

## **REFUGEE APPEAL NO. 15/92**

**N.M.K.**

### **AT AUCKLAND**

Before: B O Nicholson (Chairman)  
R P G Haines (Member)  
J M Priestley (Member)

Counsel for the Appellant: Mr N Foot

Representative of NZIS: Ms J Timms

Date of Hearing: 23 March 1992

Date of Decision: 2 December 1992

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### **DECISION OF THE AUTHORITY DELIVERED BY B O NICHOLSON**

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This is an appeal against the decision of the Refugee Status Section of the New Zealand Immigration Service declining the grant of refugee status to the appellant, a Bulgarian national.

The appellant is a 31 year old divorced man who arrived in New Zealand on 18 February 1992. The appellant evidence is that he is a son of a family who were known to be opposed to the communist regime in Bulgaria from 1944 onwards. At the age of 14 when he was expected to join the communist youth group, Komsomol, he refused to do so.

In September 1978 he was required to do his compulsory military service in the army and was posted to an area on the Turkish Border. He claimed that he was ill-treated because of his political attitude and as a result he attempted to desert by crossing the border into Turkey. The Turkish authorities returned him to Bulgaria and on 3 November 1978 he was sentenced to two years in an army prison camp. Conditions in this prison camp were harsh. He was unable to leave the camp during the period of two years. His mother visited him there on two occasions. He said that the inmates were used as the quarry for the purpose of training Alsatian guard dogs. As a result, although some protective clothing was supplied to them for this exercise, he and his fellow inmates suffered injuries from the dogs.

Upon his release he joined a political theatrical group known as Mask which performed satirical work directed against the communist government. The appellant was also a church attender and on 17 April 1981 he was arrested on leaving the church when he was seen in conversation with a Greek girl whom he wished to marry and accompany back to Greece. He was detained by the authorities in prison for seven

days during which time he was beaten and questioned as to why he should be associating with a foreign woman.

On 22 April 1984 the appellant married a Bulgarian woman who was a member of the Communist Party. The appellant explained that he did not mix politics with love.

On 8 December 1984 he was arrested in the course of a student protest in Sofia. He was expelled for one year from the educational institute where he was training. He was also detained by the security police for a period of seven days and beaten and interrogated in the course of that detention.

In 1987 he succeeded in obtaining work in the [deleted] project in Sofia. This involved the packaging of military equipment among other things and to his own surprise he found himself involved in work which was of a militarily sensitive nature.

In 1988 he joined Ilinden, a group devoted to the cause of human rights for the Macedonian minority in Bulgaria and became an organiser for that group.

On 14 November 1989 he was arrested at a demonstration at the Alexander Nevski Square in Sofia. He was detained for 24 hours and suffered a beating.

In January 1990 he applied for a passport and at about this time he lost his job at [deleted] project because he had engaged in unauthorised correspondence on commercial matters with companies in the west and had thereby incurred the displeasure of the project manager, a devout communist.

His passport was issued on 8 February 1990 and on 28 April 1990 he left Bulgaria and proceeded to Finland where he applied for refugee status unsuccessfully. During his stay in Finland of 18 months, he said that he converted to Lutherism. Following the refusal of his refugee application he left Finland on 29 October 1991 and travelled via Poland, Czechoslovakia, Hungary and Romania back to Bulgaria. In the course of this journey he applied for visas to various countries but was refused by all except Argentina. However he was unable to take advantage of the grant of an Argentinian visa because he did not have the US\$4,000 available for the airfare. He said further that he was concerned about the security of his wife and child who he had left behind in Bulgaria when he went to Finland. He had news that his wife was receiving threats and that his child had been injured at nursery school. He felt he had no option but to return to Bulgaria because of his family's problems and his failure to obtain a visa for another suitable country.

Upon his return to Sofia he found that his parents and sister had been harassed in his absence and that his father had died. He said he was attacked by communist sympathisers in the streets of his home city of Chumen as a traitor to his country, because he had applied for refugee status in Finland. He also claimed that an attempt was made by unknown persons to run him down with a motor car.

On 16 November 1991 he was arrested in Sofia on a charge of disrupting social order. He had gone to his wife's house but found that she had enlisted the aid of communist authorities to obtain a divorce from him and that she was refusing him access to their child. The resulting domestic disturbance ended in his arrest. He was detained for 14

days during which time he was beaten and questioned about his activities in Finland. He said that the authorities appeared to be aware of his refugee application there.

Following his release he went back to Chumen where on 9 December 1991 he was involved in organising a protest rally against the communist mayor and council of that city. He was arrested and beaten severely including suffering some broken teeth but was released after two weeks. He also received an injury above one eye which has left a scar.

Thereafter he avoided trouble until 3 February 1992 when he was able to leave Bulgaria and travel to Singapore and then onwards to New Zealand. The appellant said that he is now a member of the Independent Organisation for Defence of Human Rights and that he had belonged to the Social Democrat Party but that he resigned from that in 1990 before he went to Finland.

The appellant originally claimed persecution on both political and religious grounds at the hands of the state authorities but at the hearing of his appeal he abandoned the claim as to religious persecution. He fears further physical violence and detention at the hands of the security police if he returns to Bulgaria.

Article 1A(2) of the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees defines a refugee as 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.

On the issue of credibility we were concerned about the appellant's inconsistent statement to us and to the Refugee Status Section as to when he suffered the injury to his teeth. In his claim to us he said that this occurred on the occasion of this last arrest by the police in December 1991. He is recorded as having stated at his interview with the Refugee Status Section that his front teeth were broken during his interview with the police in 1981 following his arrest in the company of his Greek girlfriend. The appellant explained this discrepancy on the basis that his interview with the Refugee Status Section was carried out under very adverse conditions when he was extremely fatigued after a long flight and lack of sleep for some 48 hours. But alternatively he says that the interviewer has mixed up 1981 with 1991.

The Authority has endeavoured to clear up this discrepancy by having the appellant examined by a dental surgeon appointed by the NZIS and the appellant himself subsequently obtained a further report from a second dental surgeon of his own choice. The resulting reports have been less than satisfactory. The first report by Dr Burton is to the effect that the injuries to the front teeth were caused earlier than December 1991. He has not gone so far as to say that the appellant's condition was more consistent with an injury in 1981 than an injury in 1991. The second report by Dr Ross is to the effect that it is simply not possible to tell from the present condition of the appellant as to whether the injuries occurred in 1981 or 1991. We have not found either report particularly satisfactory. We have reached the conclusion there is a doubt as to when the injury occurred, the benefit of which we must give to the appellant. We proceed on the basis that the injury to his teeth occurred in December 1991, after his return from Finland.

Insofar as the accuracy of the record of his interview with the Refugee Status Section is concerned we accept that he was dealt with by the New Zealand Immigration Service in a most unsatisfactory manner upon making his application for refugee status at Auckland Airport. He was detained in police cells at the Otahuhu police station and his interview was carried out there in the presence of his counsel who had no effective opportunity to obtain proper instructions from him beforehand. The appellant says that he was confused and frightened by the treatment he was receiving and at the time of his interview, because of the long flight from Singapore and his lodgement in a police cell he had had little or no sleep in the preceding 48 hours. He says that if there are any discrepancies between his statement to the Refugee Status Section and to this Authority, they are accounted for by those circumstances.

The appellant was one of two Bulgarians who were treated in this fashion at the same time when they arrived together at Auckland Airport and in the case of the appellant's companion which has already been determined by this Authority on appeal, we expressed our concern at the treatment meted out to these men. No attempt was made by the NZIS to explain the reasons for this treatment either in this hearing or in the hearing of the appeal of the appellant's companion. In this respect we refer to our decision in *Refugee Appeal No. 20/92 Re TP* (23 July 1992). Given the adverse circumstances under which that interview was conducted we find it difficult to treat any inconsistencies between the appellant's account to us and to the Refugee Status Section as being of any significance.

In general the appellant's account appeared to us to be coherent and credible and we accept it as generally accurate. We find the appellant has a genuine fear and that that fear is of detention and physical ill-treatment at the hands of the Bulgarian authorities, matters which we consider of sufficient gravity to amount to persecution. We further find that the persecution he fears is on the grounds of his political opinion, being openly opposed to the communist system of government in Bulgaria.

The appellant's claim is that while there has been some progress towards a democratic style of government in Bulgaria in recent years, at the level of the bureaucracy and the courts communists still have great influence. Moreover, although the Union of Democratic Forces Party (UDF) had a small majority in the Grand National Assembly of Bulgaria at the time of hearing, many of that party are ex-communists. Political tolerance is minimal in his view. He claims that the changes which have occurred are merely cosmetic and that for ordinary citizens there has been no improvement in the area of human rights.

We have already found in recent decisions in *Re TP (supra)* and in *Refugee Appeal No. 81/92 Re VA* (6 July 1992) that on present information available to this Authority it is not sufficiently clear that persons in the position of this appellant would not now suffer political persecution if they are returned to Bulgaria. Our reasons for that view are set out in those decisions and do not require repetition here. We would add however that as recently as 30 October 1992 the New Zealand "Herald" reported that the UDF have lost a confidence vote in the Assembly and the government has resigned. The report adds to our uncertainty as to the stability of democratic style government in Bulgaria. In view of this appellant's political activity against the communist regime and in view of our findings about the present situation in Bulgaria

we find that the appellant faces a real change of persecution for political reasons if he is returned to Bulgaria at present.

The Refugee Status Section in its decision suggested that the appellant after his rejection by the Finnish authorities re-availed himself of the protection of Bulgaria by returning there. We do not consider that there is a justifiable conclusion. We refer to Hathaway's *Law of Refugee Status* 1991 at pp 197-199 where he deals with the question of cessation of refugee status. Article 1(C) of the Convention relevantly states:

“This Convention will cease to apply to any person falling under the terms of Section A if:

1. He has voluntarily re-availed himself of the protection of the country of his nationality or; ....
4. He has voluntarily re-established himself in the country which he left or outside which he remained owing to fear of persecution.”

At page 199 Hathaway has this to say:

“It is not appropriate however to construe this cessation clause effectively to penalise refugees who return to “test the waters” in their state of origin. If refugees are to be encouraged to attempt repatriation, generally viewed as the most desirable solution to refugeehood, they must have some assurance that they can resume refugee status in the event that the actual conditions at home prove unsafe. Before a finding of cessation based on voluntary re-establishment is made therefore, both the facts underlying the original successful claim to refugee status and post re-establishment factors should be taken into account. If the totality of the evidence demonstrates a forward looking genuine risk of persecution this cessation clause is not a bar to continued recognition as a refugee.”

It is appreciated of course that the appellant had not been accorded the status of a refugee in Finland before he returned to Bulgaria but the principle enunciated by Hathaway in respect of the cessation clause nevertheless holds good for somebody in the appellant's situation.

We find that the appellant's act in returning to Bulgaria as he himself claims was forced upon him by his circumstances rather than by any genuine wish to re-establish himself in Bulgaria and that one of his principal reasons for returning was his concern for his wife and child. Having suffered rejection in that area and having been treated as he was by the authorities subsequent to that rejection by being interrogated and beaten on two occasions, as well as suffering an assault in the streets of Chumen for political reasons, his action in leaving Bulgaria and applying for refugee status afresh in this country appears to us to be justified. Certainly it is clear that once he had lost access to his daughter he knew he was no longer prepared to put up with the sort of treatment that he had received in the past from the authorities. The treatment which he did suffer during his short return to Bulgaria reinforces the validity of his belief that he is likely to suffer persecution if he is returned to Bulgaria from New Zealand.

For the reasons given we find that the appellant has a well-founded fear of persecution for a Convention reason.

The appeal is allowed. Refugee status is granted.

“B O Nicholson”

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[Chairman]