the appellant's warehouses was shot during the night. The appellant complained to the unit within the FSB dealing with the fight against organised crime. He was asked to arrange a meeting with DD. Four armed officers from the FSB came with him to the meeting to try and catch DD. However, DD became aware of the officers and quickly left. Soon afterwards, the FSB officers were contacted by DD who dissuaded them from taking any further action.

[20] In light of what had happened previously with BB, the appellant considered approaching AA about DD's actions but decided against it. He believed that AA and his associates might end up killing DD and that this would put him in more risk.

[21] Instead, the appellant closed down the business and in 2007 established another company, JKL Company Ltd. In order to better protect this business from DD and CC, the appellant went into partnership with a person whose wife was an official in the regional prosecutor's office. This had little effect. The police continued to demand payment of bribes. Also, a new agency connected with the Ministry of Internal Affairs directorate responsible for fighting economic crimes began interfering in the business. Trucks of goods were periodically seized and were only returned when US$50,000 was paid.

[22] Additionally, a senior official in the prosecutor's office now began demanding an extra US$3,000 per month in *krysha* payment. The appellant approached his business partner's wife and asked her to intervene. An agreement on the total amount of *krysha* payment was reached. Nevertheless, from time-to-time, trucks continued to be stopped and goods seized. At around the same time, a representative of the tax office began demanding further bribes.

[23] In late 2007, the appellant's now teenage son was found dead. Although the incident was reported as suicide, the appellant was suspicious that his son may have been murdered because of the appellant's problems. He now hired bodyguards to protect himself and his family.

[24] Concerned at the worsening business environment, the appellant decided to cease trading in X town. He resigned from JKL Company Ltd and investigated relocating to Moscow. The appellant understood that he would still have to make *krysha* payments but thought some of the pressure might be eased. AA informed the appellant he would accompany him to Moscow and took him to see the head of a large OCG. The representative of this group informed the appellant at this meeting that they would set him up in business and that he would work for them, using their capital. The appellant told the representative that he did not like to work that way. He was informed that he would not otherwise be able to work in Moscow and that he should "consider things". They told him that he would not be able to live and practise business anywhere in Russia. No matter where he went, they would find him.

[25] The appellant said he would think about it and returned to X town. Frightened about this development, he immediately began the process of obtaining a visa to come to New Zealand. He now began getting threatening text messages and emails from DD that he would be killed. Concerned for his safety, the appellant moved to another town to stay with a relative of his wife. While hiding there, he received a telephone call from DD who told him that they knew where he was staying. The appellant became very frightened because the only way DD could have obtained this information was through the FSB.

[26] He now began to wind down his business in earnest. Stock was sold and licenses allowed to lapse. Their visas were issued and, in late 2008, the appellant, his wife and two children arrived in New Zealand. At the expiry of his visa, the appellant suggested to his wife that they remain in New Zealand. She was reluctant to do so and so she and the children returned to Russia after approximately two weeks. The appellant remained in New Zealand for a further

month trying to obtain a further visa to remain. When this was declined, the appellant left New Zealand. He then travelled to another country where he applied for a further visa to enter New Zealand. While outside New Zealand, the appellant continued winding up his business. The leases were terminated and his employees paid until the end of 2008.

[27] Since being in New Zealand the appellant has been told of threats being made against him. The wife of his former business partner has warned him that, should he return to Russia, criminal charges would be brought against him again. In early 2010, the appellant was informed by his wife that police officers had visited the home and told her that a case had been opened against him. The appellant requested that his wife write to get a copy of the complaint. She had done so but to date has received no reply.

[28] The appellant is concerned that, should he be returned to Russia, he would be tracked down by the Moscow crime syndicate and killed. He has refused their offer to work for them and believes they will kill him as a matter of principle. He is also concerned that he may be killed by DD. Threats of this nature have already been made against him and it was only the protection money he was paying to AA which prevented them from carrying out this action. He has now ceased making these payments. There is nothing to stop them from carrying out their threats. He believes there are strong links between organised crime and the Russian security apparatus. He would need to register his whereabouts with the authorities and this would inevitably be given to the crime syndicate. Nowhere in the Russian Federation would be safe for him.

Material and Submissions Received

[29] No material additional to that provided by the appellant to the RSB was submitted before the hearing. On 14 March 2012, the Tribunal wrote to the appellant requesting he provide written confirmation of the name of the OCG he met with in Moscow. By letter dated 21 March 2012, the appellant replied.

ASSESSMENT

[30] Under section 198 of the Immigration Act 2009, on an appeal under section 194(1)(c) the Tribunal must determine (in this order) whether to recognise the appellant as:

(a) a refugee under the 1951 Convention Relating to the Status of Refugees ("the Refugee Convention") (section 129); and

(b) a protected person under the 1984 Convention Against Torture (section 130); and

(c) a protected person under the 1966 International Covenant on Civil and Political Rights ("the ICCPR") (section 131).

[31] In determining whether the appellant is a refugee or a protected person, it is necessary first to identify the facts against which the assessment is to be made. That requires consideration of the credibility of the appellant's account.

Credibility

[32] The appellant is accepted as a credible witness. His evidence was detailed, spontaneous and consistent with his previous evidence. His account was materially corroborated by credible documentary evidence in the form of medical reports relating to injuries sustained after the beating at the hands of BB and in relation to his son's death. There is credible documentary evidence relating to his various business activities. As will be seen, his account sits comfortably within the picture painted by country information related to corruption in the Russian Federation and the activities of OCGs. Country information establishes the existence of the local OCG identified by the appellant. His account is therefore accepted in its entirety.

Findings of fact

[33] The Tribunal finds that the appellant is a citizen of the Russian Federation who has run a number of businesses in the alcohol and foodstuffs importation and distribution businesses since the mid-to-late 1990s. For the entirety of this period, the appellant and any business partners he has had from time to time have had to pay substantial sums by way of bribes in order to obtain the required business licences. Additional bribes have been paid to the local militia and the federal security services to ensure they "provide" their services.

[34] Additionally, since approximately 2004, the appellant has paid a sum of money to a representative of an OCG to buy their protection against the predatory behaviour of other OCGs operating in his region.

[35] Despite payment of these monies, the appellant has experienced ongoing problems with rival OCGs. On one occasion in late 2005, he was severely beaten by the representative of a rival OCG who demanded payment of a substantial sum of money. Since around that time, attempts were made by a representative of another OCG to obtain control of his business. Verbal threats have from time to time been made against the appellant and a senior member of the local FSB working in league with that organisation has used his influence to have criminal proceedings brought against the appellant. This resulted in his being convicted and sentenced to imprisonment. This conviction was overturned on appeal by the appellant, but not before the appellant spent a short period of time in prison. The appellant has refused to sign over control of his business to this group.

[36] Apart from the actions of the various OCGs, officials attached to various regulatory and law enforcement agencies have, from time to time confiscated or seized the appellant's goods to extract bribes.

[37] Over time, the pressure on the appellant and financial demands made of him to continue operating business in Russia increased to a point where he felt he could no longer continue business in his area. He travelled to Moscow and was taken before a representative of a powerful Moscow-based crime syndicate and informed that he had to work for that syndicate. The appellant refused.

[38] The appellant went into hiding and fled to New Zealand. He has shut down his existing businesses. He has been informed by his wife that, should he return to Russia, further criminal proceedings will be instituted against him. He is also concerned that the crime syndicate for whom he refused to work or transfer his business will kill him to make a point. His claim will be assessed against this background.

The Refugee Convention

[39] Section 129(1) of the Act provides that:

> "A person must be recognised as a refugee in accordance with this Act if he or she is a refugee within the meaning of the Refugee Convention."

[40] Article 1A(2) of the Refugee Convention provides that a refugee is a person who:

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

> being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it."

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

(a) Objectively, on the facts as found, is there a real chance of the appellant being persecuted if returned to the country of nationality?

(b) If the answer is yes, is there a Convention reason for that persecution?

Assessment of the Claim to Refugee Status

[42] For the purposes of refugee determination, "being persecuted" has been defined as the sustained or systemic violation of core human rights, demonstrative of a failure of state protection – see *Refugee Appeal No 74665/03* (7 July 2004) at [36]-[90]. Put another way, persecution can be seen as the infliction of serious harm, coupled with the failure of state protection – see *Refugee Appeal No 71427* (16 August 2000), at [67].

[43] In determining what is meant by "well-founded" in Article 1A(2) of the Convention, the Tribunal adopts the approach in *Chan v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379 (HCA), where it was held that a fear of being persecuted is established as well-founded when there is a real, as opposed to a remote or speculative, chance of it occurring. The standard is entirely objective – see *Refugee Appeal No 76044* (11 September 2008) at [57].

Objectively, on the facts as found, is there a real chance of the appellant being persecuted if returned to the Russian Federation?

Corruption in the Russian Federation

[44] The appellant's account of *krysha* payments forming a routine aspect of conducting business in Russia is corroborated by evidence which has emerged in the High Court civil action in the United Kingdom between the two well-known Russian oligarchs, Boris Berezovsky and Roman Abramovich. In describing '*krysha'* as "the word of the trial", Luke Harding "*Abramovich v Berezovsky*: what have we learned so far? "*The Guardian* (7 November 2011) states:

> "Literally, it means "roof" in Russian. But it carries a kaleidoscope of other associations: an arrangement; lobbying; political services; icebreaking; protection from murder by Chechen terrorists and bandits; fixing; and a long-term relationship with more or less regular payments."

[45] Charles Clover "Who runs Russia?" *The Financial Times Magazine* (16 December 2011) reports that a scandal erupted in Moscow in 2011 when a man charged with running an illegal gambling casino testified that he paid local police and prosecutors as much as 80 per cent of his profits, estimated at some RUB770 million (approximately NZ$30 million), by way of "*krysha*" payments.

[46] Other country information also points to its routine nature. The article "Corruption in Russia: Blood Money" *The Economist* (20 October 2005) points to a then worsening situation for businessmen and others in terms of bribery and corruption. It cites a Moscow-based developer who estimated that 10 per cent of his costs went in bribes and who stated that if a project required 50 licences, every licence needed a bribe. Similar emerges from Steven Lee Myers "Pervasive Corruption in Russia Is Just Called 'Business'" *New York Times* (13 August 2005):

> "A businessman here recently formed a company to supply equipment used in new office and apartment buildings. Despite the country's construction boom, it nearly foundered. That is, until this summer, when two "intermediaries" arranged to fix the bidding for contracts from a regional government.
>
> He has since received four new contracts, he said, and expects more. Success has its cost, though. He had paid bribes, he said, amounting to 5 to 10 percent of each contract. The largest, so far, totalled $90,000.
>
> The amount of each bribe was punched out on a desktop calculator to avoid any paper trail. He expressed disgust but said the bribes were an unavoidable cost of doing business in Russia today.
>
> "If you want to be competitive you have to play the game," he said, agreeing to speak in a lengthy interview only if he, his company and the regional government were not identified. He said he feared legal difficulties and being harmed or even killed.
>
> "It used to be called bribery," he added. "Now it is just called business."
>
> Bribery is certainly not new to Russia, but according to several recent surveys and interviews with dozens of Russians, it has surged in scale and scope in recent years under the presidency of Vladimir V. Putin, so that today it touches just about every aspect of life."

[47] The article quotes from an interview with Grigory A Satarov, the president of INDEM, an anti-corruption NGO in Russia and others familiar with business practices in Russia. Myers records:

> "According to a very wealthy and prominent Moscow businessman, who spoke on condition of anonymity for fear of prosecution or political retaliation, as well as others interviewed, bribes have increasingly become a necessity, either to win contracts or to keep inspectors and prosecutors at bay.
>
> …
>
> Mr. Satarov said one major businessman had told him of having to pay monthly bribes to five federal ministries. Fully half of the businessman's profits went to

> bribes, Mr. Satarov recounted. "He said, 'When it reaches 70 percent I'm going to close the business.'"
>
> A business consultant who until recently worked with the European Union on economic development projects in Kaliningrad and Moscow said he had endured repeated encounters with bribe-seeking officials, who demanded cash, gifts or the hiring of unqualified relatives.
>
> In an interview, the consultant, who agreed to discuss the issue only if not identified because of fears of retribution, said it was necessary to understand bribery in the context of the Russian government.
>
> "Corruption is not a virus infecting the system," he explained, saying that was how bribery was viewed in Europe or the United States: as an aberration that must be isolated and cut out. "It is the system itself that is corrupt.""

[48] However, there have been some positive changes. According to the United States Department of State *Country Report on Human Rights Practices 2010: Russia* (8 April 2011) ("the 2010 DOS report") at section 4:

> "Legislation enacted in December 2008 defined corruption and set forth key principles for combating it. It requires government officials to submit financial statements, restricts their employment at entities where they had prior connections, and requires reporting of actual or possible corrupt activity. Implementation of the legislation, however, was still incomplete. Although some agencies, such as the Ministry of Justice, issued implementing regulations defining conflict of interest in certain situations, not all agencies issued implementing regulations."

[49] Further regulative steps have been taken in 2011. The United States Department of State *Country Report on Human Rights Practices 2011: Russia* (24 May 2012) ("the 2011 DOS report") notes at section 4:

> "In May the Duma passed legislation criminalizing transnational bribery and substantially increasing fines and prison sentences for offering and receiving bribes. For example, the maximum penalties for receiving a bribe became 15 years' incarceration and a fine equivalent to 100 times the amount of the bribe. The law also created a new crime of mediation in bribery as well as administrative corporate liability for transnational bribery."

[50] Furthermore, steps have been taken by some agencies to control corrupt practices within their ranks, though some prosecutions brought by these agencies have been half-hearted at best. The report notes:

> "Prosecutors charged some high-level officials with corruption during the year; however, most government anticorruption campaigns were limited in scope and focused on lower-level officials. Allegations of corruption were also used as a political tactic.
>
> Corruption charges were brought against 120 investigators and 12 prosecutors during the year. Corruption charges were also brought against 48 lawyers, eight members of election commissions, 214 deputies of municipal councils, 310 municipal officials, 11 deputies of regional parliaments, one State Duma deputy, and three judges. Ten department heads and 26 deputy department heads reportedly faced administrative charges for unacceptable investigative work, and three were dismissed for violation of authority."

[51] Prosecutions have continued in 2011. The 2011 DOS report cites reports that some 2,800 officials have been charged including some 120 investigators, 12 prosecutors and three judges. While the law provides criminal penalties for official corruption, the Government acknowledged that the law had not been enforced effectively. The net result is, according to both the 2010 and 2011 DOS reports, that corruption remained widespread throughout the executive, legislative, and judicial branches. Corruption in law enforcement remained a serious problem. Viewed overall, the picture painted by the 2010 and 2011 DOS reports remains one of corruption continuing to exist at endemic levels. The 2010 DOS report observes:

> "Manifestations included bribery of officials, misuse of budgetary resources, theft of government property, kickbacks in the procurement process, extortion, and improper use of official position to secure personal profits. The NGO Information Science for Democracy (INDEM) continued to assert that corruption was also widespread in other official institutions, such as the higher education system, health care, the military draft system, and the municipal apartment distribution system. INDEM also estimated in a 2009 report, and asserted during the year, that bribes and corruption cost the country the equivalent of 33 percent of the country's gross domestic product.
>
> …
>
> The law makes giving and receiving bribes punishable by up to 12 years of incarceration; a person who pays a bribe is relieved of criminal liability if the bribe was extorted or if the individual voluntarily informs law enforcement authorities about it. While there were prosecutions for bribery, a general lack of enforcement remained a problem. Investigations of bribery and other corrupt practices are conducted by the Ministry of Interior and the FSB, both of which were themselves widely perceived as corrupt.
>
> The Global Competitiveness Report 2010-11, compiled by the World Economic Forum, cited corruption as the country's most problematic factor for doing business. The country's score in Transparency International's Corruption Perception Index worsened. The country scored poorly on other measurements of transparency and corruption as well, including judicial independence, fairness in the decisions of government officials, the transparency of government policymaking, and the influence of organized crime.
>
> In a statement issued on October 27, the Interior Ministry reported that bribery increased by 17.5 percent from January to September, compared with the same period of 2009 and the average bribe increased 1.5 times to more than 42,500 rubles ($1,400). The statement cited alleged corruption by many officials at the federal, regional, and local level, including four serving and former deputy governors and five regional ministers."

[52] INDEM conducted research into the level of corruption in Russia on behalf of the Russian Federation's Ministry of Economic Development which, on 14 June 2011, published the report *Condition of the Everyday Corruption in the Russian Federation*. The report focused on the assessment of petty bribery and the efficiency of government anti-bribery measures. It included a large-scale public

survey of 17,500 respondents in 70 Russian regions. According to INDEM's press release (see: www.indem.ru):

> "The study revealed that the average bribe grew nearly twofold in five years from 2780 rubles (approx. US$90) in 2005 to 5285 rubles in 2010 (approx. US$176). Additionally, the study established that the total volume of petty bribery in Russia has also grown significantly from 164 billion rubles (approx. US$5.8 billion) from 129 billion rubles (US$4.6 billion) five years ago. This growth, however, should take into account the 7-8% inflation rate. If compared to the growth of GDP, the volume of corruption in Russia has been progressively declining from 0.95% in 2001, 0.60% in 2005 to 0.42% in 2010.
>
> The average amount of a petty bribe in 2001 (1817 rubles), 2005 (2780 rubles) and 2010 (5285 rubles) grew faster than inflation. In 2010 it was 93% of an average salary. Extensive growth of an average bribe explains the decline in the volume of a petty corruption – most of the Russian citizens simply can not afford to pay bribes at such a high cost.
>
> Russian citizens have the highest risk to get involved into the corruption transaction is during interactions with the Traffic Police, while applying for a child care/kinder gardens and when applying for a college/higher education. State and municipal healthcare system leads in terms of volume of petty bribery – 35295 million rubles (approx. US$1.2 billion), Traffic Police – 24, 236 billion rubles (US$0.8 billion dollars) and Higher Education System (College and University) – 20,783 billion rubles (US$0.69 billion dollars) are further situated. These fields of activity account for almost half of the total petty bribery market in Russia.
>
> Other notable findings include the reduction of those who do not know how to give a bribe from 24% in 2005 to 9% in 2010. Furthermore, it appears that only 1% of the respondents do not give bribes based on fear of prosecution. Interestingly, 77% of the respondents heard of the government anti-bribery measures, however, only 4% think that government is taking all necessary steps to fight the corruption. 19% of respondents believe that government officials do not make efforts to fix this problem and 40% state that a greater effort needs to be done in this sphere."

[53] The 2010 DOS report describes police corruption as "pervasive". A candid account of how corrupt practices operate within the police was made in November 2009 by Ministry of Interior Major Aleksey Dymovskiy, in a YouTube video request to Prime Minister Putin to address widespread corruption among law enforcement officers. The 2010 DOS report notes:

> "Although the video attracted nationwide attention, authorities did not investigate Dymovskiy's allegations. Instead, in January they charged him with abuse of office and fraud. His wife alleged that investigators tried to plant drugs in his home during a raid. He was subsequently released but lost a suit for slander filed by the chief of police of Novorossiysk and was ordered to pay 108,000 rubles ($3,500) in damages. In an interview with the *New York Times,* Dymovskiy acknowledged taking bribes himself. He asserted that authorities were aware that police had to augment their low salaries from other sources. He described a practice considered common: at the end of a shift officers must turn over a portion of their bribes, 700-3,000 rubles ($25 to $100) a day to the "cashier," a senior member of the department. Dymovskiy asserted that if officers did not pay up, they were disciplined.
>
> In February Vadim Karastelyov, a Novorossiysk human rights activist who assisted in Dymovskiy's defence, was arrested as he was distributing pamphlets asking residents to attend a rally for Dymovskiy and was jailed for a week for promoting an

> unauthorized demonstration. Immediately after his release, two strangers beat him, causing a skull fracture, but did not try to rob him. Although after his apprehension one of Karastelyov's attackers stated that he acted out of personal animosity, many human rights observers believed that Karastelyov was attacked because of his support for Dymovskiy."

Organised crime groups (OCGs)

[Paragraphs [54] and [55] have been withheld under section 151 of the Immigration Act 2009. They relate to country information regarding the region and city where the appellant lived in the Russian Federation. The country information cited in these paragraphs confirms that multiple OCGs operate in the city and region and are linked with powerful OCGs elsewhere inside the Russian Federation.]

[54] […]

[55] […]

[56] Speaking of the Tambov or Tambovskaya crime group active in St Petersburg, Galeotti "Profit and loss – Russian crime network faces business strain" *Jane's Intelligence Review* (27 April 2009) observes:

> "Like most other Russian groups, the Tambovskaya is essentially a network of semi-autonomous individuals, cells and smaller teams rather than a traditional, hierarchical organised crime gang. The components of the network will cohere to resist a common threat and will draw on and unite with colleagues to exploit particular opportunities when they arise. At other times, they will pursue their own agenda and even compete with each other."

Dr Galeotti also observes that:

> "Like most Russian organised crime networks, the Tambovskaya has from the first been involved not just in predatory extortion and protection racketeering but also a more judicial provision of its services to enforce contracts and protect clients from other criminals. This provision of what is known as a krysha (a 'roof') remains a core business…"

[57] The Tribunal accepts that these basic observations about Russian crime syndicates generally can be taken as being equally applicable to the operation of the XYZ gang and other OCGs operating in X town.

[58] A recent article, Charles Clover "Who runs Russia?" *The Financial Times Magazine* (16 December 2011) paints a picture of continuing collusion between powerful organised crime groups and the state security apparatus, although the extent of integration remained a topic of debate among experts he interviewed.

Clover interviews Maxim Gladki, a Russian journalist specialising in mafia cases and a trusted confidant of senior mafia figures. Clover states:

> "Mafia killings are fewer in number compared with the "wild west" days of the 1990s, but they are qualitatively different. Twenty years ago, killings were carried out mainly with knives, as firearms were prohibited in the USSR. Fifteen years ago, the Mafia got around to using guns, but, according to Gladki, the "Rambo mentality" and "low level of professional ability" meant a lot of collateral carnage. These days, however, the level of professionalism is chilling. Snipers make head shots at hundreds of metres, or evade 10 security cameras on their escape, leaving behind an untraceable weapon. It does not take a genius to understand that new people have arrived on the scene. "Basically, the mafia has been taken over by the state," says Gladki.
>
> The middle-aged Gladki's career has traced the rise of Russia's first mafiosi, the so called *vory v zakone* or "thieves in law", from a quasi monastic order of gang leaders that ran life in the gulags under the USSR, through the wild west days of the capitalist 1990s, to the decade of Vladimir Putin's Russia. "Now all the *vory* have gone to work for the FSB [the Federal Security Service, successor to the KGB], and life has got duller," conceded Gladki, over lunch at a coffee house around the corner from my office. Top ranking "thieves in law" now own legitimate businesses, drive armoured Maybachs, hang out with judges, politicians, and have policemen on their payrolls. But while Russia's *vory* have started to go legit, the opposite has happened to Russia's authorities. Indeed, the basic functions of organised crime – protection rackets, narcotics, extortion and prostitution, have increasingly been assumed by the Russian state.
>
> In a WikiLeaks cable, a Spanish judge – an expert on the Russian mafia, who has studied the mob for 11 years – told US diplomats that he considered Russia a "mafia state", where "one cannot differentiate between the activities of the government and OC [organised crime] groups".
>
> In my own experience researching crime in Russia, one often came across hybrid organisations made up of organised crime and law enforcement, though it was never quite clear who was telling whom what to do."

As against this, Gladski notes:

> "Mark Galeotti, a Russian mafia specialist at New York University, says he is not a fan of the "Mafia state" hypothesis, in which organised crime is essentially inseparable from the Kremlin. However, he says it is undeniable that on occasion, one side will find a use for the other: "If we look at the extent to which organised crime does the bidding of the state the answer is that it happens in specific cases," he said "The state can often set the rules because the state is clearly the biggest game in town."

State protection of complainants against organised crime

[59] Given the reports of corruption and indeed collusion between the security apparatus and OCGs, it is unsurprising that the 2010 DOS report, at section 1e, notes that corruption extends to the criminal justice system and that witness intimidation by criminal elements is widespread:

> "Authorities did not provide adequate protection for witnesses and victims from intimidation or threats from powerful criminal defendants. In May 2009 the Ministry of Interior estimated nearly half of the approximately 10 million witnesses in

> criminal cases suffered threats or violence from criminal elements; they noted the existence of the witness protection program was little known among the population.
>
> In February 2009 a Moscow judge, Olga Kudeshkina, publicly criticized Moscow's judicial system, alleging widespread improper influence on rulings and calling it an "instrument for settling political, commercial, or personal scores." She was subsequently dismissed from her position. She appealed her case to the European Court of Human Rights (ECHR), which in August awarded her 10,000 euros ($13,400).
>
> In June 2009 the Council of Europe issued a report, based on interviews with judges, prosecutors, defense lawyers, and defendants, which asserted that judges routinely received intimidating telephone calls from superiors instructing them how to rule in specific cases, with particular emphasis placed on delivering convictions at any cost. The report stated defense attorneys were frequently threatened and corporations were at the mercy of corrupt law enforcement officials. Among the cases detailed in the report was one of a Moscow region judge who was dismissed and told publicly by a United Russia Duma deputy that she "ought to be shot" after voiding the results of a local election."

The right to life under international law

[60] The appellant has the right to life; See Article 3 of the Universal Declaration on Human Rights 1948 (UDHR). Article 6 of the International Covenant on Civil and Political Rights 1966 further provides:

> "Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life."

[61] Nowak *The UN Covenant on Civil and Political Rights: CCPR Commentary (*N P Engel, Kehl am Rhein, 2005), at pp121-122, notes that the use of the adjective "inherent" in Article 6(1) expresses not only a concern to express a natural law foundation for the right to life, but also to signal its intrinsic importance. After all, as Nowak comments:

> "… without effective guarantee of this right, all other rights of the human being would be devoid of meaning."

[62] This importance is reflected by the non-derogable nature of the right to life. No derogation from the right to life is allowable under Article 4 ICCPR, even in times of national emergency. Protection of the right to life is found in the major regional human rights instruments; see Article 2 of the European Convention on Human Rights 1950; Article 1 of the American Declaration on the Rights and Duties of Man 1948; Article 4 of the Inter-American Convention on Human Rights 1969; and Article 4 of the African [Banjul] Charter on Human and Peoples' Rights 1981.

[63] The Human Rights Committee ("the Committee") has also issued guidance as to the interpretation of Article 6. In *General Comment No 6: Article 6* (*Right to*

Life) (30 April 1982), at para 3, the Committee addressed the issue of state protection against arbitrary deprivation of life. It stated:

> "3. The protection against the arbitrary deprivation of life which is expressly required by the third sentence of Article 6(1) is of paramount importance. The Committee considers that States parties should take measures not only to prevent and punish deprivation of life by criminal acts, but also to prevent arbitrary killings by their own security forces."

[64] In *Refugee Appeal No 75787* (31 October 2006) the Refugee Status Appeals Authority ("the Authority") at [55]–[71], examined the scope of Article 6 ICCPR as it related to the threat of harm emanating from a non-state actor. The Authority at [57]–[69], noted support in both the drafting history and concluding observations of the Committee in respect of States Parties' reports for the proposition that the obligation on the state under Article 6 includes taking steps to protect individuals from arbitrary deprivation of life at the hands of private individuals. See generally, discussion in Nowak *(op cit)* at p40 and pp122-124 and Kälin and Kunzli *The Law of International Human Rights Protection* (Oxford University Press, Oxford, 2010) at pp291-292. This obligation gives rise to a duty to investigate and, where appropriate, prosecute and punish.

[65] The Committee puts the matter thus in General Comment No 31:

> "8. The article 2, paragraph 1, obligations are binding on States [Parties] and do not, as such, have direct horizontal effect as a matter of international law. The Covenant cannot be viewed as a substitute for domestic criminal or civil law. However the positive obligations on States Parties to ensure Covenant rights will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities that would impair the enjoyment of Covenant rights in so far as they are amenable to application between private persons or entities. There may be circumstances in which a failure to ensure Covenant rights as required by article 2 would give rise to violations by States Parties of those rights, as a result of States Parties' permitting or failing to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities. States are reminded of the interrelationship between the positive obligations imposed under article 2 and the need to provide effective remedies in the event of breach under article 2, paragraph 3. The Covenant itself envisages in some articles certain areas where there are positive obligations on States Parties to address the activities of private persons or entities."

[66] The ambit or scope of the duty to investigate and act in relation to anticipated private harm has been considered by the European Court of Human Rights. The leading judgement is *Osman v United Kingdom* (2000) 29 EHRR 245 where the court observed (at paragraph 115):

> "It is common ground that the state's obligation in this respect extends beyond its primary duty to secure the right to life by putting in place effective criminal law provisions to deter the commission of offences against the person, backed up by law-enforcement machinery for the prevention, suppression and sanctioning of

> such provisions. It is thus accepted by those appearing before the Court that Article 2 of the Convention may also imply in well defined circumstances a positive obligation on the authorities to take preventative operational measures to protect an individual whose life is at risk from the criminal acts of another individual. The scope of this obligation is a matter of dispute between the parties."

[67] After noting the unpredictability of human conduct and the strains on the operational priorities and resources facing state law enforcement agencies, the court held (at [116]) that, in order for this duty to be breached, it must be established:

> "… that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures which, judged reasonable, might have been expected to avoid that risk."

[68] The Inter-American Court of Human Rights reached similar conclusions in *Velasquez Rodriguez v Honduras* (1988) 9 HRLJ 212 at [172]-[174].

The right to life and the standard of protection

[69] The duty under Article 6 ICCPR cannot impose on States Parties an obligation to ensure that no harm can ever occur to an individual at the hands of a private actor in all circumstances. This does not mean, however, that provided it can be shown that the state in the country of origin has done or will do all it reasonably can to avoid the risk to the claimant's life, that there can be no failure of state protection under the Refugee Convention. Rather, what must be established is that the steps taken by the state must be such as to reduce the risk to the claimant to below the real chance threshold. See here, the discussion in *Refugee Appeal No 71427/99* (16 August 2000) at [62]–[67] and Penelope Matthew, James C Hathaway and Michelle Foster "The Role of State Protection in Refugee Analysis" (2003) 15(3) *International Journal of Refugee Law* pp444-460.

Application to the facts: the risk to the appellant

[70] The appellant's evidence sits comfortably with the country information relating to the status of X town as a region in which highly sophisticated and multiple OCGs operate. Given the above country information, the Tribunal has given anxious scrutiny to the appellant's claim.

[71] Throughout his time as a businessman in X town, the appellant suffered multiple interferences with his right to work. While the Tribunal acknowledges that being forced to conduct his business in such an environment can be considered a breach of his right to work, his being forced to make *krysha* payments to various

state agencies and the OCGs to conduct his business does not in itself constitute serious harm. Moreover, by the appellant's own account, despite the difficult business environment inside X town, he became wealthy and could afford expensive cars and a holiday home. No serious harm has resulted to him by this reason alone and there is no reason to believe his economic position would be any different in the future.

[72] Nevertheless, he has been subjected to arbitrary detention on two occasions, first for a few days and then for a couple of months. The latter followed his conviction on criminal charges brought against him as part of an orchestrated campaign by DD to obtain control of his lucrative business. While he was ultimately able to have his conviction overturned, this was not before he spent a number of weeks in a cramped isolation cell.

[73] The appellant also suffered violence and threats of violence. He was beaten with a baseball bat by BB causing significant injury. While he reported this incident to the militia and his assailants arrested, they were quickly released and his further complaints to the prosecutorial officials went nowhere. Moreover, his approach to the police as opposed to seeking 'protection' from AA meant that he had voided the protection arrangement offered by AA. This incident was only settled when the appellant was forced to submit to the arbitrage of the OCG moderator and pay a large sum of money for distribution among the affected OCGs.

[74] While having some reservations about the degree of risk to him, the Tribunal cannot say that, in context, the risk that the appellant will be killed by DD or his associates is a remote or speculative one. His claim that the only reason he was not killed before he left Russia was the payment of *krysha* to AA is plausible in the context of the country information. Threats have, nevertheless, been made to kill him by a powerful OCG with links to the local federal security forces. To that must be added the fact that the protection of AA is no longer available to the appellant.

[75] In this case, there is credible evidence of a high degree of collusion between DD and senior officials in the FSB. In such circumstances, the Tribunal accepts that, even if the appellant were to make a complaint about the risk to his life from DD, the protection that ought to be forthcoming to him would not be provided by the state.

[76] Accordingly, both a real chance of serious harm and the failure of state protection are established. The first principal issue is therefore answered in the affirmative. The appellant has a well-founded fear of being persecuted.

Is there a Convention reason for the persecution?

[77] In order to be recognised as a refugee, a claimant must establish not only a well-founded fear of being persecuted, but also that this predicament is linked to one of the five Convention grounds. As to the relevant standard, in *Refugee Appeal No 76235* (6 September 2002) the Authority held, at [173]:

> "...it is sufficient for the refugee claimant to establish that the Convention ground is a ***contributing*** cause to the risk of "being persecuted". It is not necessary for that cause to be the sole cause, main cause, direct cause, indirect cause or "but for" cause. It is enough that a Convention ground can be identified as being relevant to the cause of the risk of being persecuted. However, if the Convention ground is remote to the point of irrelevance, causation has not been established."

[78] In this case, there is no link to any Convention ground whatsoever. The appellant's predicament arises not out of any actual or imputed political opinion. It is not linked to his race or religion. The notion that, as a businessman, he forms a particular social group in Russia founders because it is difficult to identify any innate or immutable internal defining characteristic which unites the group. There is no past association which is beyond his power to change, nor does his status as a businessman amount to a characteristic which is so fundamental to his identity that he ought not to be required to change it.

[79] The Tribunal notes that a comprehensive review of the divergence in approach towards interpretation of the particular social group category has recently been published; see Michelle Foster *The 'Ground with the Least Clarity': a comparative Study of Jurisprudential Developments relating to 'Membership of a Particular Social group'* Legal and Protection Policy Series UNHCR (April 2012). It is not necessary to deal in any detail in this case with the 'social perception' or 'social visibility' tests adopted in other jurisdiction. Suffice to say, the Tribunal remains doubtful as to the correctness of this approach. This case highlights something of the difficulties this approach presents in that there is little or no evidence before the Tribunal to qualify "businessmen" in the Russian Federation as being a socially visible or perceived group. To apply a social perception or social visibility test in these circumstances effectively requires the Tribunal to unilaterally assert a distinct social perception or visibility inside the Russian Federation of a very wide and diverse group of individuals. This potentially enlarges both the group and the Convention ground to a meaningless degree.

Conclusion on claim to refugee status

[80] The appellant's predicament is not grounded in any one of the five Convention reasons. The serious harm faced by the appellant does not therefore fall within the scope of the Refugee Convention. Accordingly, the appellant is not entitled to be recognised as a refugee under section 129 of the Act.

The Convention Against Torture

[81] Section 130(1) of the Act provides that:

> "A person must be recognised as a protected person in New Zealand under the Convention Against Torture if there are substantial grounds for believing that he or she would be in danger of being subjected to torture if deported from New Zealand."

[82] Section 130(5) of the Act provides that torture has the same meaning as in the Convention Against Torture, Article 1(1) of which states that torture is:

> "… any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions."

Assessment of the Claim under Convention Against Torture

[83] There has been no suggestion by the appellant that he is at risk of being tortured by a public official for one of the specified purposes under Article 1 of the Convention Against Torture definition of torture. Accordingly, there are no substantial grounds for believing that the appellant would be subjected to torture as defined under the Act.

The ICCPR

[84] Section 131(1) of the Act provides that:

> "A person must be recognised as a protected person in New Zealand under the Covenant on Civil and Political Rights if there are substantial grounds for believing that he or she would be in danger of being subjected to arbitrary deprivation of life or cruel treatment if deported from New Zealand."

[85] Pursuant to section 131(6) of the Act "cruel treatment" means cruel, inhuman or degrading treatment or punishment but, by virtue of section 131(5):

> "(a) treatment inherent in or incidental to lawful sanctions is not to be treated as arbitrary deprivation of life or cruel treatment, unless the sanctions are imposed in disregard of accepted international standards:
>
> (b) the impact on the person of the inability of a country to provide health or medical care, or health or medical care of a particular type or quality, is not to be treated as arbitrary deprivation of life or cruel treatment."

Assessment of the Claim under the ICCPR

[86] *In AI (South Africa)* [2011] NZIPT 800050-53, at [80]-[85], the Tribunal considered a submission that the reference to being "in danger" means the 'standard' under section 131 equated to the real chance standard under the Refugee Convention. The Tribunal observed:

> "[82] The submission risks going too far. Sight must not be lost of the statutory terms, which provide that there must be substantial grounds for believing that the person "is in danger of...". There is a risk, in attempting to further define what is already a definition, that a test wholly distinct from that intended by Parliament becomes established.
>
> [83] The most that can be said is that "in danger of" raises a low threshold. What must be established is less than the balance of probabilities but something more than mere speculation or a random or remote risk. To that extent, the standard can be seen as analogous to the standard applied in refugee law but it goes no further than that."

This was followed in *AK South Africa* [2012] NZIPT 800174-176, at [79].

[87] It is not necessary on the facts of this case for the Tribunal to further examine this issue. This is because the Tribunal, for the reasons set out in [70]-[75], is satisfied that there are substantial grounds for believing that the appellant faces an arbitrary deprivation of his life at the hands of DD or his associates should he return to Russia.

Internal protection alternative and the protected person jurisdiction

[88] Because the appellant's problems have to date been localised to the X town region, an issue arises in this appeal as to whether the appellant is able to avoid being killed by DD and his associates by moving to elsewhere inside the Russian Federation.

[89] Section 131(2) of the Act provides that:

> "a person must not be recognised as a protected person in New Zealand under the Covenant on Civil and Political Rights if he or she is able to access meaningful domestic protection in his or her country or countries of nationality or former habitual residence."

[90] The phrase “able to access meaningful domestic protection” reflects the jurisprudence of the Authority in relation to what it had come to term ‘the internal protection alternative’, known more usually by its acronym ‘IPA’. The principle derives from the ‘surrogate’ nature of protection granted under the Refugee Convention, by which international protection is extended *only* where the claimant’s home State is unwilling or unable to protect him or her from anticipated persecution; see, generally, discussion in J C Hathaway *The Law of Refugee Status* (Butterworths, Toronto, 1981) at pp133-134. In *Canada (Attorney General) v Ward* [1993] 2 SCR 688, 709 the Supreme Court of Canada held:

> “International refugee law was formulated to serve as a back-up to the protection one expects from the state of which an individual is a national. It was meant to come into play only in situations when that protection is unavailable, and then only in certain situations. The international community intended that persecuted individuals be required to approach their home state for protection before the responsibility of other states becomes engaged. For this reason, James Hathaway refers to the refugee scheme as 'surrogate or substitute protection', activated only upon failure of national protection.”

[91] This principle is well established in the Authority’s jurisprudence; see, for example, *Refugee Appeal No 11/91 Re S* (5 September 1991); *Refugee Appeal No 135/92 Re RS* (18 June 1993) and *Refugee Appeal No 71684/99* (29 October 1999); [2000] INLR 165. It was approved by the Court of Appeal in *Butler v Attorney-General* [1999] NZAR 205 at pp216-217, although the Court’s judgment led to the Authority amending its approach by rejecting ‘reasonableness’ as a relevant criterion; see *Refugee Appeal No 71684/99* (29 October 1999).

[92] The Authority’s contemporary approach to the IPA was fully articulated in *Refugee Appeal No 76044* (11 September 2008). It was held that, in the context of the Refugee Convention, the IPA was a mechanism which served to deny international protection to a person who had already shown that they had a well founded fear of being persecuted in at least a part of the country of origin or former habitual residence: see [117]-[120]. It was held that the IPA inquiry spoke primarily to the availability of protection in the home country and not the risk of harm, (although the two were, to some extent, intertwined considerations). As to the contours of what constituted ‘meaningful’ domestic protection under an IPA analysis, the Authority stated, at [178] :

> “…the Authority affirms the “Hathaway/New Zealand rule”, namely that once a refugee claimant has established a well-founded fear of being persecuted for a Convention reason, recognition of that person as a Convention refugee can only be withheld if that person can genuinely access in his or her home country domestic protection which is meaningful. Such protection is to be understood as requiring:

> (a) That the proposed internal protection alternative is accessible to the individual. This requires that the access be practical, safe and legal.
>
> (b) That in the proposed site of internal protection there is no risk of being persecuted for a Convention reason.
>
> (c) That in the proposed site of internal protection there are no new risks of being persecuted or of being exposed to other forms of serious harm or of *refoulement*.
>
> (d) That in the proposed site of internal protection basic norms of civil, political and socio-economic rights will be provided by the State. In this inquiry reference is to be made to the human rights standards suggested by the Refugee Convention itself."

[93] Section 131(2) puts the Authority's approach in the refugee jurisdiction on a statutory footing in the protected person jurisdiction. The specific adoption of the phraseology used by the Authority means that Parliament can:

(a) be taken to have been aware of the Authority's jurisprudence; and

(b) intended the Authority's approach to extend into the protected person jurisdiction under the 2009 Act so far as context allows.

[94] Other matters point in this direction. First, the statutory reference to meaningful domestic 'protection' locates the inquiry as a protection-related issue, not one of risk. Second, the statutory bifurcation of the IPA inquiry between sections 131(1) and 131(2) is instructive. Section 131(2) begins with:

> "**Despite subsection (1)**, a person must not be recognised as a protected person in New Zealand…"

[95] The words highlighted suggest that the inquiry into whether a viable IPA exists can occur only *after* a view has been formed that the person is in danger of suffering cruel treatment or the arbitrary deprivation of life in at least some part of the home country. In other words, the function of the IPA inquiry in the protected person jurisdiction is the same as in the refugee jurisdiction which was explained in *Refugee Appeal No 76044*. If established on the evidence, it operates to potentially deny protection to a person who has in a sense established a *prima facie* case for protection under the Act.

[96] The statutory expression in section 131(2) of key features of the Authority's approach in the refugee jurisdiction supports the view that the requirements for a viable IPA in the protected person jurisdiction must be considered to be broadly identical to those set out in *Refugee Appeal No 76044.*

[97] At the very least, to be ‘meaningful’ protection the site of the proposed IPA must reduce the danger of being subjected to the arbitrary deprivation of life or cruel treatment as defined under the Act to a remote or speculative level. The claimant must not thereby be exposed to any new risks of serious harm which might precipitate return to the place of former habitual residence. Context does not require these criteria to be modified.

[98] An issue arises, however, as to what extent, if any, the context requires a modification in approach as regards the extent to which socio-economic entitlements should feature in the section 131(2) analysis.

[99] Their inclusion in the IPA in the refugee jurisdiction stems from the Refugee Convention itself which guarantees minimum levels of socio-economic entitlement to those to whom it applies; see generally James C Hathaway *The Rights of Refugees under International Law* (Cambridge University Press, Cambridge, 2005). Furthermore, the Convention draws on a variety of human rights including socio-economic rights to determine what constitutes ‘being persecuted’; see *BG (Fiji)* [2012] NZIPT 800091 at [88]-[120]. The Refugee Convention has been directly incorporated into the 2009 Act and, to the extent an issue is not dealt with by the Act, both refugee and protection officers and the Tribunal are required to act consistently with the Convention: see sections 127(20 (b) and 193(3).

[100] By contrast, only a narrow, if important, band of rights under the ICCPR are engaged by the protected person jurisdiction. Furthermore, unlike the Refugee Convention, the ICCPR is not specifically directed to the situation for persons outside their country of nationality and makes no express provision for their legal status in host countries.

[101] However, for the following reasons, the Tribunal is not persuaded that these factors should lead to any modification in approach.

[102] First, the ICCPR itself recognises that the rights it guarantees, including the narrow band given statutory privilege under section 131 of the 2009 Act, are not hermetically sealed from other human rights as expressed in the UDHR, including socio-economic rights. Article 22 ICCPR, which guarantees the right to join trade unions, is as much an economic right as a civil and political one.

[103] This general inherent relationship is reflected in the preamble to the ICCPR which states :

> "Recognizing that, in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights"

[104] It is further reflected in an integrated approach to human rights protection developed in international jurisprudence in recent decades under which economic social and cultural entitlements are able to be given protection through treaties protecting civil and political rights in certain fact circumstances; see *BG (Fiji)* at [141] .

[105] Second, although the ICCPR is not specifically migration and displacement focussed, the rights it guarantees, with only limited exception, are enjoyed by all individuals in the territory of a States Party including non-nationals; see Kälin and Kunzli (*op cit*) at p490. In *General Comment No 15 The position of aliens under the Covenant* (11 April 1986), where the Human Rights Committee relevantly state:

> "1. Reports from States parties have often failed to take into account that each State party must ensure the rights in the Covenant to "all individuals within its territory and subject to its jurisdiction" (art. 2, para. 1). In general, the rights set forth in the Covenant apply to everyone, irrespective of reciprocity, and irrespective of his or her nationality or statelessness.
>
> 2. Thus, the general rule is that each one of the rights of the Covenant must be guaranteed without discrimination between citizens and aliens. Aliens receive the benefit of the general requirement of non-discrimination in respect of the rights guaranteed in the Covenant, as provided for in article 2 thereof. This guarantee applies to aliens and citizens alike. Exceptionally, some of the rights recognized in the Covenant are expressly applicable only to citizens (art. 25), while article 13 applies only to aliens."

[106] In *General Comment 31* (*op cit*) at paragraph [10] the Human rights Committee emphasise that ICCPR rights are available to asylum seekers, refugees and migrant workers.

[107] Although this does not prohibit all distinctions drawn between citizens and non-citizens, as individuals within the territory of New Zealand as a States Party to the ICCPR, persons seeking protected person status under the Act also benefit from the inherent relationship between ICCPR rights and their economic, social and cultural counterparts.

[108] At the end of the day, section 131(2) refers to accessing domestic protection which is "meaningful". An IPA which exposes the claimant to other forms of serious harm or in which basic or core components of civil, political and socio-economic rights will not be provided by the State can hardly be said to be

meaningful. A person seeking protected persons status in New Zealand should not be denied protection under section 131, if denial would require him or her to live in conditions of squalor and destitution, or otherwise endure extreme hardship inconsistent with basic human dignity, in order to avoid being subjected to the arbitrary deprivation of life or cruel treatment elsewhere in the country of nationality or former habitual residence.

[109] The Tribunal therefore considers there is no compelling reason why the inquiry into the enjoyment of basic socio-economic entitlements in the proposed IPA site should be different from those relevant to the IPA inquiry in the refugee context.

Summary of conclusions on IPA test under protected person jurisdiction

[110] In order for the statutory test under section 131(2) to be satisfied it must be established that:

(a) The proposed site of internal protection is accessible to the individual. This requires that the access be practical, safe and legal;

(b) In the proposed site of internal protection there are no substantial grounds for believing that the appellant be will arbitrarily deprived of life or suffer cruel, inhuman or degrading treatment or punishment;

(c) In the proposed site of internal protection there are no new risks of being exposed to other forms of serious harm or of *refoulement*; and

(d) In the proposed site of internal protection basic civil, political and socio-economic rights will be provided by the State.

Application to the facts

[111] In this case, the appellant's problems have been localised to X town. It is there that he has had conflict with DD and other OCGs. However, the appellant has been told, and the Tribunal has accepted, that false criminal proceedings have been initiated against him by DD at the behest of DD.

[112] Charles Clover "Who runs Russia?" *The Financial Times Magazine* (16 December 2011) reports in relation to the issue of state collusion with organised crime that the authorities in Russia have a database called *Rozysk-*

Magistral, described as a police database tracking the movement of specific individuals across Russia. It is impossible to know if the appellant's name is on this database. However the existence of outstanding charges in Russia against him would mean that, should his identity be checked by any official, there is a strong possibility of details of the new charges emerging. If so, he could expect to be arrested and remanded in custody back to X town.

[113] Furthermore, although often flouted, under Russian law the appellant is required to register his address with the authorities; see United States Department of State *Country Reports on Human Rights Practices 2011: Russia (*25 May 2012*)* at section 2.d. If the appellant were to attempt to register his address or to establish a new business venture in the Russian Federation, he will need to deal with the regulatory agencies including the militia and FSB. This will, even if not immediately, give rise to a risk that details of his whereabouts will be passed onto DD and then to DD.

[114] For these reasons, the Tribunal is not satisfied that there is any viable IPA available to the appellant in Russia. He cannot genuinely access any domestic protection which is meaningful anywhere in the Russian Federation.

Conclusion on Claim under ICCPR

[115] For the above reasons, the Tribunal is satisfied that the appellant is entitled to be recognised as a protected person under section 131(1) of the 2009 Act. Protected person status is granted.

CONCLUSION

[116] For the foregoing reasons, the Tribunal finds that the appellant:

(a) Is not a refugee within the meaning of the Refugee Convention;

(b) Is not a protected person within the meaning of the Convention Against Torture;

(c) Is a protected person within the meaning of the Covenant on Civil and Political Rights.

[117] The appeal is allowed.

"B L Burson"

B L Burson
Chair

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B L Burson
Chair