REFUGEE STATUS APPEALS AUTHORITY
NEW ZEALAND

REFUGEE APPEAL NO 75132

AT WELLINGTON

Before:	C M Treadwell (Chairperson) G Pearson (Member)
Counsel for the Appellant:	J Petris
Appearing for the NZIS:	No Appearance
Date of Hearing:	15 and 16 July 2004
Date of Decision:	16 August 2004

DECISION

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[1] This is an appeal against a decision of a refugee status officer of the Refugee Status Branch (RSB) of the New Zealand Immigration Service (NZIS) declining the grant of refugee status to the appellant, a national of Vietnam.

INTRODUCTION

[2] The appellant is a married man, aged 27 years. His wife and child are living in Vietnam.

[3] The appellant was a crewman on a South Korean fishing boat. He jumped ship in late 2002, while the vessel was berthed at a New Zealand port. He applied for refugee status some months later, on 10 March 2003 and was interviewed by the Refugee Status Branch on 4 September of that year. His application was declined on 31 March 2004.

[4] The account which follows is a summary of the appellant's evidence given at the appeal hearing. It is assessed later.

THE APPELLANT'S CASE

[5] According to the appellant, he was born into a Catholic family. His father is a retired farmer and his brothers work in various labouring capacities. All members of the appellant's family continue to live in their home village of X, in north Vietnam.

[6] As Catholics, the appellant and his family have suffered some discrimination at the hands of the Vietnamese authorities. While they were not prevented from worshipping at an existing Catholic church, the Catholic community was refused permission to build a new church. In his household register (a copy of which he submits in evidence), the appellant chose to put his religion as "none", even though the authorities are aware that his family in Catholic, simply to avoid any harassment he might receive from officialdom if he were to put "Catholic".

[7] The appellant completed high school in about 1993, though in his last few years of school he also learned the trade of clock and watch repair, establishing a small business in Y town. He borrowed some 20 million *dong* from the bank to finance the enterprise.

[8] Following his schooling, the appellant made a barely adequate living from his business. In 1997, he married and the couple had their first child the following year.

[9] In 1999, the appellant went to Ho Chi Minh city for nine months, to undertake a maritime training course. While he did so, his wife was able to support herself through a small business of her own. The following year, the appellant responded to an advertisement by the ABC Frozen Products Company, offering training in marine mechanics and employment on South Korean fishing boats at a salary of US$400 to US$500 per month. The ABC Frozen Products Company was a private company, acting as the local recruiting agent for foreign fishing companies.

[10] The appellant was required to pay an application fee of four million *dong* (approximately US$266) to the ABC Frozen Products Company, as well as the fees for his passport and work visa. He undertook the marine mechanics course and was issued a certificate to that effect in February 2001.

[11] Following completion of his course, the appellant was offered a place on a South Korean fishing boat, (hereafter "*MV No 1*"), operating in Korean and Japanese waters. The contract was for a maximum of two years. The appellant was required to pay a deposit of 60 million *dong* (approximately US$4,000), which he borrowed from the bank at an interest rate of 1.5%pm. The ABC Frozen Products Company arranged all necessary paperwork, including his passport and exit permit.

[12] The appellant was flown to Korea, where he joined *MV No 1*, on which he served for five months. At that point, the fishing season ended and he was flown back to Vietnam.

[13] The appellant says that he was ill-treated on *MV No 1*, being forced to work long hours - sometimes two or three days in a row. He could not speak Korean and the officers of the ship (all Koreans) could speak no Vietnamese. He was not given work as a mechanic but found himself to be an ordinary deck-hand, sorting and packing fish. The only mechanical work he was given was the task of watching and oiling the engine occasionally. He and the other crew were regularly kicked and beaten. On one occasion, the appellant was struck on the head with an iron bar by a supervisor, Z, causing an injury.

[14] During his employment, the appellant's salary was US$210 per month - the rate for casual crewmen. It was paid to his family in Vietnam, at the rate of US$150, allowing for various deductions.

[15] On returning to Vietnam, the appellant spoke with an employee of the ABC Frozen Products Company. He complained about his non-employment as a mechanic and the mistreatment he had received and was told that this would be looked into. In fact, he never heard further about the matter.

[16] In spite of his difficulties aboard *MV No 1*, the appellant undertook a second contract on another fishing vessel, *MV No 2*. He was motivated to do so by his financial difficulties and by the fact that the ABC Frozen Products Company refused to refund his deposit until the two years of his contract had elapsed - notwithstanding that he had ceased working on *MV No 1* after only five months.

[17] This time, however, the appellant avoided the ABC Frozen Products Company and negotiated directly with the larger DEF Corporation, in Hanoi, for whom the ABC Frozen Products Company was affiliated. His file was transferred to the DEF Corporation and, on 7 March 2002, he signed a contract to work on *MV No 2* for two years. The appellant put in evidence his copy of the contract.

[18] The contract discloses, in summary, that the appellant was to be employed as a crewman for two years from October 2002, at a monthly salary of US$210. Provision was made in the contract for overtime pay, bonuses and allowances, illness (including medical insurance) and priority-ranking for further work if his contract did not run the full course.

[19] As to the appellant's obligations, he was required to pay various minor sums, as well as a deposit of US$250 and a 10% service charge on his salary. As to the deposit, the contract offset this against the amount already paid to the ABC Frozen Products Company in 1999. The appellant also agreed that he would not "stay behind illegally" and that a fine would be imposed if he did so.

[20] While the appellant was waiting for his employment to begin, he changed his mind about the terms. He did not consider US$210 was adequate and so he went to the ABC Frozen Products Company (which acted, in effect, as the local agent for the larger DEF Corporation) and pointed out that he was a mechanic and should be paid accordingly. They promised him that he would be employed as a mechanic and would receive the mechanic's rate of US$400 to US$500 per month. He would be required to pay the standard deposit of US$4,000 which, of course, they were already holding.

[21] DEF Corporation duly arranged the appellant's necessary papers, including his Vietnamese exit permit and New Zealand work visa. In early November 2002, the appellant and two other Vietnamese men were flown to New Zealand, to join *MV No 2*, in part replacement for nine crew who had jumped ship the previous week. *MV No 2* was a joint venture vessel, though the appellant does not know the name of the New Zealand joint venture partner.

[22] Of the 30 to 40 crew on *MV No 2*, some 18 were Vietnamese, though the Captain and officers were all Korean. Again, the language barrier prevented verbal communication.

[23] *MV No 2* remained in port for five days, while it was prepared for a sea trial. The appellant was given ordinary crewman's duties, cleaning and painting the ship. Again, he and other crew members were treated harshly by the Korean officers, often being punched and kicked in passing. On one occasion, the appellant was sitting on some steps, having a cigarette, when an officer wanted to pass. The officer punched the appellant in the mouth in order to make him move. On another occasion, he was accidentally struck on the head by an iron bar while another crew member was being assaulted.

[24] The sea trial lasted a week. Other difficulties encountered by the appellant were a cold cabin, no warm boots or gloves for working in the freezer when packing fish, long hours (up to 18 hours at a time) and insufficient time for breaks. On one occasion, when he sorted fish into the wrong group, he was made to hold a fish in his mouth while he worked, to remind him to concentrate.

[25] On returning to a New Zealand port, the appellant was mistreated further. The beatings and kicking continued. The most serious incident, however, occurred when he and another Vietnamese crewman were required to remove rust from the superstructure, using angle grinders. The appellant put his down, in order to remove a shard of rust from his eye. His supervisor became angry at the appellant's apparent indolence and pushed the angle grinder against the appellant's shoulder, causing it to rip through both the appellant's clothing and his skin. The appellant showed the Authority a 5cm elliptical scar on his shoulder which he says is the legacy of that incident.

[26] The appellant was not allowed to go to the ship's nurse for treatment to his shoulder. Instead, his supervisor fetched some cream, which he applied.

[27] By this stage, *MV No* 2 had been back in port for some five days. The appellant decided that he could not stay on the ship any longer. At about 9pm, he made his way to the wharf by swinging along one of the hawsers, to avoid the attention of the man in the wheelhouse. On the wharf, he escaped through the gate and walked through the night.

[28] The appellant knew that there was a nearby city because some of the Korean officers had taken him there on an outing a few days earlier. He walked through the night to the city, where a Vietnamese person gave him directions to a

Vietnamese restaurant. There, the Vietnamese owners gave him shelter and work, until he moved to Wellington in January 2003.

[29] The appellant has spoken with his wife by telephone regularly since he jumped ship. She has informed him that the bank has demanded repayment of all overdue funds, totalling one million *dong*, plus interest, the loans for which matured on 27 September 2003. The appellant submits in evidence two demands from the bank which his wife has forwarded to him.

[30] The appellant also submits two documents from the local police in his village. Both are addressed to the appellant's wife. One is a summons, asking the appellant's wife to attend at the police station on a certain date in late 2003"

> "… regarding husband [the appellant] who was working on a labour export contract and escaped as notified."

[31] The second document is a notice, issued on the day the appellant's wife was to attend at the police station, recording her as his "sponsor in the labour export work contract" and concluding that she is forbidden to leave her place of residence.

[32] According to the appellant, his wife's "place of residence" means her village, rather than her dwelling. She is also prohibited from going out after 11pm. These restrictions have caused much pressure on her and the appellant states that she has moved to live with her parents. His wife, a friend and the appellant's parents have all been questioned about his whereabouts and have been told that he must report to them if he returns.

[33] According to the appellant, the bank has now foreclosed on his house and it has been sold.

[34] The appellant fears that if he returns to Vietnam he will be imprisoned for breaching the terms of his exit permit and labour contract.

[35] Counsel made oral submissions to supplement the written submissions he had earlier tendered to the Refugee Status Branch at first instance, all of which have been considered and are taken into account herein.

THE ISSUES

[36] The Inclusion Clause in Article 1A(2) of the Refugee Convention relevantly provides that a refugee is a person who:-

> "... owing to a 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."

[37] In terms of *Refugee Appeal No. 70074/96* (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 APPELLANT'S CASE

[38] Before turning to the issues raised by the Convention, it is necessary to first address the question of the appellant's credibility.

[39] It is accepted that the appellant is a Vietnamese fishing boat crewman who jumped ship from *MV No 2*, that he has defaulted on the loans from his bank and that the Vietnamese police summonsed his wife in terms of the summons and notice which he has put in evidence.

[40] The appellant's claim of mistreatment on *MV No 2* - allegedly the cause of his jumping ship - is false. We are satisfied that he has invented this part of his account in order to bolster a claim to refugee status. His evidence on this part of his claim was replete with inconsistencies and improbabilities. We take into account:

Claimed physical mistreatment on *MV No 2*

[41] The appellant's account of being struck with the angle grinder is significantly different to the account he gave to the Refugee Status Branch. On appeal, he claims to have stopped work in order to remove a fleck of rust from his eye, causing his supervisor to mistakenly think he was lazy. To the Refugee Status Branch, however, he claimed that he had been struck with the grinder because he tried to intervene when another Vietnamese crewman was being beaten. Faced with these irreconcilable accounts, the appellant prevaricated for some time, before asserting that the other worker had attempted to intervene when he (the appellant) was being beaten. Quite apart from the insincere and glib delivery of the appellant's explanation, it does not account for his clear evidence to the Refugee Status Branch that it had been his own attempted intervention in the beating of the other man that had caused the Korean officer to turn on him in fury and press the grinder to his shoulder. Nor could the appellant offer a satisfactory explanation for his failure to correct the interview report when it was sent to him, in spite of his concession that a Vietnamese friend read it to him.

[42] The same alleged incident gave rise to a further inconsistency. The appellant told the Authority that, after the injury had occurred, one of his friends went and fetched the ship's nurse who came and bandaged the wound, giving the appellant medication. To the Refugee Status Branch, however, the appellant gave a detailed account of the supervisor himself going to the nurse and getting bandages and other items and then personally attending to the dressing of the appellant's wound, in order to prevent the nurse seeing the injury and reporting it to the captain. Again, when this was pointed out to him by the Authority, the appellant changed his evidence, claiming that he did not in fact know at the time who was treating his shoulder and so presumed it was the nurse. That third version of events is inherently implausible, quite apart from the fact that it does not explain why the appellant should have given either of the earlier versions.

[43] The Refugee Status Branch's interview report records that the appellant claimed to have been struck on the head with an iron bar on *MV No 2*, when his supervisor, Z, was dissatisfied with his work (see p129 of the file). When reminded by the Authority that he was recorded as having said this, the appellant agreed that it had happened on *MV No 2*, during his first week on board, before the sea trials. When it was then pointed out to him that the interview report was in apparent error and that the refugee status officer's notes of interview in fact recorded the appellant as claiming that the assault by Z had been on his first

voyage, on *MV No 1* (two years earlier), the appellant changed his evidence and agreed that it had happened on his first trip, not the second. As to why he should make such an error, the appellant then stated, for the first time, that he had also been hit on the head with an iron bar on the second trip, but on that second occasion it had been an accident - occurring when one of the Korean officers was attacking another crewman. He had, he claimed, thought that he was being asked about the accidental blow to his head on the second trip. That explanation is rejected. Even if there had been such an accidental blow on the second trip (and we are satisfied that it was no more than a spontaneous invention by the appellant in an attempt to redress the inconsistency), the appellant had already confirmed the essential details of the incident, including the identity of Z and the deliberate nature of the blow, as happening on the second trip. It was clear that he was not referring to any accidental blow.

[44] There were numerous other inconsistencies in relation to the appellant's claimed mistreatment on board *MV No 2*. He told the Authority, for example, that he did not tell the Refugee Status Branch of the incident in which he was punched in the mouth because he felt it was not important. Contrasted against his evidence to the Refugee Status Branch of other mistreatment, such as the Korean crew being "not friendly" towards him, the omission to mention being punched in the mouth is surprising.

[45] The appellant also told the Authority that, on *MV No 2*, he was often hit with objects, including brooms, raw fish and fishing gaffs. When reminded that he had earlier in the appeal hearing stated that he had never been hit with any object other than the (accidental) iron bar and the grinder, the appellant could not explain the inconsistency.

Escape from the ship

[46] The appellant also gave inconsistent evidence as to his decision to escape from the ship. He told the Authority that he discussed it in advance with his two Vietnamese friends, who told him "not to be stupid" because he would lose his deposit with the DEF Corporation. They counselled him against it. When the Authority pointed out to the appellant that he had told the Refugee Status Branch that the three men had discussed jumping ship together but that, come the hour, he was unable to find them, the appellant denied having said this. He could not

explain, however, why the interview notes kept by the refugee status officer clearly record him saying it.

[47] The account of the manner of the appellant's escape was also inconsistent. Initially, he gave the Authority an elaborate explanation of having sought permission from the man in the wheelhouse to leave the ship in order to make a telephone call home from the public telephone at the post office. Having been given permission, he then left the ship at about 9pm by the gangplank in the orthodox manner and passed through the wharf gate into the night. It was only when it was pointed out to him that he had given the Refugee Status Branch a wholly different account - of having left the ship surreptitiously at 1am (avoiding the gangplank), getting soaking wet in the process and having to take off all of his clothes to wring them dry - that the appellant changed his evidence and stated that he had in fact avoided the man on guard by swinging himself ashore on one of the ship's hawsers, getting his trouser legs wet as he did so. When asked to explain his earlier evidence of getting permission to make a telephone call and leaving the ship legitimately, the appellant could give no sensible explanation.

[48] According to the appellant, he walked from the wharf into the city of X. He was asked by the Authority a number of times to describe the journey and, in particular, whether he recalled if there had been any unusual features near to the wharf. The appellant could remember none, though the point was explored with him at length. It was only when the Authority then pointed out to him that the road from the wharf in fact soon leads into a 1.9km vehicular tunnel, that the appellant remembered this and claimed that he had walked through it. It is surprising that, if he negotiated it on foot, he should fail to recall such a tunnel until reminded of it - raising the strong suspicion that, in fact, he made the journey in an organised fashion by vehicle, not on foot at all.

[49] Taking the above cumulatively, we are satisfied that the appellant's claim to have been physically mistreated on board *MV No 2*, causing him to jump ship in the manner he has described, is untrue.

Catholicism

[50] It is also necessary to record our conclusions on the appellant's claim to be Catholic. We do not accept that his evidence in this regard can be relied upon either. We reach that view for the following reasons:

[51] The appellant stated in his refugee application form that his religion was "Buddist" (sic). Asked to explain this, he told the Authority that he had not known that his friend who, on his instructions, was completing the form for him in English, had written this. The appellant told us that he had told him to write "Christian". We reject that as untrue. Quite apart from the improbability inherent in the translator making such a mistake it is, in fact, the second explanation given by the appellant for this inconsistency. To the Refugee Status Branch, he claimed that he had deliberately stated that he was a Buddhist because (at p143 of the file):

> "… if I had declared that I am a Catholic, the Vietnamese government would have made very difficult for me to go abroad."

[52] The appellant was unable to explain why he had given two, irreconcilable explanations, though admitting that he had done so.

[53] Further, the Authority discussed Catholicism generally with the appellant. Even at the most superficial level, he displayed little or no understanding of it. Beyond identifying Mary as "the mother-God", he could name no other prophets or Gods worshipped in the Catholic faith. Mary, he advised, had no children. He could not name any holy or spiritual books read by Catholics. Asked to talk about the aspects of the Catholic faith which were important to him, the appellant could articulate only that he believed it would make him a "better man" and that "mother" will help him in his life if he does good things.

[54] Although claiming to have attended two church services at a Catholic church in Wellington (he could not name the church), he agreed that the services had been in English, which he could not understand. In spite of this, he conceded that, in over one and a half years, he has made no enquiry as to whether there is a service in Vietnamese in Wellington.

[55] Taken cumulatively, these concerns lead us to conclude that, whatever his family's historical background might have been, the appellant is not a practising Catholic and has no significant interest in the Catholic church.

[56] Notwithstanding these findings, it is necessary to address the issues raised by the Convention against the balance of the appellant's account.

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

Persecution

[57] Persecution is appropriately defined as the sustained or systemic violation of basic or core human rights, such as to be demonstrative of a failure of state protection; see *Refugee Appeal No 2039/93* (12 February 1996). Without derogating from the requirement that such basic or core human rights be breached, it can also be said that persecution comprises serious harm plus the absence of state protection. In this regard, see *Refugee Appeal No 71427* (16 August 2000) at [43] – [67].

[58] Counsel invited the Authority to conclude that Vietnam's human rights record is such that it should be presumed that the appellant will be persecuted if he returns there. He relied upon the proposition of Professor J C Hathaway in *The Law of Refugee Status* (Butterworths, Toronto, 1991) at p80, that:

> "The appropriate starting point for an analysis of objective conditions within the refugee claimant's state of origin is an examination of that country's general human rights record. Because the insufficiency of state protection is the *sine qua non* for recognition as a refugee, persons who flee countries that are known to commit or acquiesce in persecutory behavior should benefit from a rebuttable presumption that they have a genuine need for protection."

[59] With respect to counsel, the cited passage is not in fact support for the proposition that a country's poor human rights record creates a rebuttable presumption that any particular claimant faces a real chance of being persecuted. The passage must be read in context. The concern expressed is one of state protection. Professor Hathaway proposes only a rebuttable presumption that a state with a poor human rights record will fail to provide state protection. That is a far cry from a rebuttable presumption of a claimant being persecuted, in that it ignores entirely the serious harm element inherent in the concept of "being persecuted".

[60] Further, even if there is a rebuttable presumption that a state well-known for abusing human rights will fail to provide state protection, as proposed by Professor

Hathaway, for the reasons which follow it is not necessary for us to decide the point. We record, however, that it would be rebutted here on the facts, in any event.

Country information

[61] Mr Petris submitted that Vietnam has a poor human rights record. He referred the Authority to the United States Department of State *Country Reports on Human Rights Practices*, published annually, as a source of general information.

[62] We accept that Vietnam does have a poor record of respecting human rights. The latest Department of State *Country Reports on Human Rights Practices: Vietnam* (April 2004), summarises its concerns as follows:

> "The [Vietnamese] Government's human rights record remained poor, and it continued to commit serious abuses. The Government continued to deny the right of citizens to change their government. Police sometimes beat suspects during arrests, detention, and interrogation. Several sources also reported that security forces detained, beat, and were responsible for the disappearances of persons during the year. Incidents of arbitrary detention of citizens, including detention for peaceful expression of political and religious views, continued…. [S]ome persons reportedly died as a result of abuse in custody…. The judiciary was not independent, and the Government denied some citizens the right to fair and expeditious trials. The Government continued to hold a number of political prisoners. The Government restricted citizens' privacy rights, although the trend toward reduced government interference in the daily lives of most citizens continued. The Government significantly restricted freedom of speech, freedom of the press, freedom of assembly, and freedom of association."

[63] The thread running though the report is one of continued repression by the state of political dissent and, to a lesser extent, religious practices. Against this background, the appellant claims to be at risk of being persecuted for having breached the conditions of his exit permit and his employment contract.

Breach of the conditions of the exit permit

[64] As was put to the appellant, the penalties for breaching the terms of an exit permit are contained in Article 89(1) of the Vietnamese Penal Code, which provides:

> "The punishment for any person who illegally exits from [Vietnam} or who illegally stays abroad shall be a warning, reeducation without detention for a period of up to 1 year, or imprisonment for [a term of] 3 months to 2 years…."

[65] The penalties set out in Article 89(1) were not disputed by counsel, though he invited the Authority to accept that local or village authorities in Vietnam sometimes act with impunity, creating a potential for capricious and arbitrary punishment. We will return to that submission shortly.

[66] Counsel submitted that the imposition by the Vietnamese state of exit permits (including penalties for breaches thereof) is a breach of Article 13(2) of the 1948 *Universal Declaration of Human Rights*, which provides:

> " ARTICLE 13
>
> …
>
> (2) Everyone has the right to leave any country, including his own, and to return to his country."

[67] As the Authority pointed out to counsel, however, the right to leave a country is not an absolute one. Article 12 of the 1966 *International Covenant on Civil and Political Rights* provides for restrictions which may be legitimately imposed:

> "ARTICLE 12
>
> …
>
> 2. Everyone shall be free to leave any country, including his own.
>
> 3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (*ordre public*), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant. "

[68] Two points emerge. First, the appellant's circumstances must be seen in context. He was not denied permission to leave his country. Nor is he at risk of being punished for having done so. What he is at risk of is punishment for failing to return to Vietnam within the time by which he notified the state that he would return. To the extent that Article 13(2) of the *Universal Declaration of Human Rights* and Article 12(2) of the *International Covenant on Civil and Political Rights* are inconsistent with the exit permit requirement, any breach arising from the imposition of conditions on departure or staying abroad is not a core one and falls demonstrably short of being persecutory.

[69] Second, in the absence of any evidence of discriminatory intent or even that it is wielded in an arbitrary or capricious way, the Vietnamese exit permit requirement reasonably falls within the limitation set out in Article 12(3) of the *International Covenant on Civil and Political Rights* as being provided by law, both

to protect national security and public order. As an example of the legitimacy of such restrictions generally, the Department of State records that Vietnam is concerned to address a significant trade in international people-trafficking (particularly of women and children) into prostitution, forced marriages and servitude in other countries. It is also concerned with the exploitation of its nationals in overseas labour bondage contracts. Serious efforts are being made, according to the Department of State, to address these concerns:

> "Hundreds of traffickers have been convicted and imprisoned, most notably in one high-profile case in 2002 in which over 150 persons were indicted for prostitution and migrant smuggling. That particular case involved ex-ministerial and law enforcement agents. The Government worked with international NGOs to supplement law enforcement measures and cooperated with other national governments to prevent trafficking. It also cooperated closely with other countries within the framework of INTERPOL and its Asian counterpart."

[70] Against such a background, the practice of officially regulating the departure of nationals from any particular country, including Vietnam, is a permissible departure from the general right to leave a country.

[71] We turn now to counsel's submission that some local authorities in Vietnam have sometimes been known to act arbitrarily. That is accepted, but excesses by some officials out of many, on some occasions out of many, do not give rise to a general assumption in all cases. No evidence is produced by the appellant of the likely treatment he would receive on return to his village (save for the summonses, which suggest, if anything, the observance of regular legal practices). It is speculative to assume that he would not be treated in accordance with the law, as set out at [64] above. As pointed out by the High Court of Australia in *Minister for Immigration and Ethnic Affairs v Guo* (1997) 144 ALR 567, 577 (HCA), conjecture or surmise has no part to play in determining whether a fear is well-founded. A fear is "well-founded" when there is a real substantial basis for it. But no fear can be well-founded for the purpose of the Convention unless the evidence indicates a real ground for believing that the applicant for refugee status is at risk of being persecuted. A fear of being persecuted is not well-founded if it is merely assumed or if it is mere speculation.

[72] As to the statutory penalties, it is accepted that disproportionately harsh punishment can sometimes justify a conclusion that the statutory provision exists, or is used, for persecutory reasons. That is not the case here. While the maximum prescribed penalty of two years imprisonment is severe, the existence of

a graduated scale suggests that the Vietnamese state recognises varying degrees of gravity of offence and imposes penalties accordingly.

[73] There is nothing aggravating about the appellant's breach of his exit permit, except his bare failure to return in time. If any conclusion can be drawn, it is that the appellant would be penalised at the lower end of the scale. We bear in mind:

(a) it would be his first offence;

(b) the appellant has no history of anti-regime conduct;

(c) the appellant has had no previous significant difficulties with the authorities in any respect;

(d) the steps taken by the authorities to date have not been capricious or arbitrary. Instead, the service of summonses suggests efforts to apply the law;

(e) there has been no serious mistreatment of the appellant's wife, despite her sponsorship of the appellant; and

(f) The nature of the police enquiries to the appellant's wife do not suggest that he is regarded as anti-regime.

[74] In summary, the evidence does not suggest that the appellant would be punished at the higher end of the scale. Further, the penalties at the lower end of the spectrum are not persecutory. They do not constitute serious harm.

[75] We conclude that the appellant does not face a real chance of being persecuted for jumping ship and breaching the conditions of his exit permit.

[76] For the sake of completeness, we also record that the evidence does not suggest that such penalties as might be imposed for breaching the terms of an exit permit are for any Convention reason. In the absence of any evidence that the imposition of such penalties would be for reason of, for example, the appellants' actual or imputed political opinion, the consequences of breaching laws of

universal application relating to illegal migration fall outside the Refugee Convention; see *Refugee Appeal No 3/91* (20 October 1992) at pp 35-87.

Breach of employment contract

[77] Counsel submits that it is in fact the state which seeks to punish the appellant for breaching his employment contract. He submits that the DEF Corporation is a state-owned enterprise, and that the Vietnamese state is therefore a party to any penalty imposed on the appellant for breaching the contract, thus giving rise to persecution.

[78] No aspect of this assertion is tenable. First, any penalty under the employment contract is not persecutory. Whether the other party is a private company or the state, it will have whatever contractual rights might follow, including the financial penalties which appear to have been imposed such as loss of the deposit and a fine. There is no suggestion by the appellant that his breach of his employment contract will, of itself, give rise to any harm to him other than the financial penalties which flow as contractual remedies. Those financial penalties do not constitute serious harm. They are not persecutory.

[79] Second, the state-owned nature of the labour company does not imply a lack of state protection. Mr Petris submitted that the enforcement of fines under labour contracts is often undertaken by the police, suggesting state complicity in harming the appellant. We agree, however, with the view expressed in *Refugee Appeal No 2384/95, 2385/95 and 2386/95* (5 June 1997), in which the same contention was made in similar circumstances, that such fines under employment contracts are often enforced by the Vietnamese police because the police and local officials perform various administrative functions in relation to civil dispute resolution at the village level in Vietnam. In that case, the Authority held:

> "However, under the communist system there is no real separation of the state from most areas of the economy so that the fact that the police or local officials might ultimately be employed to administer fines provided for under contracts with state-owned corporations is not in itself remarkable."

[80] See also *Refugee Appeal No 70655* (21 May 1998), which approved and adopted the view in *Refugee Appeal No 2384/95, 2385/95 and 2386/95* (5 June 1997) that such penalties are not for any Convention reason. The short point is that states - even communist ones with poor human rights records - engage in

commercial activities. The fact that such purely commercial activities might occur against a generalised political backdrop does not *per se* imbue the actors with political opinions.

[81] The other party to whom the appellant remains in debt is the Vietnamese bank from which he has been borrowing money since he began his watch-repair business over a decade ago. It will be recalled that the "Notice of Mature Loan" and "Notice of Overdue Loan" were both issued by the bank in the normal course, following the maturing of the appellant's loans.

[82] As between the appellant and the bank, such sum as remains due on those loans after the appellant's partial repayment and the mortgagee sale of his house, is a straightforward matter of contractual obligation, far removed from the concept of persecution.

CONCLUSION

[83] In summary:

(a) Such penalty as the appellant might face for having breached the terms of his exit permit are not persecutory and would be in the nature of prosecution, not for any Convention reason; and

(b) Such penalty as the appellant might face for breaching his employment contract will be in the nature of financial contractual remedies, not being persecutory and not being for any Convention reason.

[84] The appellant does not face a real chance of being persecuted for any Convention reason. It follows that he is not a refugee within the meaning of Article 1A(2) of the Convention. Refugee status is declined. The appeal is dismissed.

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C M Treadwell
Member