

REFUGEE STATUS APPEALS
AUTHORITY
NEW ZEALAND

REFUGEE APPEAL NO 76477

AT WELLINGTON

Before: A N Molloy (Member)

Counsel for the Appellant: J Petris

Appearing for the Department of Labour: No Appearance

Date of Hearing: 24 & 25 March 2010

Date of Decision: 15 April 2010

DECISION

[1] This is an appeal against the decision of a refugee status officer of the Refugee Status Branch (RSB) of the Department of Labour (DOL), declining the grant of refugee status to the appellant, a national of Vietnam.

[2] The appellant claims that he is an officer in the Vietnamese armed forces. He says that he is at risk of being seriously harmed by the military authorities because he was identified as a potential whistle-blower in connection with the corrupt practices of superior officers. As a result, he left his military post without authorisation. He believes that if he is returned to Vietnam he will be arbitrarily tried and convicted of offences of which he is innocent.

[3] The appeal turns upon whether the appellant's claim is well-founded. This is assessed following the summary of his claim that appears below.

THE APPELLANT'S CASE

[4] The appellant was born and raised in District Z. He lived there with his parents and siblings until he graduated from high school around the turn of this century. A relative of the appellant's father (the uncle) is a senior officer in the Vietnamese army and the appellant decided to enlist in the army in around 2002, after applying unsuccessfully to enrol at university.

[5] The appellant's first year in the military was spent first undergoing, and later helping to administer, basic training. He then undertook a three year course in mechanical engineering from which he graduated in late 2006. Upon graduating, he was promoted to the rank of first-lieutenant.

[6] As part of his course, the appellant studied the principles of Communism as practised in Vietnam. The appellant enthusiastically embraced the ethos of equality and service for the public good that was taught. He impressed his superior officers with his willing attitude and his active involvement in social and Communist Party activities and was provisionally invited to join the Communist Party at around the time he graduated. His membership was confirmed, after a trial period lasting approximately a year, in late 2007. Party membership afforded additional privileges such as voting rights and the right to participate in decision-making and policy-setting within the Party.

[7] Around the beginning of 2008, the appellant noticed that some senior officers were involved in a scam in which wood was gathered from public forests and sold for private profit. This was contrary to the idealistic perception which the appellant had developed while studying. He could not understand how those who should be upholding the basic Party principles could be responsible for such flagrant violations.

[8] The appellant's difficulties began to surface after he raised an objection to this practice at Party meetings. Higher ranking officers warned him to keep his objections to himself. They began a campaign to undermine him in order to preserve their own interests and to remove the threat that he posed to their profitable scheme.

[9] For example, on one occasion he was ordered to collect firewood from a particular forest. The order was communicated orally and without any written confirmation, which was out of the ordinary. En route the weather became so bad that the vehicle the appellant was driving was unable to traverse the roads and he

was forced to turn around. On his return journey to military headquarters, the appellant was unexpectedly stopped by another military vehicle which conducted what the appellant now believes was a premeditated search. His truck was fortuitously empty for reasons already outlined, but if he had collected wood as ordered, the appellant believes he would have been accused of the very practice to which he had raised objection. In the absence of a written order justifying his possession of the firewood, he would have been unable to corroborate his claim that he was acting under orders.

[10] The appellant confided his concerns to his father who contacted the appellant's uncle. The uncle confirmed that the appellant was perceived to be a corrupt influence within the Party and said that he was being investigated. A short time later the appellant was transferred to another military base approximately five kilometres away. He was denied military privileges such as leave, and his movements were severely truncated. The Communist Party also withdrew many of the appellant's privileges. He was no longer able to attend meetings and his voting rights were suspended.

[11] He believes that all of these measures were put in place to discredit him in retaliation for his principled stance over the corrupt practices to which he had drawn attention.

[12] In the meantime the appellant's father took steps to help the appellant to leave Vietnam. He obtained a Vietnamese passport for the appellant and set in train a process of applying for permits enabling the appellant to study in New Zealand. A raft of false documents were provided to Immigration New Zealand over a period of time, indicating that the appellant wished to study English in New Zealand, and confirming that he had been employed in various roles within the hospitality industry in Vietnam.

[13] In September 2008, the appellant's brother approached the uncle as part of a plan to assist the appellant to escape. He told the uncle that the appellant's father had been involved in a car accident, and asked the uncle to approve special leave for the appellant to visit his father in hospital. The uncle complied, which enabled the appellant to leave the military base. He left Vietnam by air within days, using the passport and airline tickets provided by his father.

[14] The appellant entered New Zealand and obtained a permit for study purposes in late September 2008. He remained in New Zealand unlawfully after his permit expired. Eventually the appellant confided in another member of the

Vietnamese community in New Zealand, who raised the possibility of applying for refugee status. The appellant lodged his application for refugee status in May 2009 and provided a detailed, hand-written statement in support of his application. After interviewing the appellant in late September 2009, a refugee status officer of the DOL issued a decision declining his application for refugee status in late December 2009. It is from that decision that the appellant appeals.

Material received

[15] Prior to the appeal hearing, the Authority received written submissions from Mr Petris within the body of letters dated 15 March and 12 April 2010. Mr Petris also made oral submissions at the end of the hearing. The appellant provided the Authority with access to various original documents during the appeal hearing, including his military identification card and his passport. These were returned to the appellant during the hearing.

THE ISSUES

[16] The Inclusion Clause in 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."

[17] 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

THE APPELLANT IS A CREDIBLE WITNESS

[18] In order to address the issues identified, it is first necessary to determine

whether the appellant is a credible witness. The Authority finds that he is.

Evidence before the RSB

[19] As a precursor the Authority makes observations about two credibility findings made by the refugee status officer who declined the appellant's application for refugee status.

[20] The first relates to an inference drawn by the refugee status officer that the term "professional soldier", that appears on the appellant's military identification card, contradicts his claim to be a commissioned officer. The appellant disputes that conclusion.

[21] When the Authority invited the interpreter who assisted at the appeal hearing to view the military card, she did not believe that it bore any reference to a rank. The inference drawn by the refugee status officer is therefore at least open to question.

[22] More importantly, the refugee status officer was led to believe by the interpreter who assisted at the interview with the appellant that the word for a particular military rank should be translated from Vietnamese as "sergeant". This term was used by the appellant to describe a person who had given him an order. The refugee status officer, understandably, found it to be incongruous that a first lieutenant could be given an order by a sergeant.

[23] The same term was translated by the interpreter at the appeal hearing as "colonel", which fundamentally alters the nature of the evidence in question.

[24] These points are not made to criticise the decision previously made, but simply to highlight the importance of context and interpretation, and also to contrast the information available to the Authority when compared with the evidence upon which the refugee status officer relied.

General observations about credibility

[25] The appellant's account was, in broad terms, consistent with the accounts he had previously given in his written statement and during the interview he attended with the RSB. He spoke spontaneously and with a convincing level of detail about various aspects of his account, including the study he undertook and the nature of his duties as a military officer. He did not appear to embellish his testimony and was frank when asked questions he could not answer.

[26] Importantly the Authority finds it plausible that the appellant was idealistic and perhaps somewhat naïve in his perception of the political environment into which he was thrust after graduating from his studies.

[27] While there were aspects of the appellant's account about which the Authority has reservations, none were so lacking in credibility that the Authority could find them to be implausible. The Authority is unable to say with certainty that the appellant's claim is untruthful and he is afforded the benefit of any doubt in accordance with the principle articulated in *Refugee Appeal No 523/92 Re RS* (17 March 1995). His claim is accepted as credible.

[28] The Authority accordingly finds that the appellant is a national of Vietnam. He is an officer of the armed forces who abandoned his post without seeking or obtaining permission when senior officers and members of the Communist Party began to target him as a result of his perhaps naïve but principled objection to their self-serving practices.

[29] It is upon this basis that the Authority will assess the appellant's appeal.

OBJECTIVELY, ON THE FACTS AS FOUND, IS THERE A REAL CHANCE OF THE APPELLANT BEING PERSECUTED IF RETURNED TO VIETNAM?

[30] For the purposes of refugee determination, "being persecuted" has been described 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) and *Refugee Appeal No 74665/03* [2005] NZAR 60; [2005] INLR 68 at [36] to [125]. Put another way, it has been expressed as comprising serious harm plus the failure of state protection; *Refugee Appeal No 71427* (17 August 2000).

[31] The Authority has consistently adopted this the decision in *Chan v Minister of Immigration and Ethnic Affairs* (1989) 169 CLR 379 (HCA), which held that a fear of being persecuted will be well-founded when there is a real, as opposed to a remote or speculative, chance of such persecution occurring. This entails an objective assessment as to whether there is a real or substantial basis for the anticipation of being persecuted. Mere speculation will not suffice.

[32] The Authority now turns to consider the country information against which the risk to this appellant is to be assessed.

General situation in Vietnam

[33] Vietnam is a single party state in which the Communist Party (CPV) exercises effective control of all aspects of the civil and political life of its citizens. Its human rights record is poor. According to Transparency International: *Transparency International Country Study Report: Vietnam 2006*:

“Vietnam is a one party state, the CPV is the ultimate authority in all domains. No opposition parties exist or are allowed. The CPV does not recognise other political parties, and attempts to establish them are harshly suppressed. Currently, the Party has over three million members. While this is low as a percentage of the total population, it has always been this way, reflecting the official view that CPV members should be the country’s super elite.

The Party wields significant influence over the executive branch and the electoral process. At present, 90% of national assembly deputies are members of the Party.
...”

[34] Various issues of concern are identified by Human Rights Watch in the following terms:

“... the country remains a one party state that denies its citizens the freedoms of speech, press, assembly and religion, as well as the right to form independent trade unions and political parties. Domestic legislation effectively criminalises peaceful dissent and unsanctioned religious activities, resulting in people imprisoned under harsh conditions for peaceful expression of their political and religious views.” Human Rights Watch 2009 *Universal Periodic Review Submission: Vietnam* (May 8 2009) [at page 1].

[35] According to the International Federation for Human Rights (IFHR) the government’s domestic attitude embraced the “relentless and systematic repression of human rights defenders and all dissenting voices”; *Observatory for the Protection of Human Rights Defenders Annual Report 2009 – Vietnam* (18 June 2009).

[36] In addition the criminal justice system is described in damning terms by Human Rights Watch. It states that police torture is “prevalent”, describes Vietnamese courts as “lacking independence and impartiality”, and states that Vietnamese law authorises arbitrary “administrative detention” without trial. Prison conditions are described as “harsh and even life-threatening” and, according to the HRW report, prisoners can be placed in solitary confinement during pre-trial detention, in dark, cramped and insanitary cells. Convicted prisoners must perform hard labour, often under hazardous conditions: *HRW World Report 2010: Vietnam* (January 2010)

[37] Freedom House *Countries at the Crossroads 2006 Country Report Vietnam* (The Freedom House report) reiterates that the judiciary is not independent, and states that judges are appointed by the Ministry of Justice, largely for their political loyalty and membership of the Communist Party. It states that police often make

arrests without court-issued warrants and that, once indicted, individuals are presumed guilty under the constitution. Prosecutors are not independent from political interference and trials often last no more than a few hours. The Freedom House Report also observes that Article 2 of the Constitution places the CPV, and hence many of its members, above the law (at p8).

[38] In such a climate it is unsurprising that, according to at least one comprehensive report from Finland, state corruption is widespread throughout the country; Centre for Community Support Development Studies (CODES) (Finland) *Anti-corruption in Vietnam: the situation after two years of implementation of the law* (November 2008).

[39] This report (the CODES report) refers to efforts made by the Communist Party, the National Assembly and the government of Vietnam to address this problem over the past 10 years. It concludes that while the anti-corruption law promulgated in 1998 provides an important basis upon which corruption could be fought, its implementation had stalled since 2007 due to weak implementation mechanisms, insufficient punishments, corrupt practices remaining endemic in the institutions of state governance and the lack of power among the general public to obtain open accountability from central government (p40). The CODES report refers to a perception that “Perpetrators shield and protect one another, so they can impede detection and control” (p41), and observes that:

“People have shown scepticism and concern, saying for instance that: ‘Party and the state have been criticising corruption in society while people in positions of power have obviously been acting corruptly’: ..” (p7)

[40] Country information also indicates that the official response to those who attempt to investigate and expose corrupt practice can be arbitrary. Human Rights Watch refers to the case of Nguyen Khac Toan, who attempted to form an anti-corruption association. He was arrested in 2002 and sentenced to 12 years’ imprisonment; HRW *Not yet a workers’ paradise*, (May 2009).

[41] *Reporters Without Borders* also refers to the trial of two journalists who reported on a scandal implicating top officials within the transport ministry. The trial is described as intending to frighten an entire profession and to silence dissent about corrupt practices: *Reporters Without Borders 2008*, “Trial of two journalists will be test for press freedom and the fight against corruption” (10 October 2008)

[42] The appellant’s dilemma is exacerbated by the fact that he has deserted his military post. There is no definitive country information relating to the consequences of desertion for an officer. According to the Home Office Country

Report Country Information & Policy Unit Immigration & Nationality Directorate
Home Office, *United Kingdom Country Report Vietnam*, October 2003:

“The position of deserters from Vietnamese military forces is unclear: NGOs such as Amnesty International refer to Article 256 of the 1986 Criminal Code, arguing that desertion carries the death penalty. The Article, however, refers to active service in a combat situation, and our experts report that desertion in Vietnamese society does not carry a negative stigma, with the individual’s reasons for desertion being taken into account. Most deserters are sent back to their units for punishment at the commander’s discretion, with no specific penalty for desertion.”

Summary

[43] The appellant’s dilemma can be simply stated.

[44] He is an officer within the military who has antagonised individuals of higher rank and with more influence than him. His enemies have a direct self-interest in seeking to undermine and punish him. The information which is available about Vietnam indicates that corruption is widespread and supports his claim that he may be subjected to an arbitrary and unjust process.

[45] The Authority finds that there is a substantive, rather than a remote or speculative, basis for finding that the appellant is at risk of being arbitrarily tried and convicted for offences of which he is either innocent, or for which there are mitigating circumstances which will not be taken into account. The consequences of such a conviction are that he would lose his career and his future prospects, and more directly and of more immediacy, that he would be wrongly subjected to imprisonment in conditions which are harsh and unreasonable.

[46] His position is worsened by the fact that he has deserted his military post because of the invidious position in which he found himself after being subjected to attempts by senior officers within the military and within the Communist Party to falsely label him as corrupt. Their intention was to undermine his efforts to bring their corrupt practices to light.

[47] While there is no clear information as to the penalty for an act of desertion, it is reasonable to infer that the appellant will be perceived to have committed an offence which, in military terms, is potentially serious. It is possible that his act of desertion will come to light upon his return to Vietnam and that he could be apprehended at the airport upon arrival. In the circumstances there is every chance that the corrupt individuals within the armed forces would take steps to ensure that the appellant is denied due process and that the consequences of his conviction are harsh.

[48] In all the circumstances, the Authority finds that the consequences are tantamount to serious harm. Rather than being protected by the state, the serious harm will be imposed by agents of the state. The reason why the appellant will face this predicament is connected to the Convention ground of political opinion.

CONCLUSION

[49] The first principal issue identified for determination is answered in the affirmative. The Convention ground is political opinion.

[50] For the above reasons, the Authority finds that the appellant is a refugee within the meaning of Article 1A(2) of the Refugee Convention. Refugee status granted. The appeal is allowed.

"A N Molloy"
A N Molloy
Member