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Dockets: A-182-06

A-185-06

Citation: 2007 FCA 171

CORAM: DÉCARY J.A.

SEXTON J.A.

EVANS J.A.

Docket: A-182-06

BETWEEN:

JEREMY HINZMAN (A.K.A. JEREMY DEAN HINZMAN)

LIAM LIEAM NGUYEN HINZMAN (A.K.A. LIAM LIEM NGUYE HINZMAN)

AND NGA THI NGUYEN

Appellants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

Docket: A-185-06

BETWEEN:

BRANDON DAVID HUGHEY

Appellant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

Heard at Toronto, Ontario, on March 19, 2007.

Judgment delivered at Ottawa, Ontario, on April 30, 2007.

REASONS FOR JUDGMENT BY: SEXTON J.A.

CONCURRED IN BY: DÉCARY J.A.

EVANS J.A.

REASONS FOR JUDGMENT

SEXTON J.A.

INTRODUCTION

[1] Jeremy Hinzman and Brandon Hughey voluntarily enlisted to serve in the United States military. During their time in the military, they developed an objection to the war in Iraq, resulting in their belief that it is illegal and immoral. After learning that their units would be deployed to Iraq, they deserted the military and came to Canada, where they made claims for refugee status.

[2] The Refugee Protection Division of the Immigration and Refugee Board (the "Board") considered the claims of Mr. Hinzman and Mr. Hughey (collectively referred to in these Reasons as the "appellants") for refugee status and held that the appellants are not Convention refugees or persons in need of protection, as set out in the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 ("IRPA"). The Board therefore concluded that the appellants are not entitled to stay in Canada as refugees.

[3] In the Federal Court, Mactavish J. dismissed applications for judicial review by the appellants and certified a question which appears later in these Reasons (*Hinzman v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 420, *Hughey v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 421).

[4] The appellants now appeal to this Court. However, for the reasons that follow, I see no reason to depart from the conclusions of the Board and Mactavish J. that the appellants are not entitled to refugee status. Accordingly, I would dismiss the appeals.

[5] These Reasons are given in respect of both appeals (A-182-06 and A-185-06). A copy will be placed in the file of each appeal.

FACTS IN THE HINZMAN APPEAL

[6] In late 2000, Jeremy Hinzman enlisted for a four-year term in the U.S. Army. Mr. Hinzman's decision to join the military was motivated both by the fact that the military would provide him with financial assistance that would allow him to attend university upon completion of his term of enlistment and by his belief that the Army had a higher or noble purpose of doing good things. He chose specifically to become an infantryman because he wanted "to experience the essence of the Army."

[7] Prior to enlisting in the Army, Mr. Hinzman had apparently explored Buddhism. Nevertheless, at the outset of his military service, it appears he did not have any reservations about bearing arms or otherwise fulfilling his duties as a soldier.

[8] However, during basic training, Mr. Hinzman testified that he underwent a process of desentization intended to dehumanize the enemy that caused him to start to question his involvement with the military.

[9] After completing training, Mr. Hinzman was posted to Fort Bragg. Although he excelled as a soldier, Mr. Hinzman continued to question his impending involvement in combat. He testified before the Board that he had been "kind of living a double life," outwardly indicating that he was a "soldier's soldier" but inwardly developing concerns about killing. Ultimately, he concluded that he could not kill, and that all violence does is perpetuate more violence.

[10] Consequently, Mr. Hinzman applied on August 2, 2002 for reassignment to non-combat duties as a conscientious objector, in accordance with Army Regulation 600-43. Although he indicated on his application that he was not a member of a religious sect or organization, he noted that over the past few years, he had been discovering a world-view framed by the teachings of Buddhism, which led to his decision that he was unable to kill. He also stated in the application that in January 2002, he and his wife had begun attending meetings of The Religious Society of Friends, or Quakers, a church espousing pacifism. In accordance with the military's conscientious objector procedures, within three days of submitting his application for conscientious objector status, Mr. Hinzman was reassigned to guard the entrance gate at the Fort Bragg base.

[11] For reasons that are unclear, Mr. Hinzman's first conscientious objector application was not dealt with on its merits. Accordingly, he submitted a new application in October 2002, after he had learned that his unit would be deployed to Afghanistan. Mr. Hinzman believed that the United States had a legitimate basis for going into Afghanistan because he was satisfied that there were links between the Taliban regime then in power in Afghanistan and al-Qaeda, the terrorist organization responsible for the September 11, 2001 attacks on the United States. Mr. Hinzman therefore went to Afghanistan, where he was assigned to kitchen duties because of his pending application for conscientious objector status.

[12] A hearing was held in respect of Mr. Hinzman's conscientious objector application while he was in Afghanistan, on April 2, 2003. Although First Lieutenant Dennis Fitzgerald, who was appointed investigating officer, was satisfied that Mr. Hinzman sincerely opposes war on a philosophical, societal and intellectual level, he concluded that Mr. Hinzman did not meet the definition of conscientious objector, as outlined in Army Regulation 600-43, because Mr. Hinzman had indicated that while he was unable to conduct offensive operations in combat, he would conduct defensive and peacekeeping operations. The First Lieutenant therefore denied Mr. Hinzman's conscientious objector application. First Lieutenant Fitzgerald also held that Mr. Hinzman was using his conscientious objector application to get out of the infantry, a conclusion based, in part, on the negative and apparently erroneous, inference drawn from the First Lieutenant's belief that Mr. Hinzman did not claim conscientious objector status until after he learned he would be deployed to Afghanistan.

[13] Although Mr. Hinzman has complained about his inability to call witnesses at the hearing because the hearing was held in Afghanistan and the witnesses he would have called were in the United States, he did not request an adjournment of the hearing, as he was permitted to do under Army Regulation 600-43. Moreover, Mr. Hinzman chose not to exercise his right to appeal the First Lieutenant's decision, indicating that upon returning to the United States he was worn down and felt there would be no point in pursuing the matter.

[14] Mr. Hinzman subsequently returned to the United States and resumed his normal duties as an infantryman. In December 2003, he learned that his unit would be deployed to Iraq on January 16, 2004. He was determined, however, not to fight in Iraq because he believed the United States military action there to be illegal and immoral. Consequently, Mr. Hinzman decided to desert.

[15] Mr. Hinzman, along with his wife and son, arrived in Canada on January 3, 2004 and filed for refugee status approximately three weeks later. His refugee claim was based on his beliefs described above.

[16] Mr. Hinzman maintains that, if returned to the United States, he will be prosecuted for desertion and likely receive a sentence of one to five years in a military prison.

FACTS IN THE HUGHEY APPEAL

[17] Brandon Hughey volunteered to join the U.S. Army on July 30, 2002 at the age of 17 years, while still a student in high school. He reported for duty on July 9,

2003. Like Mr. Hinzman, he enlisted for a period of four years. Mr. Hughey testified that he joined the military to access financial assistance that would enable him to go to college and because he believed that some things were worth fighting for.

[18] Mr. Hughey learned of the war in Iraq while he was in basic training. Although he originally assumed the war in Iraq could be justified, his opinion changed over time, so that he too believed that the war in Iraq was illegal.

[19] Mr. Hughey testified that while on approved leave from his unit from November 20, 2003 to December 18, 2003 he conducted research about the U.S. military action in Iraq that further entrenched his opposition to the war. Upon his return to his duty station, Fort Hood, Mr. Hughey told his non-commissioned staff sergeant that he did not think the military action in Iraq was morally right and asked the staff sergeant for assistance in seeking a discharge from the military. Mr. Hughey was told to stop thinking so much, that he had signed a contract, and that there was nothing that the superior officer was going to do to help accommodate his request for a discharge. A similar appeal by Mr. Hughey to another superior officer on a later occasion elicited a similar response.

[20] Through research on the internet, Mr. Hughey learned of an anti-war activist named Carl Rising-Moore who was willing to help soldiers escape the military. After Mr. Hughey contacted him in February 2004, Mr. Rising-Moore agreed to help Mr. Hughey get to Canada and explained that Mr. Hughey's only option would be to apply for refugee status on his arrival.

[21] While Mr. Hughey and Mr. Rising-Moore were exchanging e-mails, Mr. Hughey learned that he would be deployed to Iraq. He therefore left his base and arrived in Canada with Mr. Rising-Moore on March 5, 2004. Mr. Hughey applied for refugee protection approximately one month later, on the basis that he had a well-founded fear of persecution in the United States because of his political opinion.

[22] In his testimony, Mr. Hughey stated his belief that if returned to the United States he would face one to five years in prison and that he might face a more severe sentence because the Army knew through interviews in Canada that he had sought asylum in another country. He also testified that in basic training his drill sergeants told the soldiers that they could be put to death for desertion.

DECISIONS OF THE BOARD

1) Interlocutory Decision as to Admissibility of Evidence

[23] Mr. Hinzman brought a preliminary motion before the Board to adduce evidence to establish that the war in Iraq is illegal under international law. He maintained that this evidence of illegality was relevant to his claim because it would bring him within paragraph 171 of the United Nations *Handbook on Procedures and Criteria for Determining Refugee Status* (the "*Handbook*"), a document treated as a "highly persuasive authority" in an assessment of whether an individual qualifies for refugee status: *Chan v. Canada (Minister of Employment and Immigration)*, [1995] 3 S.C.R. 593 at page 659.

[24] Paragraph 171 of the *Handbook* provides as follows:

> 171. Not every conviction, genuine though it may be, will constitute a sufficient reason for claiming refugee status after desertion or draft-evasion. It is not enough for a person to be in disagreement with his government regarding the political justification for a particular military action. 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, in itself be regarded as persecution.

[25] Mr. Hinzman argued before the Board that an illegal war constitutes a military action "condemned by the international community as contrary to basic rules of human conduct," within the meaning of paragraph 171 of the *Handbook*, such that any punishment for deserting an illegal war would constitute persecution.

[26] The Board disagreed. In its view, when paragraph 171 of the *Handbook* speaks of a military action contrary to basic rules of human conduct, it refers to specific acts the soldier would be expected to perform "on the ground," not to the legality of the conflict as a whole. Accordingly, the Board concluded the illegality of the war in Iraq was not relevant to Mr. Hinzman's claims and therefore refused to admit evidence directed to the issue.

[27] The appellants are represented by the same counsel. Moreover, Mr. Hughey's case was heard by the same Board member who had previously adjudicated the *Hinzman* case. In light of the Board's preliminary evidentiary ruling in the *Hinzman* case, counsel for the appellants did not adduce evidence as to the illegality of the war in Iraq in the *Hughey* case.

2) Decisions as to the Merits of the Refugee Claims

[28] Although the Board issued separate Reasons in the *Hinzman* and *Hughey* cases, the claims in each case were dismissed on substantially the same basis. Therefore, I summarize the key holdings of the Board collectively.

[29] The Board first identified that there is a presumption in refugee law that states are capable of protecting their citizens. Likewise, the Board noted that there is a presumption that ordinary laws of general application, such as the U.S. laws relating to desertion, are not persecutory. After a detailed analysis, the Board concluded that the appellants had failed to rebut these presumptions of state protection and neutrality of laws and as such, their refugee claims could not succeed.

[30] The Board also considered the appellants' contention that the U.S. military action in Iraq involves serious violations of international humanitarian law which are condemned by the international community as contrary to basic rules of human conduct. The appellants argued that, because of these violations of international humanitarian law, paragraph 171 of the *Handbook* directs that any punishment for their refusal to participate in such conduct would amount to persecution. The Board

rejected this argument after an extensive review of the evidence adduced to establish the "on the ground" conduct of the United States military in Iraq. According to the Board, the appellants failed to adduce sufficient evidence to show that if deployed to Iraq they would personally have been required to engage in conduct condemned by the international community as contrary to basic rules of human conduct.

[31] Finally, the Board considered whether the punishment the appellants would face upon return to the United States would amount to persecution. To establish this claim, the Board indicated that the appellants would have to show that the relevant provisions of the U.S. Uniform Code of Military Justice ("UCMJ") would be applied to them in a discriminatory fashion or would amount to cruel or unusual treatment or punishment. Neither of these grounds, in the Board's view, was made out by the appellants. Accordingly, the appellants' applications for refugee status were rejected.

DECISIONS OF THE FEDERAL COURT

[32] The appellants sought judicial review of the Board's decisions in the Federal Court. A central issue before Mactavish J. was the interpretation and application of paragraph 171 of the *Handbook*. The appellants argued that the Board had been wrong to exclude evidence of the Iraq war's illegality as irrelevant to the appellants' refugee claims, that the Board erred in finding that the appellants had not established that the violations of international humanitarian law committed by the American military in Iraq are systemic, and that the Board had applied too heavy a burden on the appellants to demonstrate that they would have been involved in unlawful acts had they gone to Iraq.

[33] After extensive reasons, Mactavish J. rejected all of the appellants' claims regarding paragraph 171. She held that in the case of a mere foot soldier, paragraph 171 refers only to "on the ground" conduct of the soldier in question, not to the legality of the war itself. Moreover, she concluded that the Board's holding that violations of international humanitarian law by the American military in Iraq were not systemic or condoned by the state was a finding of fact reviewable on a standard of patent unreasonableness. In her view, the appellants were unsuccessful in impeaching the Board's finding against this standard. Likewise, Mactavish J. was satisfied that the Board had applied the appropriate standard of proof in determining whether the appellants had demonstrated that they would have been involved in unlawful acts had they gone to Iraq.

[34] Finally, Justice Mactavish considered whether it was reasonable for the Board to find that the appellants had failed to rebut the presumption of state protection. She concluded that the Board's decision was appropriate. In her view, because there is no internationally recognized right to conscientiously object to a particular war, other than in the circumstances specifically identified in paragraph 171 of the *Handbook*, which in her view were not made out in either of the present cases, the fact that the appellants may face prosecution upon return to the United States did not amount to a failure of state protection or to persecution on the basis of political opinion.

[35] Accordingly, Mactavish J. concluded that there was no basis for interfering with the decisions of the Board. She also certified the following question:

> When dealing with a refugee claim advanced by a mere foot soldier, is the question whether a given conflict may be unlawful in international law relevant to the determination which must be made by the Refugee Division under paragraph 171 of the UNHCR *Handbook*?

RELEVANT STATUTORY PROVISIONS

[36] Section 95 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 ("IRPA") confers refugee status on individuals who are Convention refugees, while section 96 of IRPA defines what constitutes a Convention refugee. The text of these sections is as follows:

95. (1) Refugee protection is conferred on a person when	95. (1) L'asile est la protection conférée à toute personne dès lors que, selon le cas :
(*a*) the person has been determined to be a Convention refugee or a person in similar circumstances under a visa application and becomes a permanent resident under the visa or a temporary resident under a temporary resident permit for protection reasons;	*a*) sur constat qu'elle est, à la suite d'une demande de visa, un réfugié ou une personne en situation semblable, elle devient soit un résident permanent au titre du visa, soit un résident temporaire au titre d'un permis de séjour délivré en vue de sa protection;
(*b*) the Board determines the person to be a Convention refugee or a person in need of protection; or	*b*) la Commission lui reconnaît la qualité de réfugié ou celle de personne à protéger;
(*c*) except in the case of a person described in subsection 112(3), the Minister allows an application for protection.	*c*) le ministre accorde la demande de protection, sauf si la personne est visée au paragraphe 112(3).
(2) A protected person is a person on whom refugee protection is conferred under subsection (1), and whose claim or application has not subsequently been deemed to be rejected under subsection 108(3), 109(3) or 114(4).	(2) Est appelée personne protégée la personne à qui l'asile est conféré et dont la demande n'est pas ensuite réputée rejetée au titre des paragraphes 108(3), 109(3) ou

114(4).

96. A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,	96. A qualité de réfugié au sens de la Convention — le réfugié — la personne qui, craignant avec raison d'être persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques :
(*a*) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themself of the protection of each of those countries; or	*a*) soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de chacun de ces pays;
(*b*) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.	*b*) soit, si elle n'a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle, ne peut ni, du fait de cette crainte, ne veut y retourner.

ANALYSIS

1) Introduction

[37] The certified question asks this Court to rule on whether evidence of the illegality of a military action is relevant to an analysis governed by paragraph 171 of the *Handbook*. However, to qualify for refugee status, the appellants would have to first satisfy the court that they sought, but were unable to obtain, protection from their home state, or alternatively, that their home state, on an objective basis, could not be expected to provide protection. In my view, for the reasons that follow, the appellants are unable to satisfy this first criterion and therefore it is unnecessary to proceed to the second stage of the analysis where the certified question might become relevant. I would therefore decline to answer the certified question and would dismiss the appeals.

2) Standard of Review

[38] Mactavish J. correctly identified that questions as to the adequacy of state protection are questions of mixed fact and law ordinarily reviewable against a standard of reasonableness (*Hinzman v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 420 at paragraph 199, *Hughey v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 421 at paragraph 186). As the discussion that follows will illustrate, I am of the view that the Board's holding that the appellants failed to rebut the presumption of state protection was reasonable.

3) State Protection and Persecution

[39] In their Memoranda of Fact and Law, the appellants accept that to succeed in their claims for refugee status, they must come within the definition of "Convention refugee," which is set out in section 96 of IRPA:

96. A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,	96. A qualité de réfugié au sens de la Convention — le réfugié — la personne qui, craignant avec raison d'être persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques :
(*a*) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themself of the protection of each of those countries; or	*a*) soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de chacun de ces pays;
(*b*) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.	*b*) soit, si elle n'a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle, ne peut ni, du fait de cette crainte, ne veut y retourner.

[40] The appellants argue that if they are returned to the United States, they will face one to five years in prison for deserting the military. This punishment, they say, amounts to persecution on the basis of their political opinion that the war in Iraq is illegal and immoral. Moreover, they maintain that because the alleged persecutor is the state itself, state protection from persecution is necessarily absent. Therefore, the appellants assert that they are Convention refugees.

[41] In evaluating the appellants' claims, the starting point must be the direction from the Supreme Court of Canada that refugee protection is meant to be a form of surrogate protection to be invoked only in those situations where the refugee claimant has unsuccessfully sought the protections of his home state. In *Canada (Attorney*

General) v. Ward, [1993] 2 S.C.R. 689 at page 709 ("*Ward*"), La Forest J., speaking for the Court, explained this concept as follows:

> At the outset, it is useful to explore the rationale underlying the international refugee protection regime, for this permeates the interpretation of the various terms requiring examination. International refugee law was formulated to serve as a back-up to the protection one expects from the state of which an individual is a national. **It was meant to come into play only in situations when that protection is unavailable, and then only in certain situations. The international community intended that persecuted individuals be required to approach their home state for protection before the responsibility of other states becomes engaged.** [Emphasis added.]

[42] The appellants say they fear persecution if returned to the United States. However, to successfully claim refugee status, they must also establish that they have an objective basis for that fear: *Ward* at page 723. In determining whether refugee claimants have an objective basis for their fear of persecution, the first step in the analysis is to assess whether they can be protected from the alleged persecution by their home state. As the Supreme Court of Canada explained in *Ward* at page 722, "[i]t is clear that the lynch-pin of the analysis is the state's inability to protect: it is a crucial element in determining whether the claimant's fear is well-founded." [Emphasis in original.] Where sufficient state protection is available, claimants will be unable to establish that their fear of persecution is objectively well-founded and therefore will not be entitled to refugee status. It is only where state protection is not available that the court moves to the second stage, wherein it considers whether the conduct alleged to be persecutory can provide an objective basis for the fear of persecution. If indeed the illegality of the war is relevant, it is at this second stage that the court would consider it. However, because I have determined that the appellants are unable to satisfy the first stage of the analysis, that is, that the United States is incapable of protecting them, it is unnecessary to consider the issues arising in the second stage, including the relevance of the legality of the Iraq war.

[43] In *Ward*, the Supreme Court explained at page 725 that in refugee law, there is a presumption of state protection:

> …nations should be presumed capable of protecting their citizens. Security of nationals is, after all, the essence of sovereignty. Absent a situation of complete breakdown of state apparatus, such as that recognized in Lebanon in *Zalzali*, it should be assumed that the state is capable of protecting a claimant.

[44] To rebut the presumption, the Court stated that "clear and convincing confirmation of a state's inability to protect must be provided": *Ward* at page 724.

[45] In *Kadenko v. Canada (Solicitor General)* (1996), 143 D.L.R. (4th) 532 at page 534 (F.C.A.), Décary J.A. elaborated on these principles and highlighted that the more democratic a country, the more the claimant must have done to seek out the protection of his or her home state:

> When the state in question is a democratic state, as in the case at bar, the claimant must do more than simply show that he or she

> went to see some members of the police force and that his or her efforts were unsuccessful. **The burden of proof that rests on the claimant is, in a way, directly proportional to the level of democracy in the state in question: the more democratic the state's institutions, the more the claimant must have done to exhaust all the courses of action open to him or her**. [Emphasis added.]

[46] The United States is a democratic country with a system of checks and balances among its three branches of government, including an independent judiciary and constitutional guarantees of due process. The appellants therefore bear a heavy burden in attempting to rebut the presumption that the United States is capable of protecting them and would be required to prove that they exhausted all the domestic avenues available to them without success before claiming refugee status in Canada. In *Minister of Employment and Immigration v. Satiacum* (1989), 99 N.R. 171 at page 176 (F.C.A.) ("*Satiacum*") this Court was called upon to consider a claim of insufficient state protection in the United States and commented on the difficult task facing a claimant attempting to establish a failure of state protection in the United States:

> In the case of a nondemocratic State, contrary evidence might be readily forthcoming, but in relation to a democracy like the United States contrary evidence might have to go to the extent of substantially impeaching, for example, the jury selection process in the relevant part of the country, or the independence or fair-mindedness of the judiciary itself.

[47] Although the United States, like other countries, has enacted provisions to punish deserters, it has also established a comprehensive scheme complete with abundant procedural safeguards for administering these provisions justly. In particular, Army Regulation 600-43 formally recognizes the validity of conscientious objection to military service by providing conscientious objectors with exemptions from military service or alternatives to combat. Soldiers attempting to avail themselves of these exemptions from combat service are provided with numerous procedural protections, including the right to a hearing and a right of appeal. They are also transferred to non-combat positions upon the making of an application, a provision from which Mr. Hinzman benefited when he was assigned to act as a guard at the entrance of the Fort Bragg base and to kitchen duties for the duration of his deployment in Afghanistan.

[48] Furthermore, while punishment for desertion can include imprisonment, the evidence indicates that the vast majority of Army deserters in the United States have not been prosecuted or court-martialled. Rather, approximately 94% of deserters have been dealt with administratively and merely receive a less-than-honourable discharge from the military (Exhibit M-5, Appeal Book at page 2420).

[49] The Board found that no evidence had been brought forward to establish that the appellants would not be afforded the full protection of the law if they were court-martialled in the United States. It concluded that if the appellants were court-martialled, they would be subjected to a sophisticated military justice system that respects the rights of the service person, guarantees appellate review and provides a

limited access to the U.S. Supreme Court, as outlined in the UCMJ and the Manual for Courts-Martial of the United States.

[50] Neither Mr. Hinzman nor Mr. Hughey made an adequate attempt to avail himself of the protections afforded by the United States. Although Mr. Hinzman applied for conscientious objector status, he did not avail himself of all the recourses available to him. In particular, he failed to take advantage of his right to request an adjournment of the hearing respecting his conscientious objector application until his return to the United States, where he would be able to call appropriate witnesses, and to avail himself of his right of appeal from a negative decision at first instance. Like the Board, I find that it was not unreasonable to expect that Mr. Hinzman would have pursued further his request for conscientious objector status after learning that First Lieutenant Fitzgerald had found against him.

[51] Unlike Mr. Hinzman, Mr. Hughey did not apply for conscientious objector status, nor did he take any other formal steps to avoid combat service contrary to his political views. Mr. Hughey's attempts to avail himself of protections available in the United States appear to be limited to the discussions he had with his superior officers about the possibility of obtaining a discharge from the military, in which he was told that such a discharge was not available. He apparently did not seek any other advice, for example from a chaplain or a lawyer, about the options available to him.

[52] Rather than attempt to take advantage of the protections potentially available to them in the United States, the appellants came to Canada and claimed refugee status. As the Supreme Court of Canada directed in *Ward*, however, refugee protection is not available where there has been an inadequate attempt to seek out the protections available in one's home country.

[53] The appellants challenge this reasoning, arguing that evidence of the state's failure to protect is unnecessary where the state is the agent of persecution. They cite *Zhuravlvev v. Canada (Minister of Citizenship and Immigration)*, [2000] 4 F.C. 3 at paragraph 19 (F.C.T.D.), for the proposition that when the state is persecuting the claimants, state protection is, by definition, absent. They note that in *Ward*, at issue were the actions of a non-state entity that was allegedly persecuting the claimant. According to the appellants, only in that situation is it appropriate for the Court to inquire into whether the state was able to protect the refugee claimant from his persecutor.

[54] However, the concepts of persecution and state protection are interconnected such that the question of whether the refugee claimant has attempted to avail himself of the protective mechanisms provided by the state is relevant both where the alleged persecutor is an organ of the state and where the alleged persecutor is a non-state entity. The central feature of the refugee protection scheme is that the refugee claimant has a fear of persecution that is objectively well-founded (*Ward* at page 723). Where the claimant alleges that he is being persecuted by the state itself, the inquiry into the availability of state protection goes to the question of whether the claimant has an objective basis for his fear of persecution. If effective state protection for religious or political beliefs is available to the claimant, it can hardly be said that there is a serious possibility of persecution by the state sufficient to make his fear of persecution objectively well-founded. The presumption of state protection described

in *Ward*, therefore, applies equally to cases where an individual claims to fear persecution by non-state entities and to cases where the state is alleged to be a persecutor. This is particularly so where the home state is a democratic country like the United States. We must respect the ability of the United States to protect the sincerely held beliefs of its citizens. Only where there is clear and convincing evidence that such protections are unavailable or ineffective such that state conduct amounts to persecution will this country be able to extend its refugee protections to the claimants.

[55] A second contention made by the appellants is that *Ward* requires refugee claimants to seek out protections provided by their home countries only if that protection can be said to "reasonably have been forthcoming." In their assessment, the protections provided to the appellants by the United States would not meet this threshold. They say that the American approach to conscientious objection does not protect those who only object to specific wars, rather than to all wars. The appellants argue that because they fall into the former category, it cannot be said that protection from the United States "might reasonably have been forthcoming" to them such that they should have attempted to avail themselves of such procedures. Moreover, the appellants submit that they would be unable to challenge the legality of the Iraq war in a U.S. court because of the U.S. political questions doctrine which, they claim, renders such issues non-justiciable. In light of this doctrine the appellants say that their only option would be to appeal to the Executive, an illusory recourse, in their view, because it was the Executive that chose to go to war in Iraq.

[56] I cannot agree. A careful reading of *Ward* illustrates that when the Supreme Court of Canada adopted the test formulated by Professor Hathaway (that only in situations in which state protection "might reasonably have been forthcoming" will the claimant's failure to approach the state for protection defeat his claim), the Court did not intend that refugee claimants would easily be able to avoid the requirement that they approach their home countries for protection before seeking international refugee protection. La Forest J. clarifies in the next sentence of his Reasons, at page 724, that the test is meant to be an objective one:

> …the claimant will not meet the definition of "Convention refugee" where it is objectively unreasonable for the claimant not to have sought the protection of his home authorities...

[57] *Kadenko* and *Satiacum* together teach that in the case of a developed democracy, the claimant is faced with the burden of proving that he exhausted all the possible protections available to him and will be exempted from his obligation to seek state protection only in the event of exceptional circumstances: *Kadenko* at page 534, *Satiacum* at page 176. Reading all these authorities together, a claimant coming from a democratic country will have a heavy burden when attempting to show that he should not have been required to exhaust all of the recourses available to him domestically before claiming refugee status. In view of the fact that the United States is a democracy that has adopted a comprehensive scheme to ensure those who object to military service are dealt with fairly, I conclude that the appellants have adduced insufficient support to satisfy this high threshold. Therefore, I find that it was objectively unreasonable for the appellants to have failed to take significant steps to attempt to obtain protection in the United States before claiming refugee status in Canada.

[58] In the circumstances, it is difficult to conclude, without clear evidence of the appellants' experiences to the contrary, that the appellants would have inadequate protection for their beliefs in the United States. Mr. Hinzman's objections to combat transcend the war in Iraq and are grounded at least in part in his religious and spiritual beliefs. He may therefore very well have qualified as a conscientious objector had he pursued his application fully. Mr. Hughey may have more difficulty in seeking conscientious objector status because he objects only to the specific military action in Iraq on political grounds. Without evidence of his attempts to obtain such protection, however, it is impossible to know how he would have fared. In any event, conscientious objector discharges are not the only means by which soldiers can obtain early release from the military. Statistics adduced by the Crown indicate that approximately 94% of deserters from the U.S. Army have not faced prosecution and imprisonment, but have merely been dealt with administratively by being released from the military with a less-than-honourable discharge. Arguably, the chance of receiving an administrative discharge will be even higher for those who attempt to negotiate a discharge before deserting their units. Contrary to the appellants' assertions, therefore, these statistics suggest that appeal to the Executive is not an illusory recourse.

[59] In oral argument, counsel for the appellants disputed the statistics relating to punishment for deserters on the basis that they were computed prior to the commencement of the most recent U.S. military action in Iraq. However, he could not point us to any contrary evidence. Moreover, there is reason to believe the statistics would not have changed materially. As Lord Hoffman noted in *Sepet v. Secretary of State for the Home Department*, [2003] UKHL 15 at paragraph 44 (H.L.), soldiers who conscientiously object to combat may do more harm than good because their unwillingness to participate voluntarily may make them ineffective in combat and because they are likely to be articulate individuals who will attempt to spread their beliefs among their colleagues. It therefore may be in the best interests of the military to accommodate those who object to combat by merely discharging them from service.

[60] Moreover, while the Board said that the appellants would likely face one to five years imprisonment if returned to the United States, this can only be an opinion as to what U.S. courts would do. It is important to note that the Board's Reasons did not consider all of the important evidence. In particular, the Reasons make no reference to the statistic that the vast majority of deserters are not prosecuted, let alone jailed for their conduct. As Justice Evans identified in *Cepeda-Gutierrez v. Canada (Minister of Citizenship and Immigration)*, [1998] F.C.J. No. 1425 at paragraph 17 (F.C.T.D.), a court will be reluctant to defer to a tribunal's decision where the tribunal's reasons consider in detail the evidence supporting its conclusions, but do not refer to important evidence pointing to a different conclusion:

> [17] However, **the more important the evidence that is not mentioned specifically and analyzed in the agency's reasons, the more willing a court may be to infer from the silence that the agency made an erroneous finding of fact "without regard to the evidence"**: *Bains v. Canada (Minister of Employment and Immigration)* (1993), 63 F.T.R. 312 (F.C.T.D.). In other words, the

> agency's burden of explanation increases with the relevance of the evidence in question to the disputed facts. Thus, a blanket statement that the agency has considered all the evidence will not suffice when the evidence omitted from any discussion in the reasons appears squarely to contradict the agency's finding of fact. **Moreover, when the agency refers in some detail to evidence supporting its finding, but is silent on evidence pointing to the opposite conclusion, it may be easier to infer that the agency overlooked the contradictory evidence when making its finding of fact**.

[61] Although the Board considered evidence suggesting that the appellants would be imprisoned for desertion if returned to the United States, it failed to make reference to the critical statistic that most deserters have not been imprisoned. This failure on the part of the Board suggests that its opinion regarding the punishment the appellants will potentially face upon return to the United States was made without regard to the material before it and therefore the Board's opinion cannot be relied upon.

4) Conclusion

[62] In conclusion, the appellants have failed to satisfy the fundamental requirement in refugee law that claimants seek protection from their home state before going abroad to obtain protection through the refugee system. Several protective mechanisms are potentially available to the appellants in the United States. Because the appellants have not adequately attempted to access these protections, however, it is impossible for a Canadian court or tribunal to assess the availability of protections in the United States. Accordingly, the appellants' claims for refugee protection in Canada must fail.

CLAIMS OF MR. HINZMAN'S WIFE AND SON

[63] Mr. Hinzman's wife, Nga Thi Nguyen, and son, Liam Liem Nguyen Hinzman, also claimed refugee status on the basis of membership in a particular social group, namely, Mr. Hinzman's immediate family. Although they are named as appellants in the *Hinzman* appeal, no arguments were addressed to them in the Memorandum of Fact and Law filed in respect of that appeal or in oral argument. Moreover, the Order sought in the *Hinzman* appeal refers to the "Appellant," in the singular, thereby apparently referring only to Mr. Hinzman. In these circumstances, I adopt the conclusions of the Board:

> The adult claimants adduced no evidence that Nga Thi Nguyen or Liam Liem Nguyen Hinzman would face a serious possibility of persecution or other serious harm as a result of being part of Mr. Hinzman's family, even were he to receive a term of imprisonment for his desertion. They relied on the evidence of Mr. Hinzman, with whose claim theirs were joined. Since Mr. Hinzman has failed to establish his claim, their claims must also fail.

DISPOSITION

[64] For the foregoing reasons, I would refrain from answering the certified question and I would dismiss the appeals.

"J. Edgar Sexton" J.A.

"I agree

Robert Décary J.A."

"I agree

John M. Evans J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-182-06
APPEAL FROM A JUDGMENT OF THE HONOURABLE JUSTICE ANNE MACTAVISH DATED MARCH 31, 2006, NO. IMM-2168-05	
STYLE OF CAUSE:	JEREMY HINZMAN (A.K.A. JEREMY DEAN HINZMAN), LIAM LIEAM NGUYEN HINZMAN (A.K.A. LIAM LIEM NGUYE HINZMAN) AND NGA THI NGUYEN v. THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	MARCH 19, 2007
REASONS FOR JUDGMENT BY:	SEXTON J.A.
CONCURRED IN BY:	DÉCARY J.A. EVANS J.A.
DATED:	APRIL 30, 2007

APPEARANCES:

Mr. Jeffry A. House	FOR THE APPELLANTS
Ms. Marianne Zoric, Mr. Robert Bafaro And Ms. Janet Chisholm	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Jeffry A. House	FOR THE APPELLANTS
Toronto, Ontario	
John H. Sims, Q.C.	FOR THE RESPONDENT
Deputy Attorney General of Canada	

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-185-06
APPEAL FROM A JUDGMENT OF THE HONOURABLE JUSTICE ANNE MACTAVISH DATED MARCH 31, 2006, NO. IMM-5571-05	
STYLE OF CAUSE:	BRANDON DAVID HUGHEY v. THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	MARCH 19, 2007
REASONS FOR JUDGMENT BY:	SEXTON J.A.
CONCURRED IN BY:	DÉCARY J.A. EVANS J.A.
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Mr. Jeffry A. House	FOR THE APPELLANT
Ms. Marianne Zoric, Mr. Robert Bafaro And Ms. Janet Chisholm	FOR THE RESPONDENT

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Date: 20070430

Docket: A-182-06

Ottawa, Ontario, April 30, 2007

CORAM: DÉCARY J.A.

SEXTON J.A.

EVANS J.A.

BETWEEN:

JEREMY HINZMAN (A.K.A. JEREMY DEAN HINZMAN)

LIAM LIEAM NGUYEN HINZMAN (A.K.A. LIAM LIEM NGUYE HINZMAN)

AND NGA THI NGUYEN

Appellants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT

The appeal is dismissed and the certified question will not be answered.

"Robert Décary"

J.A.

Date: 20070430

Docket: A-185-06

Ottawa, Ontario, April 30, 2007

CORAM: DÉCARY J.A.

SEXTON J.A.

EVANS J.A.

BETWEEN:

BRANDON DAVID HUGHEY

Appellant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT

The appeal is dismissed and the certified question will not be answered.

"Robert Décary"

J.A.