

KNOWLEDGE & INSIGHTS

What Is the Meaning of “Desertion” Under Section 54(1)(a) of the Armed Forces Act 1972?

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Written by
Tan Sri Dato’ Cecil Abraham
Rishwant Singh
Jules Khor Weizhen

INTRODUCTION

In this article we discuss a novel issue in respect of the interpretation and meaning to be given to the term “desertion” under Section 54(1)(a) of the Armed Forces Act 1972.

We make disclosure that Tan Sri Dato’ Cecil Abraham, Rishwant Singh and Jules Khor Weizhen of Messrs Cecil Abraham & Partners appeared as counsel for Colonel Dr Faiz Bin Abdul Aziz¹ before the Federal Court of Malaysia (“**Federal Court**”) in successfully appealing against the decision handed by way of a court martial convened by the Malaysian Armed Forces in convicting him of desertion and dishonourably discharging him².

¹ Instructed as counsel by the Law Chambers of Fauzi & Nasser.

² Federal Court Civil Appeal No. W-01(F)-5-02/2022(W), Kolonel Dr Faiz Azraai bin Abdul Aziz v Mahkamah Tentera Divisyen Keempat Infantri Malaysia.

THE BACKGROUND

Colonel Dr Faiz Azraai bin Abdul Aziz (“**Colonel Dr Faiz**”) was an anaesthetist serving in the Malaysian Armed Forces since 2002. In 2010, he was certified as an expert and was listed in the National Specialist Registry. He was appointed as an expert anaesthetist. He carried out his duties as an expert, a doctor, and an anaesthetist under the command of his Commanding Officer who was the Head of Department.

Between 19th October 2016 to 4th May 2017, Colonel Dr Faiz left camp without permission of his Head of Department. His reasons for his absence were that (i) for a period of five (5) years he was tormented by his superior whilst he was in service, (ii) he was not permitted to take leave, (iii) he was on continuous call, (iv) he had domestic issues that led to a divorce given irreconcilable differences with his wife, following the birth of their child, who suffered from autism, and (v) arising from the above, he suffered from depression. The reasons advanced by Colonel Dr Faiz were not contradicted by his Commanding Officer and Head of Department in the proceedings before the Military Court.

It is to be noted that Colonel Dr Faiz had also applied for early retirement. This was refused. He tried to seek non-paid leave. This was also refused. As a result, the appellant ultimately decided to take non-sanctioned leave of absence from work. During this period of over six (6) months, he resided at the same address, and he continued with his locum work to supplement his income. He had not gone into hiding nor had he attempted to leave the country.

The specific charge of desertion was made out for a period from 19th October 2016 to 4th May 2017, when Colonel Dr Faiz returned to camp. It is pertinent to note that on his return to camp, Colonel Dr Faiz was arrested by the military police and held in detention for four (4) days before being released by the Magistrates Court³. On his release, on 8th May 2017, he reported back to duty and was placed in the general pool.

Colonel Dr Faiz was subjected to court martial proceedings before a Military Court. Colonel Dr Faiz was charged with desertion pursuant to Section 54(1)(a) of the Armed Forces Act 1972, which provides as follows:

“Desertion

54. (1) Every person subject to service law under this Act who –

(a) deserts; or

(b) ...

shall, on conviction by court-martial, be liable to imprisonment...

(2) For the purposes of this Act, a person deserts who –

³ This was held to be breach of the law. In a separate action, the Government of Malaysia agreed to pay Colonel Dr. Faiz damages of RM50,000.00 for wrongful detention.

- (a) leaves His Majesty's service, ... with (in either case) the **intention**, either subsisting at the time of the leaving or failure or formed thereafter, of remaining **permanently** absent from his duty;

...
...”

The principal argument raised by Colonel Dr Faiz before the Military Court was that he had not deserted and that the proper charge ought to have been framed as being absent without leave. His defence was at no time did he intend to “*permanently*” absent himself from duty and that this absence was temporary⁴ as evidenced by the fact that he voluntarily returned to duty after his arrest and release by the Magistrates Court. In this regard, it was not in dispute that during the period that the court martial proceedings were ongoing, Colonel Dr Faiz continued to serve the Malaysian Armed Forces without interruption.

The prosecution did not agree with his defence. The prosecution argued that there was desertion proved by an intent to permanently absent himself from duty and this was sufficiently demonstrated by his absence for more than six (6) months. The prosecution chose not to bring the alternative charge for “*absenting oneself*” without leave. The sole charge therefore was for “*desertion*”.

Ultimately, he was found guilty by the Military Court for desertion. Colonel Dr Faiz was also jailed for a period of three (3) months and dishonourably discharged effective from 1st October 2018.

THE HIGH COURT PROCEEDINGS

Being dissatisfied with the decision of the Military Court, Colonel Dr Faiz filed judicial review proceedings before the High Court of Malaya at Kuala Lumpur (“**High Court**”)⁵ to challenge the decision of the said Military Court.

Before the High Court, the prosecution was successful in demonstrating with reference to *R v Mahoney*,⁶ that where an officer was absent for approximately three (3) weeks, that this was of sufficient duration to satisfy the element of permanence. The accused in *R v Mahoney* was absent for three (3) weeks and remained absent at the time of the court-martial (and at the time of conviction for desertion).

The Courts-Martial Appeal Court, per Lord Goddard CJ, in *R v Mahoney* held that three (3) weeks was a sufficiently long time that, in the absence of an explanation, entitled the court-martial to find that the accused intended to desert.

Mr. Justice Nordin bin Hassan in delivering the judgment of the High Court dated 10th July 2019, did not in paragraphs 5 to 23 of the written grounds of judgment of the High Court specifically address the argument in law pertaining to the construction to be given to Section 54(1) (a) and (2)(a) of the Armed Forces Act 1972 in so far as Colonel Dr Faiz being “*permanently absent from his duty*” was concerned. The High Court took the view in paragraphs 13 and 14 of the said written grounds of judgment that the absence of six (6) months and twenty-five (25) days satisfied the requirements of permanence. No regard appears to have been given

⁴ Section 55 of the Armed Forces Act 1972.

⁵ Kuala Lumpur High Court Judicial Review Application No. WA-25-336-11/2018.

⁶ [1957] 1 WLR 98.

to the fact that Colonel Dr Faiz voluntary returned to camp to commence duties on 4th May 2017, when he was then arrested.

The High Court relied on the decision in *Kerajaan Malaysia & Ors v Tay Chai Huat*⁷ and *Peter Chong Ngen Onn & Ors v Col. Adam bin Abu Bakar*⁸, in concluding that a court of law ought not to intervene in disciplinary proceedings, more so that of a Military Court, in seeking to reassess the evidence as this function was best entrusted to the military given the existence of military law and military rules for the guidance of officers or discipline generally.

The question of whether Colonel Dr Faiz had a reasonable explanation was a factual one and although ventilated at length was not accepted by the High Court.

COURT OF APPEAL PROCEEDINGS⁹

On 2nd June 2022, the Court of Appeal of Malaysia (“**Court of Appeal**”)¹⁰ dismissed Colonel Dr Faiz’s appeal. Mr. Justice Che Mohd Ruzima Bin Ghazali in delivering the judgment of the Court of Appeal held, inter-alia, as follows:

- (a) there are limited grounds to seek to challenge a decision of a tribunal by way of judicial review proceedings. In this regard, judicial review proceedings are not treated as akin to an appeal¹¹;
- (b) in so far as decisions of Military Courts are concerned, a court of law will not generally interfere in matters of military law prescribing rules for guidance of officers, unless there is clear evidence of a breach of natural justice¹²;
- (c) the inherent power to frame a charge under Section 54(1)(a) of the Armed Forces Act 1972 lay with the relevant authorities as provided under the law. A court of law will not generally interfere in the exercise of such discretion more so in the context of the application of military law pertaining to the disciplining of a military officer;
- (d) on the facts of the case, there is no dispute that Colonel Dr Faiz was absent from his duties for a period of six (6) months and twenty-five (25) days, which was a long period of time for him to have been absent without any indication of wanting to return until 4th May 2017. In this regard, the facts of this case are akin to *R v Mahoney*; and
- (e) as such, there was no error on the part of the Military Court in convicting Colonel Dr Faiz of desertion under Section 54 of the Armed Forces Act 1972. The prosecution has clearly established a prima facie case and there was a clear inference that the Military Court was entitled to draw that

⁷ [2012] 3 MLJ 149.

⁸ [1977] 2 MLJ 42.

⁹ Court of Appeal Civil Appeal No. W-01(A)-434-08/2019.

¹⁰ The quorum that presided over this appeal included Mr. Justice Lee Swee Seng, Mr. Justice Che Mohd Ruzima Bin Ghazali and Mr. Justice Ghazali bin Cha.

¹¹ *Chief Constable of North Wales Police v Evans* [1982] 3 All ER 141; *Harpers Trading (M) Sdn Bhd v National Union of Commercial Workers* [1991] 1 MLJ 417.

¹² *Captain Kamarul Azman Bin Jamaluddin v Lt Col Wan Abdul Majid Bin Abdullah & Ors* [1983] 2 MLJ 4; *Peter Chong Ngen Onn & Ors v Col Adam bin Abu Bakar & Ors* [1977] 2 MLJ 142.

Colonel Dr Faiz had no intention to return to his duties. The decision of the Military Court was therefore rational, procedural fair and proper.

THE FEDERAL COURT PROCEEDINGS

Dissatisfied with the decision of the Court of Appeal, Colonel Dr Faiz filed an application for leave to appeal to the Federal Court of Malaysia (“**Federal Court**”).

Leave was granted by the Federal Court in respect of three (3) questions of law but the critical question that the Federal Court was called upon to determine is:

“Can unsanctioned absence from duty for six (6) months be sufficient to satisfy the element of ‘leaves His Majesty’s Service’ or ‘fails to re-join His Majesty’s Service’ with the intention of remaining ‘permanently absent from his duty’ as defined in section 54(2) of the Armed Forces Act 1972?”

The prosecution as in the proceedings before the High Court and Court of Appeal relied on *R v Mahoney*. In *R v Mahoney*, the officer was absent for approximately three (3) weeks, and this was held to be of sufficient duration to satisfy the element of permanence. Factually, *R v Mahoney* was different: The accused was absent for three (3) weeks and remained absent at the time of the court-martial (and at the time of conviction for desertion). On the facts of this case, Colonel Dr Faiz (i) reported back to duty, (ii) was accepted back to duty, and (iii) remained at duty until the decision of the court-martial.

As such, it was contended that the element of “*permanence*” necessary to premise the charge of “*desertion*” was absent as Colonel Dr Faiz did not have the intention to remain permanently absent from duty. The element of “*permanence*” was essential and in the Malay version of the Armed Forces Act 1972, the use of the word “*selama-lamanya*”¹³ was clear guidance as to Parliament’s intent. The absence must be permanent. It cannot be temporary – no matter how prolonged.

Colonel Dr Faiz also relied on the decision in *State v Rawatsingh*¹⁴ where the Indian Court had considered the meaning of desertion in the following terms:

*“Learned Deputy Government Advocate does not contest this meaning of the word ‘desertion’. There can be no doubt that the word ‘desertion’ does not simply mean leaving the post or mere departure from the post without permission. It means something more, and that **something more is the intention never to return to the post**, or to go away with the idea of avoiding hazardous duty, or shirking any important service. It is not the prosecution’s case that the accused, left with the idea of avoiding any hazardous duty. Nor has it been satisfactorily proved that the accused had no intention of returning to duty at all. All that the prosecution has been able to prove in this case is that the accused left his post without leave. The accused has admitted that. The Sessions Judge was, therefore, right in acquitting...*

...It is clear that quitting the post without leave is a minor offence as compared to deserting the service. In both desertion and quitting the post without leave, there is the element of going away without the

¹³ “*Selama-lamanya*” in Bahasa Malaysia can and is often translated to mean “*forever*”.

¹⁴ AIR [1957] Rajasthan 26.

permission of the authorities concerned. But in desertion there is the further element to which we have already referred. This is absent in a case of quitting the post without leave.

It is obvious, therefore, that the offence under s 7(g) is a minor offence as compared to the offence under s 6(e) and the case was covered by s 238 Criminal P.C. and it was open to the Sessions Judge to convict the accused of the minor offence even though he was not charged with it.”

In *State v Rawatsingh* the accused admitted that he absented himself without leave but that there was a reason for it, namely, illness in the family and that the accused had applied for leave but it was refused. There, the Indian court of first instance dismissed the desertion charge but did not accept the prosecution’s submission that the alternative and lesser charge for “*absence without leave*” had been made out. On appeal, the High Court, presided over by Chief Justice Wanchoo, had to examine the lesser charge of absence without leave. The High Court agreed with the Sessions Court that the charge for “*desertion*” had not been made out. The High Court, however, held that the lesser charge of absence without leave had been made out and convicted the accused.

It was also argued by Colonel Dr Faiz that the English and Malaysian decisions that civil Courts will not generally intervene in matters pertaining to military law where such matters prescribe rules for the guidance of officers, was not applicable to the facts of this particular case.

Having heard arguments of the parties, the Federal Court allowed the appeal. The Federal Court appears to have accepted the arguments of Colonel Dr Faiz in that there was no degree of permanence and the word “*permanent*” had to be given its natural and ordinary meaning. The element of permanence was an essential ingredient in so far as the charge is concerned and the Bahasa Malaysia version of the Armed Forces Act 1972 uses the word “*selama-lamanya*”. This, the Federal Court indicated, was clear guidance as to Parliament’s intent, namely, the absence must be **permanent** and not temporary, no matter how prolonged.

The Federal Court agreed that the decision of the Military Court was wrong and issued a certiorari in the following manner:

“Unsanctioned absence from duty for six (6) months was not sufficient to satisfy the element of ‘leaves His Majesty’s Service’ or ‘fails to re-join His Majesty’s Service’ with the intention of remaining ‘permanently absent from his duty’ as defined in section 54(2)(a) of the Armed Forced Act 1972.”

At present, the written grounds of judgment of the Federal Court have yet to have been made available.

COMMENTARY

It is apparent from the decision of the Federal Court that when it comes to desertion, the element of intent and permanence are material issues.

The decision also makes it clear that when it comes to desertion, time periods though relevant, are not conclusive. It also appears from the decision that intent cannot be presumed and must be the subject

matter of conclusive evidence for a charge under Section 54(1)(a) of the Armed Forces Act 1972 to be properly made out.

The decision of the Federal Court is significant in that it provides guidance to the prosecution and defence in court martial proceedings such that the notion of “intent” must be clearly established. There is therefore a need to ensure examination of witnesses and the accused person in seeking to establish that there was an intent to desert. One cannot simply presume “intent” from the objective facts, more so where a military officer voluntarily reports back for duty, is accepted back at duty, and remains at duty up to (and past) the date when he or she is charged.

CONTACTS



**Tan Sri Dato' Cecil
W. M. Abraham**

SENIOR PARTNER
cecil@cecilabraham.com



Rishwant Singh

PARTNER
rishwant@cecilabraham.com



Jules Kor Weizhen

ASSOCIATE
jules@cecilabraham.com
