V94/01589 [1995] RRTA 446 (6 March 1995)

REFUGEE REVIEW TRIBUNAL

DECISION AND REASONS FOR DECISION

RRT Reference : V94/01589

Tribunal : John A. Gibson

Date : 6 March 1995

Place : MELBOURNE

Decision[1] : Application for a protection visa remitted pursuant to paragraph 415(2)(c) of the *Migration Act* 1958 ("the Act") for reconsideration with a direction that the criterion requiring the applicant to be a non-citizen in Australia to whom Australia has protection obligations under the Convention relating to the Status of Refugees done at Geneva on 28 July 1951 as amended by the Protocol relating to the Status of Refugees done at New York on 31 January 1967, is satisfied.

DECISION UNDER REVIEW AND APPLICATION

This is an application for review of decisions made on 28 February 1994 which, by virtue of s 39 of the *Migration Reform Act* 1992, have effect as a refusal to grant a protection visa.

The jurisdiction of the Tribunal arises by virtue of -

(i) sub-s 414 (1) of the Act which requires the Tribunal to review an "RRT-reviewable decision" where a valid application is made under s 412;
(ii) sub-s 411 (1), which defines an "RRT-reviewable decision" to include, subject to certain exceptions which are irrelevant for present purposes, decisions made before 1 September 1994 respectively -
that a non-citizen is not a refugee under the Convention relating to the Status of Refugees (the Convention) as amended by the 1967 Protocol relating to the Status of Refugees (the Protocol), (para (a)); and
that an application for a visa or entry permit, a criterion for which is that the applicant for it be a non-citizen who has been determined to be a refugee under the Convention as amended by the Protocol, be refused (para (b)); and
(iii) s 412, which prescribes the criteria for a valid application.

I am satisfied that the jurisdictional requirements listed under paras. (i) to (iii) *supra* exist in this matter. Note that, by virtue of s 39 of the *Migration Reform Act* 1992, the primary decisions in this matter have effect as a refusal to grant a protection visa.

BACKGROUND

The applicant is a man in his late forties of Slovak ethnicity from the Vojvodina region of The Federal Republic of Yugoslavia (Serbia and Montenegro). His home town or village was xxxxx which is xxxxxxxx xxxxxxxxxxx Slovak xx xxxxxxx. His wife and xxxxx of his xxxxxx daughters are in Yugoslavia while the other is a permanent resident of Australia. At the time of his departure from Yugoslavia in August 1993 he was the owner-operator of a xxxxxxx He is a member of a Christian church known as the xxxxxxxxxx. He filled in an application for Refugee Status in October 1993 which was lodged the following month.

THE LAW

On 1 September 1994 the *Migration Reform Act* 1992 (MRA), by amendment to the Act, introduced a visa known as a protection visa for people who seek protection as refugees: see s.36 of the Act. This visa replaces the visas and entry permits previously granted for that purpose. Section 39 of the MRA provides, in effect, that refugee related applications not finally determined before that date are to be dealt with as if they were applications for a protection visa. Accordingly, for the purposes of this review the Tribunal regards an applicant's primary application(s) as (an) application(s) for a protection visa.

The prescribed criteria for the grant of a protection visa are set out in Part 866 of Schedule 2 of the *Migration Regulations* (the Regulations): see s.31(3) of the Act and r.2.03 of the Regulations.

It is a criterion for the grant of a protection visa that at the time of application the applicant claims to be a person to whom Australia has protection obligations under the Refugees Convention and either makes specific claims under the Convention or claims to be a member of the family unit of a person who is also an applicant and has made such claims: cl. 866.211 of Schedule 2 of the Regulations.

It is also a criterion for the grant of a protection visa that at the time of decision the Minister is satisfied the applicant is a person to whom Australia has protection obligations under the Refugees Convention: cl.866.221 of Schedule 2 of the Regulations.

The remaining criteria for the grant of a protection visa are, generally speaking, that the applicant has undergone certain medical examinations and that the grant of the visa is in the public and the national interest: cl. 866.22 of Schedule 2 of the Regulations.

"Refugees Convention" is defined by cl. 866.111 of Schedule 2 of the Regulations to mean the 1951 Convention relating to the Status of Refugees (the Convention) as amended by the 1967 Protocol relating to the Status of Refugees (the Protocol). As a party to both these international instruments, Australia has protection obligations to persons who are refugees as therein defined.

The central issue for determination in this matter is whether or not the applicant is a non-citizen in Australia to whom Australia has protection obligations under the Convention and the Protocol.

Refugee defined

In terms of Article 1 A(2) of the Convention and Protocol, Australia has protection obligations to any 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."

(The five specified grounds are compendiously referred to as Convention reasons).

Outside the country of nationality.

First, the definition includes only those persons who are outside their country of nationality or, where the applicant is a stateless person, country of former habitual residence. The applicant in this case meets that requirement being outside his country of nationality.

Well-founded fear.

Secondly, an applicant must have a "well-founded fear" of being persecuted. The term "well-founded fear" was the subject of comment in *Chan Yee Kin v. The Minister for Immigration and Ethnic Affairs*(1989) 169 CLR 379 (Chan's case). It was observed that the term contains both a subjective and an objective requirement. "Fear" concerns the applicant's state of mind, but this term is qualified by the adjectival expression "well-founded" which requires a sufficient foundation for that fear (see per Dawson J at p396).

The Court in Chan's case held that a fear of persecution is well-founded if there "is a real chance that the refugee will be persecuted if he returns to his country of nationality" (per Mason CJ at p389 and p398, per Toohey J at p407, and per McHugh J at p429). It was observed that the expression " 'a real chance'... clearly conveys the notion of a substantial, as distinct from a remote chance, of persecution occurring..." (at p389) and though it "does not weigh the prospects of persecution...it discounts what is remote or insubstantial" (p407); "a far fetched possibility must be excluded" (at p429). Therefore, a real chance of persecution occurring may exist

"notwithstanding that there is less than a 50 per cent chance of persecution occurring" (at p389). "... an applicant for Refugee Status may have a well-founded fear of persecution even though there is only a 10 per cent chance that he will be shot, tortured or otherwise persecuted, (at p 429).

The Full Federal Court (see MILGEA v Che Guang Xiang, unreported, 12 August 1994, No. WAG61 of 1994, Jenkinson, Spender, Lee JJ in a joint judgment, at p. 15-16) has recently stated:

" According to the principles expounded in Chan the determination of whether the fear of being persecuted is well-founded will depend on whether there is a "real chance" that the refugee will be persecuted upon return to the country of nationality. A "real chance" that persecution may occur includes the reasonable possibility of such an occurrence but not a remote possibility which, properly, may be ignored. It is not necessary to show that it is probable that persecution will occur."

The question of how far into the future it is proper to look when examining the question of whether an applicant's fear is "well-founded" were he or she to return to their country of origin is answered in the judgment of the Full Federal Court (Black CJ, Lockhart and Sheppard JJ) in the case of MILGEA and Paterson v Mok, 22 December 1994). At p. 53 Sheppard J, with whom the other members of the Court agreed, said:

"I do not read into the evidence any question which puts the matter in the way it should have been put, namely as a matter to be considered in relation to the immediately foreseeable future."

Persecution.

Thirdly, an applicant must fear "persecution" or more accurately "being persecuted". The term "persecuted" is not defined by the Convention or Protocol. Not every threat of harm to a person or interference with his or her rights constitutes "being persecuted". The Court in Chan's case spoke of "some serious punishment or penalty or some significant detriment or disadvantage" if the applicant returns to his or her country of nationality (per Mason CJ at p. 388). Likewise, it stated that the "notion of persecution involves selective harassment" whether "directed against a person as an individual" or "because he or she is a member of a group which is the subject of systematic harassment", although the applicant need not be the victim of a series of acts as a single act of oppression may suffice (at p.429-30) " ...Harm or the threat of harm as a part of a course of selective harassment of a person, whether individually or as a member of a group subjected to such harassment by reason of membership of the group amounts to persecution if done for a Convention reason (at p.388)."

The threat need not be the product of any policy of the Government of the persons country of nationality. It may be enough depending on the circumstances, that the government has failed or is unable to protect the person in question from persecution.(at p430).

The harm threatened may be less than loss of life or liberty and includes, in appropriate cases, measures "'in disregard' of human dignity" or serious violations of core or fundamental human rights

".....persecution ...has historically taken many forms of social, political and economic discrimination. Hence the denial of access to employment, to the professions and to education or the imposition of restrictions on the freedoms traditionally guaranteed in a democratic society such as freedom of speech, assembly, worship or movement may constitute persecution if imposed for a Convention reason. "(at p.430-1)

It appears from these passages that the High Court court's view is that in some cases, infringement of social, political and economic rights will constitute persecution in Convention terms, while in other cases it will not. The Court did not set out any guidelines by which the point such infringements become persecution could be determined other than the reference by Mason CJ to "some serious punishment or penalty or some significant detriment or disadvantage".

In Minister of State for Immigration, Local Government and Ethnic Affairs v. Che Guang Xiang, the Full Federal Court said :

Denial of fundamental rights or freedoms, or imposition of disadvantage by executive act, interrogation or detention for the purpose of intimidating the expression of political opinion will constitute persecution...

Later on they stated:

To establish whether there was a real, as opposed to a fanciful, chance that Che would be subject to harassment, detention, interrogation, discrimination or be marked for disadvantage in future employment opportunities by reason of expression of political dissent, it was necessary to look at the totality of Che's circumstances.

Insofar as the first passage states that denial of fundamental rights and certain acts of a State done for the purpose of intimidation will, rather than may, constitute persecution, it may appear to go beyond what the High Court stated in *Chan*. However, the Federal Court was, of course, bound by *Chan*; furthermore, it expressly cited *Chan* as authority for its decision; it did not claim to be extending or questioning the concept of persecution enunciated in *Chan*; and it did not refer to any jurisprudence or policy considerations which might suggest that it was reconsidering the concept of persecution and intending it to apply to infringements of social, economic and political rights whatever the circumstances. If it was intending to disagree with *Chan* one would expect the Court to have stated this. I am therefore persuaded that the Federal Court in *Che* was not, after all, intending to modify or extend the concept of persecution endorsed by the High Court, but was simply restating the *Chan* test. The reference in *Che* to situations of denial of fundamental rights or freedoms, imposition of disadvantage by executive act, interrogation or detention for the purpose of intimidation, harassment, detention, discrimination and marking for future employment disadvantage must be read as a reference to such circumstances which satisfy the criteria set out by Mason CJ in *Chan* of amounting to a serious punishment or penalty or a significant detriment or disadvantage. Where

these criteria are satisfied, then, there is persecution; but where they are not, there is no persecution.

Date for determination of Refugee Status.

Whether or not a person is a refugee for the purposes of the legislation is to be determined upon the facts existing at the time the decision is to be made. (see Chan, supra; Che, supra, at p.14) In this regard, however, it is proper to look at past events and, in the absence of evidence of change of circumstances, to treat those events as continuing up to the time of determination (see Chan, supra).

In some circumstances, a person who would have satisfied the definition before the change may no longer be eligible.

In the case of Lek v MILGEA 117 ALR 455 (at pp. 462-3), Wilcox J. rejected a contention that Chan decided that the relevant date for considering whether an applicant for refugee status was the date of application, rather than the date of determination. His Honour did, however note the " High Court's emphasis [in Chan] upon the necessity to pay attention to the factors that gave rise to an applicant's departure from his/her country of nationality" (at p. 462). He stated that the correct methodology was to separate out

" two logically distinct questions: whether the applicant had a continuing subjective fear of persecution on a Convention ground at the date of determination and whether that fear was objectively founded. [The approach taken by the Department] addressed the second question by taking as the starting point the position as at the date of departure and asking whether the available evidence establishes that the position has since changed, so that the fear is no longer well founded even though subjectively continuing. In regard to the latter inquiry, and because of the practical problems noted by the High Court, there is in substance an onus of proof on those who assert that relevant changes have occurred" (at p.463).

These comments are entirely consistent with the observation of Mason CJ. in Chan that:

"in the absence of facts indicating a material change in the state of affairs in the country of nationality, an applicant should not be compelled to provide justification for his continuing to possess a fear which he has established was well-founded at the time when he left his country of nationality" (at p. 391).

CLAIMS & EVIDENCE

Submissions made on behalf of the applicant-March 1994

The following submission which is quoted substantially as written was lodged on behalf of the applicant.

The applicant holds genuine and justifiable grave concerns regarding the future of Former Yugoslavia. He believes the terrible conflict which grips the region would certainly cause him Convention based persecution were he forced to return to former

Yugoslavia. He perceives Serb expansionism to be a real and terrible threat to everyone in the region, particularly those such as himself who come from minority groups. He fears being forced to return to Vojvodina and is convinced the only future for the region is violent and bloody. As a xxxxxxxx he believes the future for him is even more precarious than for the other Slovaks trapped in Vojvodina.
Recent reports released from the region of Former Yugoslavia indicate the prospects for long term peace and stability in Serbia remain dreadful.
The applicant's advisers requested that consideration be given to the claims made by the applicant relating to his future in former Yugoslavia as well as his claims relating to his religion and problems involving his potential involvement in the conflict on an individual basis.
The applicant's statement of claims and supporting documentation indicate that minority groups, such as the Slovaks, are being singled out for military service in the Yugoslav People's Army. According to the applicant this extends to Slovaks and Hungarians being the first group sent to the frontlines in Bosnia and Croatia. This clearly constitutes a case of persecution on the basis of ethnicity as prescribed in the UNHCR definition of a refugee.
The report from the Canadian Research Board refers to a 1991 Amnesty International report that states:
"In October 1991, however, Yugoslav military legal experts indicated that only professional soldiers who refuse to take up arms during a state of war and those who flee abroad to avoid military service face a possible death penalty" (ibid, pl4).
It was submitted that the applicant would be shot on return to former Yugoslavia for a perceived desertion of the YPA, or just as tragically, he would be sent to the frontline to fight a war which would almost surely lead to his death. Or at least it would cause his death were he able to fight but due to his religion he would refuse to fight. The probable consequence of this would be execution.
A chapter from a book by Misha Glenny, dealing with Macedonia and the causes of conflict in that region was submitted and relied upon as supporting the applicant's claims.
DORS has rejected a number of applications for refugee status from applicants from former Yugoslavia on the basis that the UN Handbook rules out a claim for refugee status on the grounds of fear of punishment for desertion or draft evasion, at paragraph 167. We would question this interpretation of the UN Handbook. Paragraph 171 of the UN Handbook states:
"Where, however, the type of military action, with which an individual does not wish to be associated is condemned by the international community as contrary to basic rules of human conduct punishment for desertion or draft evasion could, in the light of all other requirements of the definition, be itself regarded as persecution".
As previously stated the current conflict and "ethnic cleansing" in former Yugoslavia has been internationally condemned. The material from Amnesty International and Misha Glenny paints a grim picture of the heinous war crimes being committed by all sides in the region. This creates a particularly difficult situation for Slovaks and religious believers like the applicant who do not wish to take sides in the current ethnic conflict.

The applicant's ethnicity is a further reason why he meets the criteria outlined in paragraph 171 of the UN Handbook for a claim for refugee status on the basis of being a deserter.

His objection to the performance of military duties also falls within the ambit of the UN Convention in accordance with Paragraph 172 of the UN Handbook
"Refusal to perform military service may also be based on religious convictions. If an applicant is able to show that his religious convictions are genuine, and that such convictions are not taken into account by the authorities of his country in requiring him to perform military service, he may be able to establish a claim to refugee status. Such a claim would, of course, be supported by any additional indications that the applicant or his family may have encountered difficulties due to their religious convictions."
The applicant's religious beliefs preclude him from engaging in any military conduct. The fear he has in relation to returning to his former home is that he will be forced to engage in such conduct. He will be compelled to refuse such a directive on two grounds. The first being due to his religion and the second being to the documented 'illegal' manner in which this conflict has been conducted.
The history or war crimes trials has shown that the following of illegal orders is not a defence for soldiers accused of war crimes. Clearly those responsible for issuing orders in this war have specifically ordered soldiers to perform 'illegal' war time acts. The applicant, even were he not a xxxxxxxx, could not involve himself in this conflict for fear of being ordered to carry out such crimes.
The applicant wishes it to be clear that the major reasons for him fearing persecution if forced to return to Former Yugoslavia are: the genuine prospect of being drawn into the horrific full scale war, the military service requirements he would be forced to fulfil if this occurred (as a xxxxxxxx he cannot take up arms under any circumstance), the oppression of the Slovaks by the Serb's, the continued blatant disregard of basic human rights by the expansionist Serbian authorities and the continued violence which completely encompasses his former homeland and diminishes any hope of a peaceful future for the region.

Applicant's statement of claims

He does not believe he or his family have any future in Vojvodina. He requests his daughter be considered as a dependant in the application. She lives with his wife, she relies on the family for food, clothing, accommodation and emotional support. She will continue to do so until married.

The applicant and his family are xxxxxxxx. It is their committed religious belief that they do not take up arms. He and all those who follow the xxxxxxxx beliefs, are non-political and against any kind of conflict.

He is a pacifist. As a xxxxxxxx he cannot take up arms. As a human being of conscience he objects to the current political and military situation in Serbia. He regards the manner in which national minorities are treated as terrible. The spread of the Serb forces into Slovenia and Croatia is also fundamentally wrong. The manner in which the Serb forces have conducted themselves is also unjustifiable.

Due to their race the Slovaks in Vojvodina are the victims of the general push from Serbia to make a Greater Serbia using the blood of minority races such as Slovaks.

As a result of his Slovak ethnicity he will be targeted for conscription in the Serbian People's army.

Since his arrival in Australia the political conflict in former Yugoslavia has continued as a bloody ethnic war in which ethnic Slovaks have no part. Ethnic Slovaks, like other minorities in his former home town, are being targeted by the Serbians for military service on the frontline and serve the army in disproportionate numbers. Slovaks are looked upon as second-class citizens by the Serb majority. The leadership of the military regard it as more desirable to send Slovaks to the frontline before seeing their own ethnic group killed in battle.

The minorities are generally forced by the Serbs to go to the front lines and the most dangerous regions.

If the applicant is forced to return to former Yugoslavia he has a great fear that he will be killed for refusing to serve the army. Particularly as he is of Slovak descent, he feels that the military would have no hesitation in ordering and carrying out his execution.

He has no desire to return to a land racked by a civil war in which he has no part. If he returned to Serbia the authorities would endeavour to force him to fight for Serbia and the communists; if he did not fight for them he would be jailed or killed.

The applicant's brother was called to the army about a year ago. He was sent to the front line in Croatia and as a result of the terrible events he witnessed he had a breakdown within ten days. His brother is not a xxxxxxxx. He was called up and was forced to go to the front and witness all manner of torture. People are called up by the JNA until 60 years of age.

The applicant was last called up before he went to xxxxxx (i.e. xxxx) Since xxxx his army book has been with the branch of the army responsible for call up. The army organisation believed that he had been in Australia since xxxxx when he lodged his army book with them before applying to come to Australia.

The situation now in his former home is one of despair and poverty as well as danger. There is no petrol, therefore as a bus driver he will have no business. As he did not inform the army of his presence in Serbia he believes he will be tried as a draft evader on his return. The applicant believes the treatment he will receive will be even worse than that normally afforded Slovaks.

Regardless of the treatment he receives, however, he can never take up arms which is against his moral and religious beliefs.

In addition to his brother being forced to serve, other Slovaks from his village are constantly forced to the frontline. Every few months the council takes about 500 males for the purpose of serving the JNA on the frontline from his village and surrounding villages. Each month or two 50 or 60 males are taken from his own specific village to go to the frontline. It is inevitable that his time, if it has not already come, will come soon. He fears that day occurring.

Every person who returns from the frontline has their own graphic tale of the real horrors of an evil war. These are stories of children being hacked up, burnt - stories of

soldiers making necklaces out of the fingers of children. Naturally they horrify him and make him even more adamant that he could never join in this war.

When a Slovak village is surrounded for call-up all telephone lines are cut. Villagers cannot warn each other of the problems occurring. The JNA ensures there is no evasion of service by those unlucky enough to be in the village.

The applicant knows one villager who was in service for four months. He said that while he was there a Hungarian lady gave the soldiers food to eat. One of the Serb soldiers just turned and killed her with an automatic rifle. The Slovak from the applicant's village challenged this Serb who told he would be lucky to die on Serb land. This is an indication of the attitude of the Serbs toward Slovaks and other minorities. Slovaks serving in the JNA must go to the toilet together because if they go alone the Serbs will kill them. Serbs and Croats commit atrocities against the minorities and blame each other.

Croats and Serbs go into villages and give the other ethnic groups a couple of hours to leave, to pack up and leave their lives behind just because of ethnic background. The choice to leaving is staying and dieing. This is the reality of ethnic cleansing and sometimes you are given no warning to leave. Serb or Croat forces just come in and wipe your people and your village out. This is the real horror of life in the applicant's former homeland. As Slovaks the applicant feels he and fellow Slovaks have no part in this conflict. They have nothing to fight for and no-one to fight against. They only wish to escape before being killed or forced to kill.

The Slovaks receive no protection from any source. There is no law and because they are a minority they are subject to all sorts of suffering. Where schools and factories operate, only Serbs may work or study there. The Slovaks are subject to manifest economic hardship as a result of their ethnic background.

The applicant is genuinely fearful of the prospect of his village being ethnically cleansed. It is xxxx xx kilometres from Belgrade in the direction of xxxxxx. At night you can hear the bombs and the fighting. You are never sure how far away it is but you can hear the fighting. You live in constant fear. All persons of his faith do not have televisions. This means they cannot view any developments in the war.

Two documents were filed with the Tribunal in September 1994.

(1) Certified copy of 'Attestation' made by the Religious Affairs Commission of the Executive Council of the Autonomous Region of Vojvodina, Socialist Republic of Serbia, acknowledging the existence and legitimacy of the xxxxxxxxx-xxxxxxxx religious community; also, acknowledging the registration of its relevant community organisation, and the authorised status of community representative, Mr xxxxx xxxxxx, appointed by the community Council of xxxxxx (accredited translation);

(2) Certified copy of 'Attestation' made by Mr xxxxx xxxxxx in his official capacity as a representative of the xxxxxxxxx-xxxxxxxx religious community, acknowledging the applicant as a member of same; also, acknowledging certain fundamental principles of the community, with particular regard to the bearing of arms and to the official persecution community members have suffered consequently (accredited translation).

The first of these documents stated (inter alia):

The xxxxxxxxx-xxxxxxxx religious community is registered in SFR of Yugoslavia and in Autonomous Region of Vojvodina. Based on the Legislation dealing with the legal status of religious assemblies Section 4, ("Autonomous Region of Vojvodina Gazette", No. 18 of the 16th August 1976), the above mentioned community has citizen's civil rights. This ruling implies full independence and autonomy within the organization of every religious community. According to our understanding, the xxxxxxxxxx xxxxxxx religious community has its own Council of Elders for SFR of Yugoslavia.
xxxxxxxxxx, date of birth 15.12.1927,... , is a member of the Council of xxxxxx and therefore is authorized to represent the interests of this religious community before the State, Self-governing and other Authorities and Organizations in SFR of Yugoslavia. He is also authorized to deal with all the questions relating to the legal nature of property, that arise from Section 6, Legal rights of religious communities Act of Autonomous Region of Vojvodina...

The second of these documents made on behalf of the xxxxxxx xxxxxxxxx Community in Novi Sad stated the attestation was made at the request of it's member, the applicant, from xxxxx and went on:

... believers of this community do not bear arms according to the biblical scriptures. This stand of ours is clearly expressed in Sections 9 and 10 of the FUNDAMENTAL PRINCIPLES OF the CHRISTIAN xxxxxxxx COMMUNITY in YUGOSLAVIA, and which principles have been given to Yugoslav authorities at the time of registration of the religious community. Above mentioned Sections of Fundamental Principles are as follows:
Section 9
In relation to Government authorities, the xxxxxxx xxxxxxxx community in accordance with the Bible (Rom.13: 1-3) takes the stand that the governments are appointed by God,and therefore our community considers that it is our duty to respect and submit to the authorities in power, and pray for them (I Tim.2: 1-4), in everything that is not contrary to Christ's doctrine.
Section 10
Members of the xxxxxxx xxxxxxxx community do not bear arms, but they are ready to serve in the Army even in the most difficult and life endangering situations. Loyalty, sincerity and honesty is a sacred duty of every member of the community.They do not take an oath on the basis of expressly stated command of Christ: " Do not kill and do not swear by anything, but let your word be "yes" for what is true, and "no" for what is not.(Mat. 5 v.21,33-37).
Because of strict adherence to God's commandments, i.e.because of not taking an oath, and not bearing arms, the xxxxxxxxs have in the past been persecuted, sentenced to prison for up to 10 years, sometimes more than once for the same reason if that reason re-occurred after serving the sentence.
This attestation is only valid as a statement for the Australian authorities in relation to religious beliefs of the xxxxxxxx members toward the government and authorities.

The document was dated in March 1994 and was stated to have been made in Novi Sad.

Further Submission

With minor amendments the following is a submission made by the applicant's advisers in January 1995.

The applicant fears persecution if returned to Vojvodina primarily on account of his Slovak ethnicity, and his moral and religious objection to service with the army of the Federal Republic of Yugoslavia (FRY). As a resident of Vojvodina, infamous for the mistreatment of its ethnic minorities, the applicant will be unable to avoid persecution. His subsequent fear is founded upon his own experiences prior to departing his homeland and the continued abuse of the Slovak minorities (sic) (and others) in Vojvodina since he departed for Australia.
He is a victim of the Serb/FRY efforts to establish a nation identified by race, culture and religion. This has resulted in the creation of a hybrid state, with political and geographic boundaries encompassing a predominantly homogenous Serbian population, yet still containing many ethnic, religious and cultural minorities. This has led to the application of the process known as ethnic cleansing, a process that has been especially violent in Vojvodina. Ethnic cleansing involves many forms of action: the expulsion of families from their homes, appropriations of property, racial vilification, discrimination, physical brutality, rape and murder. In Vojvodina, the FRY government has consistently been unable or unwilling to protect the Slovak minority; indeed, the state has even instigated or colluded with such activities.
In Vojvodina, the Slovak community is particularly vulnerable to persecution. The community represents only three percent of the overall population of the region. As a relatively small group within society, the Slovaks do not attract the same degree of media attention as other larger minority groups (such as Muslims or Croats), neither does it receive the same degree of support or international protection as other sub-groups. With regard to the applicant's fear of persecution due to his Slovak heritage, the information supplied by the Tribunal suggests that:
"The small Slovak community has faced some of the same problems as the Hungarians, being caught in a war between the Serbs and Croats, but it is not politically prominent and has not been a target of hostile media attention. We have not seen evidence of serious discrimination against Slovaks." (DFAT cable BG61224, 31/12/1993, at 28)
Such an assessment would appear to directly contradict not only the statements of the applicant regarding his experiences in Vojvodina, it would also appear contrary to the assessment of the independent 'umbrella' organisation, Human Rights Watch:
"Serbian paramilitary groups, with the apparent blessing of local, provincial and republican governments, continued to terrorise and forcibly displace Croats, Hungarians, Slovaks and others in Vojvodina ..." (Human Rights Watch World Report 1994, pp.254-255)
"... Serbian refugees, with the active assistance of the regime and extreme nationalist paramilitary groups, terrorised non-Serbs and children of mixed marriage in a systematic campaign to drive them from their homes. The refugees then occupied the abandoned dwellings. Human Rights Watch/Helsinki Watch has documented cases in which armed civilians and paramilitary forces expelled Croats, Hungarians, Slovaks and others from many villages and towns in Vojvodina ..." (Helsinki Watch, Abuses continue Herzegovina, May 1994, p.5)
Further to this, the remarks of Hugh Poulton should be noted:

"The (Serb) authorities have admitted to problems both for themselves and minorities and they have declared their concern and taken some cosmetic measures ostensibly to deal with them... The intention appears to have been to help deflect outside pressure... One [such measure] was the huge officially-organised, three-day Festival of Slovak Culture in Backi Petrovac, which was recorded, to be shown later on television as a kind of propaganda exercise. Yet, only lOkm away in the village of Glosan during the festival, hand-grenades were being thrown into Slovak yards and Slovaks expelled and replaced by Serbian refugees. It is clear that the Serbian refugees are being given a free hand to do whatever they like and terrorise minorities to make them flee and leave their houses. In return, the refugees support the Milosevic regime and help it remain in power in Serbia." (Hugh Poulton, 'The Hungarians, Croats, Slovaks, Romanians, and Rusyns/Ukrainians of the Vojvodina', in Minorities in Central and Eastern Europe, Minority Rights Group International, 1994, p.30)

Any assessment of the true position of the Slovak minority in Vojvodina - and hence the situation faced by the applicant should he be forced to return to his homeland - must take such views into account.

The situation faced by Slovaks in Vojvodina is one of extreme persecution, harassment, discrimination and hardship. Such matters must be considered with reference to the principles of the United Nations High Commissioner for Refugees (UNHCR) Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees (hereinafter UN Handbook), regarding the so-called agents of persecution:

"Persecution is normally related to action by the authorities of a country. It may also emanate from sections of the population that do not respect the standards established by the laws of the country concerned. A case in point may be religious intolerance, amounting to persecution... where sizeable fractions of the population do not respect the religious beliefs of their neighbours. Where serious discriminatory or other offensive acts are committed by the local populace, they can be considered as persecution if they are knowingly tolerated by the authorities, or if the authorities refuse or are unable to offer effective protection (UN Handbook, Re-edited, Geneva, 1992, p.17)

Even in those circumstances where the persecution of the Slovak minority is not actively and physically perpetrated by the Serbdominated FRY government itself, it is submitted that the government takes no substantive action to protect the Slovak minority, nor does it seek to prosecute the Serb protagonists. Indeed, we note that such actions - notably the expulsion of Slovaks and other minorities from their lands and homes - serves well the political purposes of the FRY government. It is contended therefore that the Milosevic regime overtly supports such ethnic cleansing, though it may utilise the brutal services of Serb paramilitary groups and individuals to do it.

The Tribunal has also provided a substantial body of adverse information regarding the issue of military service. Within these DFAT cables, much is made of the issue of prescribed penalties for failure to undertake such service; much is also made of the supposed laxity of prosecution for any such failure to fulfil such service obligations. We note however, that the UNHCR advises caution when dealing with such matters, particularly as

Not withstanding, UNHCR believes that flexibility should be applied with regard to draft evaders and deserters of Muslim origin from the Sandjak region in southern Serbia and northern Montenegro as well as other ethnic minorities... from Vojvodina when they claim strong personal views against joining the army." (UNHCR Document No. CX1904, 02/12/1993, at 3.1)

In assessing the applicant's fear of persecution should he refuse to perform his military service, it is requested that the following passage from Professor James Hathaway be considered:

there is a range of military service which is simply never permissible, in that it violates basic international standards. This includes military action intended to violate basic human rights, ventures in breach of the Geneva Convention standards for the conduct of war, and non-defensive incursions into foreign territory. Where an individual refuses to perform military service which offends fundamental standards of this sort, 'punishment of desertion or draft evasion could, in the light of all other requirements of the definition, in its self be regarded as persecution'." (James C. Hathaway, The Law of Refugee Status, Butterworths, Toronto, 1991, pp. 180-181)

It is submitted that the applicant will be prosecuted for being a draft evader should he return to Yugoslavia. It is noted that the UN Handbook states clearly that a person shall not be recognised as a refugee merely on account of fearing punishment for draft evasion.

The applicant's fear of punishment is clearly related also to his religious objections to military service and to his well-founded fear of persecution on the basis of his ethnicity.

With regard to this, it should be noted that the applicant would be likely to receive disproportionate punishment for his draft evasion.

A number of references were referred to [in the submission] concerning differential treatment of members of minorities.

It is submitted that the applicant would refuse to fight in the Balkan war on account of his sincere moral and religious objections to armed conflict per se; however, this refusal reflects also his moral and personal objections to the specific nature of the Balkan war, and to the ethno-political objectives of the Serb-dominated FRY government.

The nature of the conflict in question, being the bloody civil war that has racked the constituent republics of the former Yugoslavia since 1991, and the political culture of the country from which he has fled are relevant to the determination whether he is a refugee.

It is commonly accepted that during the course of the Balkan civil war, involving the remnant nations of the former Yugoslavia, the fighting has been protracted and particularly bitter.

Certain newspaper articles submitted for comment suggest that the Bosnian Serbs are still prosecuting the ethnic conflict in Bosnia-Herzegovina (BH) have been 'cut adrift' by their FRY allies. It is submitted however, that even a brief appraisal of the current political situation in the former Yugoslavia demonstrates that the conflict is on-going. Though it has been suggested at Tribunal level that FRY is no longer involved in the conflict in BH, such a conclusion reflects a remarkably naive assessment of the Machiavellian world of Balkan politics. While it is acknowledged that there have been some successful peace initiatives in certain regions of BH over the past year, these fragile agreements have mostly deteriorated and open conflict again ensued. The Bosnian Serb militia (with the tacit support of FRY) still pursue a policy of ethnic cleansing within BH; furthermore, FRY has not renounced its territorial designs on Croatia and Slovenia. Recent reports in the independent media state:

"United Nations officials have reported signs of a Serbian fight-back in north-western Bosnia where they have lost significant territory to Muslim-led Bosnian Government troops... The Bosnian Serb leadership, stunned by battlefield reverses unprecedented

in 31 months of war, had vowed to take all territory lost to the Muslims and Croats." ("Serbs in 'kamikaze' counter-attack", The Sunday Age, 06/11/1994)
"The threat of a wider Balkan conflict became very real today, with Croatia threatening to join the fight against the Serbs if Bihac falls, and signs that the Western powers are preparing to abandon Bosnia and end their involvement in the 31-month war." ("Croatia threatens to join in", The Age, 01/12/1994)
"Fears of a brutal new war between Croatia and Serbia have been raised by the Croatian Government's decision to ask United Nations peace-keepers to quit its territory within weeks." ("Croats' plan top oust UN troops raises fears of war", The Age, 13/01/1995)
As this most recent outbreak of fighting has worsened, so has the patience and resolve of the United Nations and NATO waned. Moreover, Croatia has again felt it necessary to involve itself in the struggles of its neighbours, perhaps sensing that if BH falls into the sphere of Serbian influence (as Kosovo and Vojvodina have done) then the fledgling Croatian state will again come under direct threat.
Recognising the on-going nature of the conflict, Senator Nick Bolkus, the Federal Minister for Immigration and Ethnic Affairs recently announced a further extension of those Temporary Visas (Class 443) specifically designed to protect citizens of the former Yugoslavia currently in Australia. These visas have been extended until 31 March 1995. The applicant holds such a visa.
If this statement of departmental policy is to be considered substantive, it would seem unreasonable to refuse the applicant his application for a permanent protection visa partly on the grounds that the conflict in his homeland has supposedly abated; while at the same time continuing to offer him and others temporary protection, on the grounds that the conflict in their homeland remains such that it is too dangerous for them to return.
It is submitted that the political situation in Vojvodina has not improved in the time since the applicant's departure and that there have been no recent tangible signs that the situation may improve in the near future. Further to this, the advice of Hathaway regarding the nature of political change should be noted , particularly as to how such change should be assessed when considering refoulement:
"First, the change must be of substantial political significance, in the sense that the power structure under which persecution was deemed a real possibility no longer exists. The collapse of the persecutory regime, coupled with the holding of genuinely free and democratic elections, the assumption of power by a government committed to human rights, and a guarantee of fair treatment for enemies of the predecessor regime by way of amnesty or otherwise, is the appropriate indicator of a meaningful change of circumstances. It would, in contrast, be premature to consider cessation simply because relative calm has been restored in a country still governed by an oppressive political structure...
"Secondly, there must be reason to believe that the substantial political change is truly effective... in other words, the refugee's right to protection ought not to be compromised simply because progress is being made toward real respect for human rights, even where international scrutiny of that transition is possible." (James C. Hathaway, The Law of Refugee Status, Butterworths. Toronto, 1991, pp.200-202)
With regard to any assessment of the applicant's well-founded fear of persecution should he be forced to return to Vojvodina, it is submitted that this fear satisfies the definitive criteria as containing both a subjective and an objective element. Any assessment of his 'objective situation' must take the psychological effect of his many experiences into genuine and compassionate consideration.

It is noted that the process of refugee determination involves an often perplexing duality for the decision-maker; that being, the necessity of at once making an assessment of an applicant's subjective fear of persecution in their country of origin, whilst seeking also to provide an objective analysis of the particular circumstances - political or otherwise - prevailing in the applicant's homeland.

At no stage of determination should a decision-maker regard the two tiers of the process as equivalent. With regard to this, the UN Handbook is quite specific:

"The phrase 'well-founded fear of being persecuted' is the key phrase of the definition. It reflects the views of its authors as to the main elements of refugee character... Since fear is subjective, the definition involves a subjective element in the person applying for recognition as a refugee. Determination of refugee status will therefore primarily require an evaluation of the applicant's statements rather than a judgement on the situation prevailing in his country of origin." (UN Handbook, op cit., p.11)

A refugee applicant's fear of refoulement must therefore be assessed primarily with regard to his or her subjective fear. While such an assessment must of course involve a detailed and objective analysis of the applicant's particular circumstances, these same circumstances must not be apportioned more weight than either the statements of the applicant, or an assessment of the applicant's personal sincerity and genuine fear of persecution.

The 'Chan Test' is an appropriate test of a refugee applicant's genuine and well-founded fear of persecution. Further to this, we direct the Member's attention to the recent Federal Court case Che Guang Xianq v Minister for Immigration, Local Government and Ethnic Affairs [1994] WAG 61 (hereinafter Che), in which Jenkinson, Spender & Lee JJ. expanded upon the 'Chan Test':

"A 'real chance' that persecution may occur includes the reasonable possibility of such an occurrence but not a remote possibility which, properly, may be ignored...

"The findings (in Che) did not address the definition of refugee set out in the Convention. To establish whether there was a real, as opposed to fanciful, chance that Che would be subject to harassment, detention, interrogation, discrimination or be marked for disadvantage in future employment opportunities by reason of expression of political dissent, it was necessary to look at the totality of Che's circumstances... The delegate may have thought it was unlikely that Che's fears would be realised but the question to be answered was whether the prospect of persecution was so remote as to demonstrate the fear to be groundless." (Federal Court of Australia, Che, [12/08/1994], pp.l5-17)

Since Che, it has been argued by some at Tribunal level that this decision does not expand or re-define the 'Chan Test'; rather, it has been suggested that the Federal Court merely re-stated it. This office does not so much argue that Che offers a profound expansion of Chan; it is merely suggested that the principles of refugee assessment expounded in Che are particularly compelling, going to the very foundation of determination.

It is submitted that when reviewing the applicant's application for refugee status, the Member must look to whether the applicant's fear of persecution can be said to be fanciful, and whether his claims can be considered groundless. If such is found to not be the case, then the applicant should be granted the protection of the Australian government.

It can only be stressed that the applicant has a very real fear of persecution should he be forced to return to Vojvodina. The applicant genuinely fears that he cannot live peacefully within FRY without enduring persecution and hardship on account of his ethnicity, and his refusal to complete his military service obligations. The Tribunal

must look to analyse the nature of the Balkan conflict itself when assessing the applicant's valid reasons for refusing to serve, and also look to assess the depth and sincerity of his moral and religious objections to the completion of such service.

The applicant is a man of strong convictions and passionate beliefs. In the opinion of his representatives, he will definitely refuse to undertake his military service if returned to FRY. This refusal will lead to severe punishment and substantial persecution - persecution that will be even more severe on account of his Slovak heritage.

The Member is requested to apply the principles expounded within the UN Handbook, which allow for refugee claims on the basis of race, religion and the refusal to serve in an unconscionable conflict. At such a time, the Member should set aside the decision of the delegate of the Minister, and accordingly recognise the applicant as deserving of the protection of this country.

Hearing

The applicant appeared at the hearing and evidence was taken through an interpreter fluent in the Slovak language as spoken in Vojvodina. Mr Lucas attended the hearing in the capacity of observer. The applicant called two witnesses who gave evidence on his behalf.

A letter was tendered at the hearing written by a Slovak member of the xxxxxxxx Church in Melbourne. He testified in the letter to the fundamental belief of his faith that adherents do not take up arms or swear an oath of loyalty to the army or for any other reason. He referred to occasions where young men who belonged to the xxxxxxxx faith had been called up and, despite their conscientious objection to military service under arms, were sentenced to imprisonment for a term of anywhere between two to ten years. In some cases there were repeat sentences of greater length than on the first occasion imposed on objectors. The writer stated that he himself had been convicted and imprisoned for three years on Goli Otok (In the hearing the applicant gave evidence that this was an island prison for criminals and xxxxxxxx prisoners were put together with them).

The applicant said that the writer of the letter, who was older than he, had been called up served his imprisonment and then when he was called up on a second occasion, he fled the country. The applicant did not know when he had been imprisoned. The applicant had known this person since his arrival in Australia as they both attended the same church.

While he had nominally been a xxxxxxxx as his parents had been believers, and had been brought up 'in the spirit', he did not accept the faith until 1980 when he realized he could not live a sinful life any more. From then on he had believed, had practised his faith and had attended church in xxxxx every Sunday.

The applicant had undergone his national service for a period of one and a half years in xxxx/x in xxxxxx and xxxxxxx in Macedonia. While he was an ordinary soldier his duties were mine and bomb clearance. At the time of his national service he had no objection to serving as he was a non-believer. From xxxxto 1980 he was a xxxx

xxxxxx in xxxxxx. He had no connection with the Yugoslav National Army (JNA) at all from the end of his national service because he left the country. He was never called-up as a reservist by the JNA, neither before or during the war in 1991/2 in Croatia.

The applicant reiterated his belief that he could neither take up arms or swear an oath of allegiance to the army as a xxxxxxxx. The question was put to him what would his response be if his family was attacked by, for example, members of a Serb militia. He responded that he would put his trust in God as he could not do anything on his own. He stated that under no circumstances would he take up weapons to defend his family or his community.

It was put to the applicant that since it was clear from his application that he had never received any call up papers at any time before his departure from Yugoslavia why was he at risk of being called-up and put in the position of having to object to service under arms. He replied that because the authorities call-up people randomly there was a chance he would in fact be required to serve. He gave the example of his brother who was called-up as a reservist sometime in 1992, during the warmer months. His brother, who is in his mid forties, is not a practising xxxxxxxx. After a short period of active service in which he experienced and observed the horrors of 'ethnic cleansing' he was discharged on the grounds that he was mentally ill. The applicant's brother lived next door to the applicant. At the same time about 500 to 600 men from the xxxxxxxxxarea (in which xxxxx lies) were called-up. They were all members of the minority groups, Slovaks, Hungarians and Romanians. Prior to that time there had been other call-ups in the area. As soon as the war started many Slovaks and members of other minorities in the locality were called-up for active service.

The applicant was asked if anyone of his age was called-up. He said that the authorities take people to go to the war up to the age of 60. When asked again he replied that he knew of people of his age and older who were required to serve. The applicant was then asked whether he could explain why he was not himself called-up during this period. He said that in 1989 before the turmoil started he had already begun the process to come to Australia. Ultimately he had been rejected. On the basis of putting in his application to go to Australia he had handed back his army booklet to the military authorities. This booklet contained details of the one period he had served. He was questioned if he knew whether or not the authorities were aware of his continued presence in Serbia. He replied that because they knew of his intention to leave Yugoslavia that may be why they did not call him. On the other hand he may have been next on the list.

In his application the applicant had made the following statement: ' As I did not inform the army of my presence in Serbia I will be tried as a draft resister'. He was asked what he meant by this. He responded that because he did not ask for the booklet to be returned he will have a greater chance of being called-up for the army or on an exercise. He meant by this during the war, but now it would be even worse because they knew he left and ran away from the war. The applicant said that when he left, the military authorities knew of his departure because he had to have his passport issued and he had to obtain a clearance from the local court that he had not been a party to any criminal wrongdoing. His passport had been issued earlier because he had to present it to the court. The military authorities knew he left because he was required

to have a clearance document from the JNA. He was asked if he had received this then he must have been treated as someone who had not evaded military service. He replied that no one asked him any questions, nor did he encounter any problems, when he went to get the certificate personally from the military authorities in the nearest large town to his home. The applicant is sure that they would call him up to the war which he is against. They would know he had left Yugoslavia. Because he is against taking up arms it would be worse for him. While there is no conflict in which the Army is directly involved it always helps the Serbs in Bosnia and there will come a time when another real war will start and everybody will be expected to fight and there is a possibility he will be killed. The country information that there is apparently now a 24 month alternative non-combat military service in Yugoslavia still presents a problem for him. If he was called-up he must take up arms and in practice the consequences of refusal are grave. While in theory there is a means available by which he may not be forced to act contrary to his religious beliefs, in practice they would force him to take up arms.He knows xxxxxxxxs who have in the past ten years refused to bear arms and have been imprisoned. He went to visit a number of them in prison. There was in particular a family of xxxxxxxxs comprising four brothers who were sentenced respectively to 7,5, 3 and 2 years in prison. The latter was under the new law which provided for a sentence of double the duration of the period of normal service and was imposed during the war. The other cases happened in the five to six years before the war. These people served their sentences either in xxxx. xxxxxxxxx or in xxxxxxx.

On account of the refusal to bear arms there is no alternative but to be imprisoned or worse. The applicant would definitely refuse to take an oath which all national servicemen and reservists are required to give before their service. Anybody who refuses would be guilty of a breach of the law and would be brought before a military court and end up in jail.

The distinction between going to court to justify one's belief and being prosecuted was put to the applicant. He responded that the ones who refuse to serve go to court on the basis of a breach of military law and on the grounds of being contrary to the Yugoslav government. Moreover despite the new regulations the applicant himself would have problems because he had served earlier and the new law which he accepts is in force is strictly for regular national servicemen. When it is a matter of a reservist being called-up for service there is no question of whether he is willing or not to take up arms. If he refuses, he will be killed. The new law will not be applicable to him; it only applies to young servicemen.

The applicant conceded that his home town was not close to the areas where displacement of minorities in Vojvodina had occurred.

Attempts to foment racial hatred against the minorities in Vojvodina carried out by Serb extremists were not successful in his area where his town of xxxxxpeople was xxxxxx xxxxxxxx Slovak and the xxxxxxxxxxxx xxxxxxxx were Romanian and Hungarian. There had been a process where if superiors in institutions or factories had not been Serbs before the war since the war began they were replaced by Serbs.

The applicant commented that the Slovaks in Ilok were to have been transported from their village to make way for Serb refugees but when the Slovak government protested, that stopped.

He does not accept that the Serbs have stopped their campaign against minorities.

As an owner/driver he did all sorts of jobs both in his area and throughout Yugoslavia. It was only in the last three years before his departure that he was an owner/driver. He doubted whether he could return and continue his business on the grounds that there was no means of communicating with people and there was no longer any normal basis for the business. People can not afford to travel, there is poverty, roads are broken and bridges damaged, petrol restrictions are in force and there are areas of the country where he used to go where he would be prevented from going. He used to drive long distances in the course of his business and that is no longer possible. He no longer could go to neighbouring states.

The applicant is totally against war and any conflict. He does not want to be involved in ethnic cleansing and is opposed to the use of force in all circumstances.

He agreed that his religion was recognised by the secular authorities in Yugoslavia, but did not accept that this implied that the State recognised his right to conscientious objection. In the final analysis when one is called to war what you do or do not believe is irrelevant to the authorities.

The applicant called as his first witness a male Slovak who had known him since his arrival here through mutual attendance at the same church. He corroborated the applicant's evidence regarding tenets of their faith and stated that since there was the prescription against killing, the gun was seen as only a preparation for killing. He said that the government did not understand them and in the past forced them to take up guns which led to the prosecution of xxxxxxxxs, for example after the second world war. Persons who had served their sentences on Goli Otok were put with common criminals. xxxxxxxxs had gone to court and been prosecuted and punished, some repeatedly for up to 13 years. The witness said they did not take up arms for the Communist authorities who did not understand their beliefs. He mentioned the death of a young Slovak conscript shortly before the end of his service at the hands of Serbs as an example of persecution.

The applicant's second witness was a female who had known him in Yugoslavia as her husband had worked with him. She said that she had been discriminated against as a Slovak in trying to obtain employment despite excellent grades.She rings her family in Vojvodina and has been told the authorities are still calling up people for war.The last time she spoke to them was just before New Year. Conscripts are being called-up into the regular army. Her information from her family in Yugoslavia was to the effect that once outside the age bracket ones liability to call-up depends on what category of duties one carried out in the regular army before. From her dealings with the applicant she knows that he would never support war and particularly the war in Yugoslavia.

The applicant's final submission was that if he had to return to Yugoslavia it might not be that he would be taken as soon as he arrived. He was sure that he would be

definitely called up and if this happens he will maintain his faith even if it means his death. He is prepared to accept his fate whatever that might be.

At my invitation Mr Lucas addressed me and made the following points:

1. While xxxxx was a xxxxx xxxx xxxxxx xxxxxx xxxxxxxx xx Slovaks, if there was further conflict it could be affected by a further wave of Serbian refugees. Up until now it had been a reasonably secure area, but in Yugoslavia at the present it cannot be taken for granted that the xxxxxxx would be secure from further waves of persons displacing the minority inhabitants in that town.

2. The court appearances which persons claiming to be conscientious objectors to military service had to face in Yugoslavia were more in the nature of prosecutions than hearings where they were able to justify their refusal to serve. He acknowledged that this contention was based on hearsay material in the form of anecdotal evidence from Yugoslav clients and there was good reason to believe that the new laws regarding conscientious objection, particularly in a war situation would not operate in practice in the way they appeared in theory, particularly in the case of members of the ethnic minorities in Yugoslavia.

3. In the course of dealing with the applicant over the preceding year or more he had been impressed by his personal sincerity and the way in which he never sought to exaggerate his claims.

4. He conceded there was no ongoing conflict in terms of a declaration of war involving the Yugoslav Army (VJ) but in reality the VJ was on a war footing and was involved in intifada style fighting in regions against minorities such as the Albanian Kosovars. The army in Kosovo was involved in a police action and there were links between the army and the continuing conflicts in Bosnia and Krajina. He submitted that it was difficult to separate the militias from former members of the JNA who were fighting for them.

DISCUSSION OF CLAIMS AND FINDINGS OF FACT.

The applicant asserts a claim on the grounds of persecution for reasons of race, nationality, religion and political opinion.

One preliminary legal point made on the applicant's behalf requires examination. A submission was made that "whether the prospect of persecution was so remote as to demonstrate the fear to be groundless " is the test to apply. In regard to this, I refer to my earlier discussion of the relationship between the cases of Che and Chan. I would also add that these words as used in Che must still be analysed against the test proposed in Chan that a person's fear of persecution will not be well-founded if the chance of persecution is remote, insubstantial or a far-fetched possibility. I do not take the Full Federal Court, where it uses the term 'groundless', to be saying anything other than it is necessary to establish that the applicant's fear is not well-founded according to the test propounded by the High Court. I do not accept in light of what precedes these words earlier in the judgment that the Federal Court meant that it is necessary to establish that an applicant's fears are without any foundation before rejecting a claim for refugee status. Indeed at page 15 of the unreported judgment the Court talked

about the delegate's finding that the claimed acts of persecution did not establish grounds on which it could be said that the applicant's fear of persecution was well-founded. I consider the term 'groundless' in no way constitutes a departure from the requirement that a fear of persecution must be shown to be well-founded as defined by the High Court in Chan. The test as set out by the High Court requires an examination of the chance of persecution which may be as low as 10% and yet an applicant may still be a refugee. The word 'groundless' must be seen in the context of the statement which the Full Federal Court itself makes that 'a "real chance" that persecution may occur includes the reasonable possibility of such an occurrence but not a remote possibility which, properly, may be ignored.' (at p. 16)

I accept that it is necessary to look at the totality of the applicant's circumstances in arriving at a decision in his case and this I have done

I have little hesitation in accepting his representatives' appraisal of the applicant. I found him to be a witness of truth, sincere in his convictions and a man of integrity. His evidence was devoid of embellishment and exaggeration. I accept that his religious objections to taking up arms and to the oath would be maintained even in the most adverse circumstances. I also accept that he has a religious objection to the use of force in all circumstances, to all conflict and in particular to the abhorrent practice known in the sanitised form as 'ethnic cleansing'.

The starting point is that it is an internationally recognized right of a government to require military service by its citizens and to impose penalties for non-compliance or military desertion. (see Handbook on Procedures and Criteria for Determining Refugee Status, Geneva, January 1992 at para. 167 (the Handbook)). I note the comment in Stoilkovic v Minister of Immigration (Federal Court, Olney J, 33 ALD 379, but referred to in Unreported, 7 September 1993 at p. 5), on the relevance of the paragraphs concerning deserters and persons avoiding military service in the Handbook to matters in issue before the Court similar to what I am considering here.

A person will not be a refugee if his only reason for refusing military service is his dislike of such service or fear of combat (see Handbook at para. 168).The Handbook states, correctly in my opinion, that :

"Fear of prosecution and punishment for desertion or draft-evasion does not in itself constitute well-founded fear of persecution under the definition. " (at para. 167)

If the applicant were to be called up to serve on his return to the Federal Republic of Yugoslavia (Serbia and Montenegro), as a reservist this action would be a legal requirement in that country. The obligation to perform military service is universal upon all males in the applicant's country, and hence it does not in itself amount to discrimination against him. Failure to respond to a call-up may expose the applicant to a penalty ranging from a fine to imprisonment for up to the period of national service or for several years (depending on the circumstances) and potentially longer if a person escapes the country with the intention of avoiding call-up (with some more severe penalties for related offences in time of war). (see DFAT cable BG 60031 of 23.03.93) These penalties which were applicable in the former Yugoslavia (see Amnesty International doc, 'Conscientious Objection to Military Service', Jan. 1991 Index POL 31/01/91) still appear to apply in the re-constituted Yugoslavia.

The Sixth Periodic Report on the situation of human rights in the territory of the former Yugoslavia of the Special Rapporteur states (E/CN.4/1994/110,21 February 1994) (at para. 132) that:

...Article 214, para. 1 of the 1992 Federal Criminal Code of Yugoslavia provides, inter alia, a sentence ranging from a fine to a term of one year of imprisonment for refusing to serve in the military forces. Furthermore, article 214, paragraph 3 of the Code provides that those who avoid military service by going abroad or staying abroad may be sentenced to a term of one to ten years imprisonment. According to the jurisprudence of the Supreme Military Court, the elements of [this article] are satisfied simply if there is an established legal obligation for military service and an intention to avoid this service through escaping abroad or through the extension of an existing stay abroad.
The basis of the applicant's claim to refugee status is that his conscientious belief in opposing war and his objection to taking up arms and swearing an oath will not be recognised by the State by reason of the lack of provision for alternative service, or the inapplicability of what provisions that do exist to his case. In these circumstances the constraints on the applicant's ability to act constituted by the absence of choice, the non-availablity of an exemption from military service or the lack of alternative service, together with the threat of imprisonment are the incidents of persecution.

His claim is one based on an objection to killing and can be classified as an absolute objection to military service.

The Handbook states in this regard:

170. There are, however, also cases where the necessity to perform military service may be the sole ground for a claim to refugee status, i.e. when a person can show that the performance of military service would have required his participation in military action contrary to his genuine political, religious or moral convictions, or to valid reasons of conscience.
Goodwin-Gill puts the matter in this way:
Objectors may be motivated by reasons of conscience or convictions of a religious, ethical, moral, humanitarian, philosophical, or other nature...Military service and objection thereto, seen from the point of view of the state, are issues which go to the heart of the body politic. Refusal to bear arms, however motivated, reflects an essentially political opinion regarding the permissible limits of state authority:it is a political act. The "law of universal application" can thus be seen as singling out or discriminating against those who hold certain political views. (The Refugee in International Law, pp. 33-4)

Schmidt in "The Former Yugoslavia: Refugees and War Resisters" (RFE/RL Research Report vol 3 no 25, 24 June 1994, pp 47-54 observes:

Under the Yugoslav constitution which is still in force in Serbia and Montenegro, there has never been a right to conscientious objector status, except on religious grounds; and even then, as in Croatia, conscientious objectors must perform service within the army itself. The only other alternative to serving in the army is desertion, the penalty for which is a maximum of twenty years' imprisonment if the country is declared to be 'in immediate danger of war.'

The provisions dealing with this aspect of the applicant's claim are referred to in the Sixth Periodic Report on the situation of human rights in the territory of the former Yugoslavia of the Special Rapporteur states (at para. 132) :

Although the Constitution and the relevant legislation of the Federal Republic of Yugoslavia provide for conscientious objection, the corresponding regulations and procedures for its implementation remain to be adopted.

On the applicant's own evidence I am unable to find that he faces a real chance of being treated as someone who has evaded his military obligations by leaving the country in light of the lack of any call-up of him personally and the fact that he was given a military clearance certificate at the time of his departure. Given the declining direct role which the Yugoslav military had in the various conflicts in former Yugoslavia at the time the applicant left I can infer that he was in all probability of little interest to them, although he was registered and it is possible that a connection between his lack of service, despite his continued presence in the country, and the handing in of his service book was simply not made. This finding is independent, however, of other factors which influence the risk he faces should he return to Yugoslavia. It also leaves open the question whether his lack of service during the period of conflict, caused possibly by the fact that the military authorities retained his service book and for that reason did not take him into account when issuing call-up notices as he was not recorded as being in Yugoslavia, would now be recognised by them and increase the chance of him being required to serve should he return on the grounds that he has had no period of service as a reservist at all.

The possibility or otherwise that the applicant may in fact be called-up if he returns to Yugoslavia is relevant to the decision which I ultimately have to make.

In relation to this an earlier DFAT cable commented:

It is possible that a man aged 38 would be called back for general army duty, but logically unlikely given the number of younger males available. It is not out of the question that if the conflict in Croatia reignites, older persons could be recalled to duty, given that there will be fewer younger persons available in Serbia and Montenegro...Again, not highly likely,... (BG 60031 of 23.03.93)

This observation would need to be qualified in my view because it was made at the time when the JNA had withdrawn into Serbia and Montenegro and by reason of the information suggesting that members of minority groups such as Slovaks are at greater risk of mobilisation by the Serbian military authorities than Serbs.

There is information which consistently paints a picture of both differential recruitment and prosecution for avoidance of military service of members of minority groups including the Slovaks.

In practice, a disproportionate number of those who have been prosecuted for refusing service in the military have been members of certain ethnic and religious groups, in particular Muslims, Slovaks and Hungarians. (UN Special Rapporteur, Mr Tadeusz Mazowiecki, Sixth Periodic Report on the Situation of Human Rights in the Territory of the Former Yugoslavia' 21/02/1994 p.23l

Members of ethnic minorities were badly treated in the armed forces where they were viewed with suspicion and often outright hostility. The US State Department 'Country Reports on Human Rights' Serbia/Montenegro 1993)
Within the province of Vojvodina, which remains part of the FRY, conscription has been a controversial issue for the Hungarian minority. While reports differ, Hungarian representatives have charged the government with recruiting disproportionately large numbers from their community to compensate for the shortfall in conscripts from republics that have left the federation. A leading member of the Democratic Community of Vojvodina Hungarians has recently revealed information, reportedly provides by the Yugoslav presidency, which indicates that Hungarian recruits account for 16 percent of the YPA (Yugoslav People's Army) although the Hungarian minority represents only three percent of the FRY's population. (Research Directorate of the Documentation, Information and Research Branch of the Immigration and Refugee Board Croatia and the Federal Republic of Yugoslavia (FRY): Military Service September, 1992 pp. 8-9)

DFAT adds:

Our impression, from evidence available, is that prosecutions for desertion would be much harsher for minority groups in Serbia, such as the Muslims, Albanians, Hungarians, and Croatians or perhaps those of mixed parentage than for those who are perceived to be distinctly Serbian by language and by religion. (DFAT facsimile advice, 16/12/1993)

The DFAT observation regarding the age must now be seen in the context of the increased risk of future conflict due to the changed situation regarding the UN force in Croatia.

The risk that the applicant would be called-up as a reservist and thus be faced with punishment for refusal to take part in a war against his conscience has been increased by the prospect of a renewed conflict brought about by the recent decision by the Croatian President to terminate the mandate of the UN troops on Croatian territory who are currently deployed to form a buffer between the Croatian army and Serbian controlled areas of Croatia.

The Age of 13/01/1995 reported:

Fears of a brutal new war between Croatia and Serbia have been raised by the Croatian Government's decision to ask United Nations peace-keepers to quit its territory within weeks.

The Serbian response to that decision was immediate.

The Yugoslav army will intervene in Croatia to defend rebel Serbs if Croatian forces attempt to seize their self-declared republic after the departure of Unite Nations troops, high- ranking Serbian officials warned...(The Age 20/01/95)

In June of last year the Yugoslav army's Chief of the General Staff, General Perisic, stressed:

The Yugoslav Army's peacetime force is, in quality and quantity, fully equipped for preventing any surprises. It is always capable of taking adequate measures..., even under the most adverse conditions. This means a very short period of time is necessary to transform the peacetime force into a wartime force of over 500,000 men, which is now complete enough to protect the nation from foreign threats of any kind...(BBC Summary of World Broadcasts, June 16, 1994)

I accept as plausible the evidence given by the applicant's female witness that information from contacts in Yugoslavia was to the effect that once outside the age bracket one's liability to call-up depends on what category of duties one carried out in the regular army before. I am prepared to draw the inference that the applicant's previous service in a mine clearing unit, albeit a long time ago, places him in a necessary category.

There is information from the Yugoslav authorities that:

All citizens of Yugoslavia are under military obligation in times of peace and war alike. ..
Conscription (entering in the military records) is done in the calendar year in which the person subject to military service will reach the age of 18 years...
Military service lasts 12 months.
In the case of recruits who for religious or for other reasons do not want to do their military service under arms or want to do so in the civilian sector, the military service lasts 24 months. Military service on civilian duties takes place in the military economic establishments, hospitals, and other organisations and institutions engaging in the matters of general public concern. (Consulate-General of FR Yugoslavia dated 05.04.94)

It requires those not wishing to do their military service under arms to immediately apply to the proper authority on receipt of their call-up papers. (see DFAT cable BG 61225 of 31.12.93)

It appears, however, that the military service in civilian duties which is provided applies only to recruits obliged to perform national service.

There is in my view a sufficient chance of the applicant being called-up and being then required to act contrary to his conscience and belief on pain of imprisonment if he refuses to bear arms or swear an oath, to constitute a real chance of persecution.

I accept the proposition that there is a greater chance of this occurring in war time, and that notwithstanding the ostensible changes in military law to allow for conscientious objection past practice as evidenced by the specific cases of persecution of xxxxxxxxs presented by the applicant and his witnesses leaves me with serious doubts as to the fair application of the law to the applicant in the event of him being called-up as a reservist. Additionally I am prepared to accept on the basis of both the applicant's evidence and the available information that the exemption provisions for service not under arms apply only to those obliged to perform national service as conscripts and not to reservists. In this respect the applicant is in a particularly difficult situation potentially because there is no record of him taking any objection to bearing arms or swearing an oath at the time of his national service since on his

evidence he was a non-believer at the time. I am unable to infer that the Yugoslav military authorities would afford him any dispensation in this regard in the event of any call-up and more particularly in a situation of international or non-international armed conflict or internal disturbances in which the VJ may be engaged in the future.

I find in addition that a lack of recognition of his genuine conscientious objection to military service is made more likely by his being a member of a minority group which according to reliable information exposes him to a greater risk of being dealt with in an adverse manner by the military authorities.

On the grounds of the continuing high level of tension in Kosovo and the prospect of renewed conflict between Serbia and Croatia, the chance of direct army involvement in fighting is no longer as speculative as it might have prior to Dr Tudjman's announcement that he was withdrawing the mandate of the UN force to remain on Croatian soil.

The consequences of a refusal to bear arms or to swear an oath would result in acts, either imprisonment or conduct of a more drastic nature, amounting to persecution on the grounds of religion or less directly of race.

While it is arguable that a refusal in such circumstance might also lead to persecution on the grounds that the acts would be treated as a political statement and constitute persecution on the grounds of imputed political opinion, it is unnecessary to make a finding in relation to this.

There is no basis upon which I can make any finding of discrimination on Convention grounds should the applicant return and encounter difficulties in starting up his business or be unable to start it at all. The matters he referred to in his evidence all are consequences of the prevailing situation in Yugoslavia and are not Convention related.

In light of my finding on the aspect of the applicant's claim based on a conscientious objection to military service I do not intend to deal with the issue of whether he faces a real chance of persecution by reason of his membership of the Slovak minority.

I find therefore that there is a real chance that the applicant will face persecution if he were to return to FRY (Serbia and Montenegro). It follows that the applicant's fear of persecution for reasons of race, nationality, religion and political opinion is well founded. As a consequence, the applicant is a refugee.

DECISION

Application for a protection visa remitted pursuant to paragraph 415(2)(c) of the *Migration Act* 1958 ("the Act") for reconsideration with a direction that the criterion requiring the applicant to be a non-citizen in Australia to whom Australia has protection obligations under the Convention relating to the Status of Refugees done at Geneva on 28 July 1951 as amended by the Protocol relating to the Status of Refugees done at New York on 31 January 1967, is satisfied.

[1] **In accordance with s431 of the *Migration Act* 1958 (C'th), (as amended), the published version of this decision does not contain any statement which may identify the applicant or any relative or other dependent of the applicant.**