REFUGEE STATUS APPEALS AUTHORITY
NEW ZEALAND

REFUGEE APPEAL NO. 76339

AT AUCKLAND

Before:	RPG Haines QC
Representative for the Appellant:	J McBride
Date of Hearing:	2, 3, 4 & 24 September 2009
Date of Further Submissions:	1 December 2009; 2 & 4 March 2010; 13 April 2010
Date of Decision:	23 April 2010

DECISION OF THE AUTHORITY

INTRODUCTION

[1] The appellant is a citizen of Romania who arrived in New Zealand in November 2008. At about the same time a court in Romania sentenced him to a term of imprisonment of approximately four years for his part in a fraudulent transaction in which a VAT refund of some substance was procured by a company in which he had an interest. The refugee claim is based on the appellant's contention that he is innocent and that the conviction and sentence are part of a persecutory process set in motion by a member or members of a city administration who profited from corruption and the peddling of political influence. It is said that the criminal proceedings were retribution for his having turned his back on this group and as a means to shut him up because he "knew too much". His post-conviction denunciation

of the group to anti-corruption agencies is submitted to be the expression of a political opinion. The further claim is that while in prison he will be at real risk of serious harm at the hands of these same individuals.

[Paragraph [2] withheld]

CORRUPTION IN ROMANIA

[3] As presented by the appellant, the events in Romania giving rise to his refugee claim took place against the background of pervasive corruption in Romania at both high and low levels. For that reason it might be helpful to briefly sketch the level of corruption in Romania. On this issue, the appellant tendered a substantial volume of evidence both at first instance and on appeal. The Authority sees little point in addressing this evidence at length or even attempting a summary. The evidence is far too voluminous and no point would be served by the exercise. It is accepted by the Authority that corruption is endemic at both low and high levels. The real issue in this case is whether, on return to Romania the appellant is at real risk of serious harm for a Convention reason. Corruption is relevant only to the degree that it informs this assessment. It is not necessary to address it as a discrete subject on its own. The appellant also claimed that the corrupt group he is in fear of engaged in "high level" corruption but the evidence establishes only "low level" corruption. It is doubtful, however, whether, on the facts, much turns on this distinction.

[4] There is little doubt that corruption is pervasive in Romania. So much so that the article captioned "Corruption in Romania: In Denial" *The Economist* (July 5, 2008) at 59-60 notes that in the Transparency International Corruption Perception Index, Romania has the highest perceived corruption level within the EU. The question posed in the article is, "How bad is corruption in Romania?". In answering this question reference is made to a report by Willem de Pauw, a Belgian prosecutor who

is also said to be a veteran EU adviser on the matter. In his report, "Expert Report on the Fight Against Corruption/Cooperation and Verification Mechanism" (Bucharest, 12-15 November 2007) a damning indictment of the Romanian parliament, judiciary and law enforcement process is given. The last paragraph of the report reads:

> If the Romanian anti-corruption effort keeps evaporating at the present pace, in an estimated six months time Romania will be back where it was in 2003.

Other comments by Mr de Pauw include the following at [9.3]:

> Whether these restitutions can be legally justified or not, is, in fact, irrelevant, since in both scenario's the fact remains that the Romanian judiciary and/or legal system appears to be unable to function properly when it comes to applying the rule of law against high level corruption.
>
> Indeed, more than five years after the start of Romania's anti-corruption drive, the Romanian public is still waiting or one single case of high level corruption to reach a verdict in first instance.
>
> It should be no surprise then, that Romania remains dangling at the bottom of every corruption deception index, consistently showing the worst results in the EU.

[5] Largely for these reasons, when Romania entered the EU on 1 January 2007, a *Co-operation and Verification Mechanism* (CVM) was set up to help Romania remedy shortcomings in the areas of judicial reform and the fight against corruption and to monitor progress in these areas through periodical reports. The most recent of such reports made available to the Authority is the *Report from the Commission to the European Parliament and the Council on Progress in Romania Under the Co-operation and Verification Mechanism* (Brussels, 22 July 2009 COM (2009) 401 final) together with the *Supporting Document Accompanying the Report from the Commission to the European Parliament and the Council on Progress in Romania Under the Co-operation and Verification Mechanism - Romania: Technical Update* (Brussels, 22 July 2009 SEC (2009) 1073). These documents cover the period July 2008 to July 2009 and address both high level and low level corruption. The former is addressed in some detail in the *Technical Update* from page 10 in the context of

investigations concerning one former Prime Minister, one Minister, one former Minister and current Member of Parliament, two other Members of Parliament, two former Members of Parliament, eight Mayors and two Presidents of county councils. Low level corruption at local level, including local government, is addressed in the same *Technical Update* at p 13.

[6] In relation to high level corruption it is said that the National Anticorruption Directorate (DNA) has maintained a good track record of investigations and has sent a significant number of high level cases to court. However, the handling of high level corruption trials by the courts, and in particular the celerity of court procedures remains problematic. In relation to low level corruption, ie within local government, it is said that after a year of implementation of the National Anti-Corruption Strategy for Vulnerable Sectors and Local Public Administration 2008-10, there has been some progress on individual measures. However, a complete assessment of progress was not possible. Detailed and verifiable outputs were not available and actual tangible results were said to be difficult to measure.

[7] As stated earlier, the pervasiveness and complexity of corruption in Romania together with the uncertain state of the reform process make it difficult to offer a definitive assessment of the problem. What can be said is that there are many variables and a blanket determination cannot be made that every transaction in Romania between an individual and a public official is tainted by corruption or that every proceeding before its courts is likewise tainted. Everything is context specific. The context, as advanced by the appellant, is addressed next. That context is local government and low level corruption.

THE APPELLANT'S CASE

[*Paragraphs [8] to [60] withheld*]

THE ISSUES

[61] The Inclusion Clause in Article 1A(2) of the Refugee Convention relevantly 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 is unable or, owing to such fear, is unwilling to return to it."

[62] In terms of *Refugee Appeal No. 70074/96 Re ELLM* (17 September 1996); [1998] NZAR 252 the principal issues are:

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

2. If the answer is Yes, is there a Convention reason for that risk of being persecuted?

ASSESSMENT OF THE APPELLANT'S CASE

Roadmap

[63] In summary, the Authority finds:

(a) The appellant is not a credible witness.

(b) There is no well-founded risk of harm should the appellant return to Romania.

(c) The political opinion ground has no application to the facts of the case. Likewise, none of the other four Convention grounds have application. The appellant faces legitimate punishment, not persecution in Romania.

[Paragraphs [64] to [84] withheld]

THE POLITICAL OPINION ISSUE

Interpreting the political opinion ground

[85] The Authority's findings on credibility and risk mean that the appellant's refugee claim must fail both because it has not been "established" in terms of s 129P(1) of the Immigration Act 1987 and because there is no well-founded risk of him being harmed in any serious way on his return to Romania. It is therefore not strictly necessary to address the question whether, had the fear of being persecuted been well-founded, a nexus could be found to one of the five Convention grounds. However, in deference to the exhaustive submissions which have been made on behalf of the appellant the Authority's view of the facts and of the law follow.

[86] When interpreting the political opinion ground of the Refugee Convention there is a risk of both over-inclusion and under-inclusion. Over-inclusion because, given an unjustifiably broad interpretation, virtually any issue can be categorised as "political". This would collapse the five enumerated grounds in Article 1A(2) (race, religion, nationality, membership of a political social group or political opinion) into one. Too narrow a construction, on the other hand, would exclude claims which on accepted principles of treaty interpretation should be recognised as falling within the political opinion ground.

[87] So while the Authority accepts that a broad characterisation of the political

opinion ground is important, all-encompassing definitions are an unhelpful distraction and are best avoided. An example of such a definition is to be found in Goodwin-Gill, *The Refugee in International Law* (Clarendon Press, Oxford, 1983) at 31 and which has appeared without modification in each of the two subsequent editions of the text:

> In the 1951 Convention, "political opinion" should be understood in the broad sense, to incorporate, within substantive limitations now developing generally in the field of human rights, any opinion on any matter in which the machinery of State, government, and policy may be engaged.

[88] The Authority's view is that this formulation is too broad to be of any meaningful assistance. The better view is that what is a political opinion is not a matter of definition but depends on the context of the case. See most recently *Refugee Appeal No. 76044* [2008] NZAR 719 at [82] - [90]. While in that case the context was the need to give a gender-sensitive interpretation to "political opinion", the principle that the meaning of political opinion is context driven is not confined to gender cases:

> **[87]** ... in the refugee determination process it must be remembered that the construction of gender identity occurs in specific geographical, historical, political and socio-cultural contexts. It is these contexts which provide the answer to the question whether the risk of being persecuted is for reason of political opinion, not an abstract notion of how "political opinion" is to be defined.

This approach is cited with approval in the UNHCR, *Guidance Note on Refugee Claims Relating to Victims of Organized Gangs* (March 2010) at [46]. While the Goodwin-Gill definition is also cited it is not developed and the discussion in this paper of the political opinion ground emphasises the critical importance of context.

[89] An earlier illustration of the Authority's approach is *Refugee Appeal No. 2507/95 Re JEAH* (22 April 1996) where a Peruvian businessman claimed to be at risk of being persecuted by the Sendero Luminoso on the grounds of political opinion because he had failed to continue meeting their extortion demands. In its discussion of the question whether the political opinion ground had application to the facts, the

Authority at p 14 stated:

> On the evidence given by the appellant, no political opinion whatever was involved in his failure to pay the "taxes" to the Sendero Luminoso. Having complied with their extortion demands for some period of time, he simply ran out of money when his business failed.
>
> As counsel recognised, if this case is to succeed at all, it must be on the second limb, namely, an imputed political opinion. The evidence establishes that the money was extorted from the appellant (and others) in order to fund the Sendero Luminoso in their attempt to overthrow the state. But the mere existence of a generalised "political" motive underlying the terrorists' forced extraction of money from businessmen is inadequate to establish the proposition that the appellant fears persecution on account of his actual or imputed political opinion ... The evidence does **not** in any way even suggest that the terrorists erroneously *believed* that the appellant's refusal to pay the "taxes" was politically based. In short, there is simply no evidence that a political opinion has been imputed by the Sendero Luminoso to the appellant. The fallacy of the appellant's argument is that the mere existence of a generalised political motive underlying the terrorists' demand for money does not lead to the conclusion that the terrorists perceive his refusal to pay to be political.

[90] The Authority then went on at pp 15-18 of the decision to discuss why, in the context of four other decisions of the Authority, refugee claimants from Peru who were at risk of being persecuted by the Sendero Luminoso had properly been recognised as refugees on the political opinion ground. The discussion highlights the critical importance of the specific facts of the particular case.

[91] One of the dangers of an all-encompassing definition is that it turns the analysis away from the facts specific to the case into a largely intellectual exercise in which semantics displace context. When the Supreme Court of Canada in *Canada (Attorney General) v Ward* [1993] 2 SCR 689 cited the Goodwin-Gill formulation with apparent approval these points do not appear to have been considered.

[92] The hazards of intellectual abstraction are illustrated by the leading Canadian decision in *Klinko v Canada (Minister of Citizenship and Immigration)* [2000] 3 FC 327 (FC:CA) at [1] and [32] where the following question was posed:

> Does the making of a public complaint about widespread corrupt conduct by customs and police officials to a regional governing authority, and thereafter, the complainant

> suffering persecution on this account, when the corrupt conduct is not officially sanctioned, condoned or supported by the state, constitute an expression of political opinion as that term is understood in the definition of Convention refugee....

[93] In answering this theoretical question in the affirmative the Federal Court of Appeal made little or no reference to the significance of context. Instead rather broad and general statements are made:

> [34] The opinion expressed by Mr Klinko took the form of a denunciation of state officials' corruption. This denunciation of infractions committed by state officials led to reprisals against him. I have no doubt that the widespread government corruption raised by the claimant's opinion is a "matter in which the machinery of state, government, and policy may be engaged".
>
> [35] ... Where, as in this case, the corrupt elements so permeate the government as to be part of its very fabric, a denunciation of the existing corruption is an expression of "political opinion".

[94] On this approach, any person who denounces corruption in a state where corrupt elements so permeate the government as to be part of its very fabric is taken to express a political opinion with little or no inquiry as to whether this supposed conclusion is borne out by the facts of the particular case.

[95] The *Klinko* interpretation has not found favour in the United Kingdom where an approach more closely aligned to that adopted by the Authority has been taken. For example, in *Gomez v Secretary of State for the Home Department* [2000] INLR 549 at [45], [55] & [64] (IAT) it was stated that the question whether a political opinion will be imputed to an individual must be assessed against the specific and individual circumstances of the case. Reference was made at [55] to the Authority's decision in *Refugee Appeal No. 2507/95 Re JEAH* (22 April 1996). The Tribunal at [71] and [72] also noted that it is an error to rely on fixed categories such as law, order and justice. Reference to broad "Star Wars" generalisations about the claimant being seen as on the side of law and order or in opposition to "dark forces" did not serve the interests of objective decision-making.

[96] In the later case of *Storozhenko v Secretary of State for the Home Department* [2001] EWCA Civ 895; [2002] Imm AR 329 (CA) the claimant had complained about the conduct of a police officer and in consequence had been harassed and threatened by the local police. It was said that as he was considered to be in favour of law and order, a political opinion along those lines should be imputed to him. The IAT had held that the claimant's difficulties arose out of his attempts to ensure that the police officer who assaulted him was punished. It was manifestly artificial to talk in terms of imputed political opinion. In the Court of Appeal, after referring to the broad Goodwin-Gill definition, Brooke LJ (delivering the judgment of the court) stated at [44]:

> ... it would, in my judgment, on the face of it be stretching the expression ["political opinion"] much too far if one was to apply it to the facts of Mr Storozhenko's case. He was being persecuted because the local police did not want him pressing an inquiry into the misconduct of one of their officers who had assaulted him. I am inclined to agree with the Tribunal that the persecution he suffered resulted from his attempts to ensure that his assailant was punished, **and that it was manifestly artificial to talk in terms of imputed political opinion**. [emphasis added]

[97] Later, at [46] Brooke LJ spoke of:

> ... the need to be cautious about over-enthusiastically seeking a Convention reason for persecution where such a reason cannot be found without distorting the facts....

[98] Addressing at [51] a submission that Mr Storozhenko's persecutors operated a state organ and that corrupt or criminal elements permeated that organ to such an extent as to be part of the very fabric of state organs (*Klinko*), Brooke LJ stated:

> In my judgment, this analysis is altogether too sophisticated on the facts of the present case. It illustrates the dangers of trying to place more weight on the dicta of other judges deciding other cases concerned with different factual situations than those dicta can properly bear.

[99] In *Suarez v Secretary of State for the Home Department* [2002] EWCA Civ 722; [2002] INLR 540 at [30] (CA) it was at [30] again emphasised that the political nature

of an applicant's actions or of the opinions which may be imputed to him or her in the light of such actions must be judged in the context of the conditions prevailing in the country of origin. The Court endorsed the statement in *Gomez* at [53] that where the concern of persecutors was not a political one but rather to maintain their economic position through criminal activities and to that end intimidate and, if necessary, eliminate those that oppose the pursuit of that aim, then there will be no conflict based upon a refusal to perform political acts, but only criminal ones. Addressing the specific claim made by Mr Suarez that he feared persecution for an imputed political opinion by virtue of his having taken a stance against the endemic corruption and lawlessness in Colombia, the court upheld the IAT decision namely, that if the appellant was at risk, it was because of what he knew and had witnessed (ie criminal activities) and not for his political opinion. The persecutors were not acting for political motives of their own but seeking to enrich themselves by crime. Keene LJ at [46], while accepting that there could be cases where the risk of being persecuted arises from a mixture of political and criminal reasons, particularly in a society such as Colombia where criminal economic activity may support political structures, added the following rider:

> But it is wrong to assume that all actions aimed at preventing the exposure of criminal activities in such a society can be characterised as imputing a political opinion ... These matters need to be looked at on a case-by-case basis.

[100] In *A v Secretary of State for the Home Department* [2003] EWCA Civ175; [2003] INLR 249 (CA) the individual claimed to be at risk because she was regarded as a police informer. After referring to *Gomez*, *Storozhenko* and *Suarez*, Keene LJ delivering the judgment of the Court again emphasised at [23] the importance of the specific context:

> But in the present case there is simply no evidence that the appellant would have been perceived by the gang as adopting any political stance when she informed the police. The natural interpretation of these events is that she was seen as having betrayed a gang member to the police and the risk to her arose from a desire for revenge.

The fact-sensitive nature of the "for reasons of" inquiry was emphasised also in *R (Sivakumar) v Secretary of State for the Home Department* [2003] UKHL 14; [2003] 1 WLR 840 (HL) at [7] and [17].

[101] In Australia, while it has been accepted (correctly) in several cases that the exposure of corruption can lead to the imputation of a political opinion, the context is seen as of critical importance. For example in *Zheng v Minister for Immigration and Multicultural Affairs* [2000] FCA 670 Merkel J, after reviewing a line of authorities including *Klinko,* said at [33] - [34]:

> [33] It needs to be emphasised that where individual, rather than systemic, corruption is exposed it is less likely that the act of exposure will be one in which a political opinion will be seen to have been manifested. This is because the exposure in that instance is more likely to be seen as the reporting of criminal conduct rather than any form of opposition to, or defiance of, state authority or governance.
>
> [34] A critical issue will always be whether there is a causal nexus between the actual or perceived political opinion said to have been manifested by the exposure of corruption and the well-founded fear of persecution ... In each case the question of whether the nexus has been established is a question of fact for the [Refugee Review Tribunal].

[102] As to the reporting of crime, the Canadian case law collected in *Ivakhnenko v Canada (Solicitor General)* (2004) 41 Imm LR (3d) 15 (FC:TD) at [64] to [67] shows that refusing to participate in criminal activity and/or witnessing and/or reporting a crime have generally been found not to be in and of themselves expressions of political opinion that attract Convention refugee protection. Nor does fear of being subjected to reprisals for having knowledge that certain individuals have committed crimes.

[103] Before turning to the facts of the present case the Authority emphasises the observation made by Keene LJ in *Suarez* that it is wrong to assume that all actions aimed at preventing the exposure of criminal activities in a society such as Colombia (where criminal economic activity may support political structures) can be characterised as imputing a political opinion. These matters need to be looked at on a

case-by-case basis. To this observation should be added the caution noted by Brooke LJ in *Storozhenko* that there are dangers of trying to place more weight on the *dicta* of other judges deciding other cases concerned with different factual situations than those *dicta* can properly bear.

Causation

[104] These points having been made, it is nevertheless acknowledged that once a "political opinion" has been established and the decision-maker moves to the "for reasons of" or nexus issue, the Authority has held that it is sufficient for the refugee claimant to establish that the Convention ground is a **contributing** cause to the risk of "being persecuted". It is not necessary for that cause to be the sole cause, main cause, direct cause, indirect cause or "but for" cause. It is enough that a Convention ground can be identified as being relevant to the cause of the risk of being persecuted. See *Refugee Appeal No. 72635/01* [2003] INLR 629 at [162] - [179] and *Refugee Appeal No. 76044* [2008] NZAR 719 at [68].

The facts

[105] The case for the appellant (Opening Submissions paras [27] - [36]) is that the "oligarchi" comprising members of the local government administration is a political oligarchy which uses its power and influence to win elections and to appoint "trusted" people to key public administration positions. The "trusted" members of the oligarchy can then use their mutual contacts to personal advantage eg by arranging the awarding of government contracts to their associated business people, with kickbacks or commissions. The appellant's initial act of turning his back on HY and his "oligarchi" in the latter part of 2004 was, it is submitted, perceived by them as the expression of an opinion against the PSD-based elite/oligarchy group. The denunciation of HY in the form of the complaint lodged with the DNA and the complaints lodged by the

appellant's wife and brother have started "a fight to the death" with HY. The act of the appellant turning his back on the "oligarchi" was a political act or expression of a political opinion for which he has been persecuted.

[106] To adopt the observation made by Brooke LJ in *Storozhenko* at [51], this analysis is altogether too sophisticated on the facts. It illustrates the dangers of "talking up" or stretching the facts beyond their natural limits.

[107] The Authority's view is that the facts show a falling out between accomplices when one (the appellant) found himself convicted and sentenced to imprisonment while the other (HY) escaped prosecution altogether. The appellant then sought to denounce HY to the authorities. This is indeed a "fight" (to adopt part of Mr McBride's expression) but a very personal fight which has nothing to do with the appellant's or HY's (or anyone else's) actual or perceived political opinion. The making of complaints to the authorities by the appellant, his wife and brother concerning the alleged unlawful activities of HY and his group was done not to manifest a political opinion or to align themselves with the forces of law and order, but as a means to an end namely, the exoneration, if not acquittal of the appellant and the simultaneous exposure of HY. The appellant acted in self-interest both when getting into the HY group and when leaving it. Nothing he has done can sensibly be described as a political act or expression of a political opinion. Nor, on the facts, has HY (or his group) seen any actual or imputed political act or expression on the appellant's part in their dealings with him. HY's singular aim in all his dealings with the appellant has been to enrich himself by crime and to protect himself from being held to account. As far as the appellant's father-in-law is concerned, the operative elements here are disappointment and the dishonouring of the family's name. In short, it is manifestly artificial to talk in terms of political opinion in the context of the present case. No such Convention ground can be found without distorting the facts. The fact that the appellant's "fight" with HY and his group takes place against the

backdrop of Romania and its pervasive corruption does not, in the circumstances, sensibly allow the political opinion ground to be deployed. No other Convention ground has application.

[108] At its highest, this is a case in which those involved in criminal activities have fallen out. In furthering his own ends, one (the appellant) has claimed that HY and his group have committed crimes and has reported them to the authorities. This does not assist the appellant because no actual or imputed political opinion can be found without distorting the facts. The corrupt group of which he was once part has not perceived him as adopting a political stance nor have they imputed one to him.

CONCLUSION

[109] For the reasons given the Authority finds that the appellant does not satisfy the requirements of Article 1A(2) of the Refugee Convention. The appellant is not recognised as a refugee. The appeal is dismissed.

"Rodger Haines"
.....
Rodger Haines QC
Deputy Chairperson