REFUGEE APPEAL NO. 81/91

V. A.

AT AUCKLAND

Before: B O Nicholson (Chairman)
R P G Haines (Member)
A Rozdilsky (Member)

Counsel for the Appellant: Mr J Sullivan

Representative of NZIS: Ms L Baird

Date of Hearing: 14 February 1992

Date of Decision: 6 July 1992

DECISION

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

He arrived in New Zealand on 29 March 1990. He has held work permits during his stay in New Zealand. His wife and son arrived in New Zealand on 5 January 1991 and they have held visitor permits.

The appellant is 30 years of age. He was born in Bulgaria. His father had a history of resistance to the Communist regime's policy of land collectivisation in the years following the Second World War. He believes his father would have been sent to a concentration camp had it not been for the influence of relatives who were active members of the Communist Party.

The appellant himself did not experience any problems until he began secondary education when he found he was not allowed to attend what he regarded as a good school, even though his examination marks entitled him to enter that school. He was instead assigned to an inferior school. A majority of children in his class joined a Communist youth group but he was not able to, he believes, because of his father's history. Furthermore he would frequently be required to attend sessions involving lectures in Communist Party doctrine and this applied, he told us, to only two other pupils in his class.

After completing secondary school he was required to complete military service as a driver. He said that during this time he was required to write essays outlining his political opinions, an activity which only he was required to perform. Upon leaving the Army, he was often arrested by the police, falsely accused of crimes and beaten in

order to obtain “confessions”. Each time he succeeded in proving his innocence. He believes these arrests arose out of his political views. He applied to join a technical school to do a four year course but was declined and instead had to join a school of lesser quality where he did a transport course. Thereafter he had great difficulty in gaining employment despite the fact that the government usually arranged work for graduates of this course. Again he believes the reason for his being declined entry to his desired school and his subsequent employment problems all relate to his past. He also told us that he found that he was continually losing jobs because of his outspokenness in relation to political matters.

The appellant’s wife had no problems with the authorities until she married her husband. One month after her marriage in 1985 she was dismissed from her job with the Bulgarian National Bank although she was allowed to apply for another job. She was told she had lost her job because she had married a man with an unreliable background. The appellant and his family next experienced problems in 1989 when he was called to the local police station and questioned about whether he had joined any opposition groups. Apparently thereafter the family began to receive anonymous telephone calls warning them not to get involved in anti-government activities and telling them to be careful what they said in front of their friends. From November 1989 these telephone calls included threats on the life of the appellant and his family.

In September of 1989 the Bulgarian government liberalised the passport laws and the appellant applied for and received a passport after paying a bribe. His wife later obtained a passport also. In order to obtain those passports there was a rigorous checking process which required both police clearances and clearance from their employers.

In December of 1989 the appellant along with many others took part in a political demonstration outside parliament in which he carried a placard with the slogan Don’t believe Communist propaganda’. He explained he was grabbed by two men in plain clothes who took him to a police station where he was questioned and beaten for some five hours. He was then released, after signing a document stating that he had not been beaten and after being warned that he would be imprisoned if he caused trouble. Thereafter he applied for an exit visa for both himself and his wife but at that time he could only get one for himself after paying a bribe. After the appellant had left Bulgaria for New Zealand his wife was advised by the police to divorce her husband and told that if she voted for the Communist Party she would receive help. She chose, however, to vote for the new United Democratic Front, a new opposition party and soon afterwards her son was declined admission to kindergarten, she believed because of the past history of the family. She obtained an exit visa in December of 1989.

The appellant and his family claim it is difficult to tell what would happen to them if they returned to Bulgaria. Although there has been a change of government, in that the United Democratic Front is now the elected government, the appellant does not accept that at grass roots level things have changed much. He believes that the Communist Party infra- structure still exists and is still able to harass citizens and that informers still operate in great numbers. The appellant fears that if he returns to Bulgaria he will suffer further discrimination of the kind he has described and that he is likely to suffer further illegal detention and bodily injury at the hands of the authorities.

Under Article 1A(2) of the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, it must be shown that owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, the appellant 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.

We have no difficulty in accepting the credibility of the appellant. He impressed us as a careful and accurate witness. He called a character witness in the form of his present employer who spoke highly of his integrity and his work capacity. The Refugee Status Section in its assessment of his case also has found no reason to doubt the credibility of the appellant and his wife. We are satisfied therefore that the difficulties, discrimination and detention that he has described in fact occurred. On the basis of that finding we are satisfied that the appellant has a genuine fear.

As to whether or not the matters the appellant has referred to are of sufficient gravity to constitute persecution we consider that the matters relating to his education and employment are matters of discrimination which on their own would not be sufficient to constitute persecution in the sense that the term is used in the Convention. He was able to obtain an education and he was able to obtain qualifications to enable him to earn a livelihood. As for employment it appears he had no difficulty in obtaining a job but only had difficulty in retaining it because of his outspokenness on political matters. However, we consider that the matter of his arrest, detention and beating by the police in the years following his Army service and again in December 1989 gave a further dimension of seriousness to his situation. We have decided, after careful consideration, that the cumulative effect of the discrimination he suffered in education and employment, the warnings and harassment that have been received by him and his family and his detention and beating by the police amount to persecution within the meaning of that term used in the Convention.

We now consider whether or not the fear of persecution is well-founded i.e. is there a real chance that persecution will occur? As a result of the decision in *Chan v Minister of Immigration & Ethnic Affairs* (1989) 160 C.L.R. 379, a decision of the High Court of Australia which has been followed by this Authority in a number of cases, we are satisfied that the appropriate time at which the assessment of the well-foundedness of an appellant's fear must be made is the date of hearing the case. Therefore, we are obliged to look at the up-to-date situation in Bulgaria.

We have been referred to a considerable body of information about the present situation in Bulgaria. It is quite clear that the former Communist Party, which has been renamed the Bulgarian Socialist Party, has been defeated at comparatively recent elections by the United Democratic Front. The appellant says, first, that most of the members of that new party are former Communists, secondly, that in any event at grass roots level the old system is still operating, communists still hold positions of authority in the bureaucracy and informers are still operating and being paid for providing information. Without going into the detail of the information with which we have been presented, it appears clear to us that there is considerable conflict as to what the position truly is in Bulgaria. There are, among the documents, statements confirming the appellant's belief that the informer network is still operating to a large extent, although the article in question suggests that the information is being stored

and not being put to use. The fact, however, that the information system is still operating has sinister connotations in our view. It is clear from the information before us that persecution of minority groups is continuing even under the new government, principally against the Turks and gypsies.

The overall political picture in Bulgaria suggests some improvement in human rights matters but we consider that the situation lacks clarity and permanence. We are unable to say that the change is material or substantial, nor are we able to say that there is no real chance that the appellant will be persecuted if he returns to Bulgaria. In this context it is appropriate to refer again to the decision in *Chan v Minister of Immigration and Ethnic Affairs (supra)* on the question of changed circumstances.

In the opinion of Mason CJ, if the fear of persecution was well-founded at the date of the asylum-seeker's departure from the country of origin, there would need to be "compelling evidence" establishing that the grounds for such fear had dissipated. Evidence of a "material change" in the state of affairs in the country is required.

Mason CJ at 391 stated:

"The Full Court placed insufficient weight upon the circumstances as they existed at the time of departure which grounded Mr Chan's fear of persecution. **In the absence of compelling evidence to the contrary** the Full Court should not have inferred that the grounds for such fear had dissipated. While the question remains one for determination at the time of the application for refugee status, in the absence of facts indicating **a material change** in the state of affairs in the country of nationality, an applicant should not be compelled to provide justification for his continuing to possess a fear which he has established was well-founded at the time when he left the country of his nationality. This is especially the case when the appellant cannot, any more than a Court can, be expected to be acquainted with all the changes in political circumstances which may have occurred since his departure." [emphasis added]. Dawson J. at 399 and 400, addressing the question of changed circumstances, was of the view that those changes are required to be "substantial". Toohey J. at 408 spoke of "relevant" changes.

Gaudron J. at 414-415 dealt with changed circumstances at length and because we find her judgment persuasive, we set out the relevant passages in full:

"It is one thing to say that an applicant must have a well-founded fear of being persecuted at the time his application is considered. It is quite another thing to say, as was said by the Full Court of the Federal Court, that, in a case involving changed circumstances, the question whether such fear is well-founded is to be answered by reference to the situation prevailing when the application is considered. Of course, and I do not understand this to be excluded by the Federal Court's formulation, a political situation can only be properly evaluated in the context of its supporting political structures. Those structures are not necessarily revealed by a consideration of current political activities and policies. And where, as here, the claim is to an extent based on political structures, something more is required than a mere evaluation of current political activities and policies. But even allowing for these considerations, I do not think it correct to say that the question whether a fear is well-founded is to be

answered by reference to the situation at the time of the determination and in isolation from the past experiences of the applicant.

The definition of "refugee" looks to the mental and emotional state of the applicant as well as to the objective facts. It is a commonplace, encapsulated in the circumstances which are insufficient to engender fear may also be insufficient to allay a fear grounded in past experience. Although the definition requires that there be "well-founded fear" at the time of determination, it would be to ignore the nature of fear and to ignore ordinary human experience to evaluate a fear as well-founded or otherwise without due regard being had to the applicant's own past experiences.

If an applicant relies on his past experiences it is, in my view, incumbent on a decision-maker to evaluate whether those experiences produced a well-founded fear of being persecuted. If they did, then a continuing fear ought to be accepted as well-founded unless it is at least possible to say that the fear of a reasonable person in the position of the claimant would be allayed by knowledge of subsequent changes in the country of nationality. To require more of an applicant for refugee status would, I think, be at odds with the humanitarian purpose of the Convention and at odds with generally accepted views as to its application to persons who have suffered persecution: see the United Nations Economic and Social Council, *Report of the Ad Hoc Committee on Statelessness and Related Problems*, (1950), United Nations Document E/1618, p.39; the *Handbook*, p.13; Grahl-Madsen, pp.176-177; *Kashani v Immigration and Naturalization Service* (1977) 547 F. 2d 376 at p 379 (7th Cir.); *Cardoza-Fonseca v Immigration and Naturalization Service* (1985) 767 F 2d 1448 at p.14534 (9th Cir.) affd (1987) 480 US 421."

We propose to adopt and apply what has been said by Mason CJ and Gaudron J.

Applying these tests, we find that there is an absence of compelling evidence from which it can be inferred that the grounds for the appellant's fear have dissipated. Given the appellant's past experiences and the inconclusive country of origin information submitted to us, it is not possible to say that the fear of a reasonable person in the position of the appellant would be allayed by knowledge of the subsequent "changes" that have occurred in Bulgaria. We accordingly conclude that his fear is well-founded.

Attention is drawn to the fact that the Refugee Convention itself contains a cessation clause in Article 1C, particularly paragraph (5). It provides that the Convention shall cease to apply to any person falling under the terms of Article 1A if that person:

"... can no longer, because the circumstances in connection with which he has been recognised as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality;
Provided that this paragraph shall not apply to a refugee falling under s A(1) of this Article who is able to invoke compelling reasons arising out of previous persecution for refusing to avail himself of the protection of that country of nationality."

New Zealand's refugee procedures do not at present contain a mechanism for the review of refugee status once granted. The absence of such provision cannot,

however, present a valid reason for declining refugee status where the human rights situation in a country of origin is in a state of flux.

Our view is that although we find that the appellant is a refugee within the terms of the Refugee Convention, it may later become appropriate to reconsider his status in the light of further developments in the human rights area in Bulgaria, having regard to the provisions of Article 1C(5). On this topic, we observe that our decision in *Refugee Appeal No. 26/91 Re A.P.G.* (13 February 1992) used inappropriate language when we stated:

"It may well be appropriate to consider revocation of the appellant's refugee status at a later date, if conditions continue to improve in Chile."
There is no provision in the Convention for "revocation" of refugee status, however.

A direct reference to Article 1C(5) would have better expressed our view in that case and a comment on the lack of a mechanism to give effect to Article 1C(5) would have been in order.

We are aware that government is presently reviewing the procedures for determination of refugee status, generally. We think it opportune for this question of review in terms of Article 1C(5) to be specifically addressed as part of that review.

For the reasons given, we find that the appellant is a refugee within the meaning of Article 1A(2) of the Refugee Convention. The appeal is allowed.

"B O Nicholson"

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[Chairman]