V95/03169 [1995] RRTA 2742 (7 December 1995)

REFUGEE REVIEW TRIBUNAL

DECISION AND REASONS FOR DECISION

RRT Reference : V95/03169

Tribunal : John A. Gibson

Date : 7 December 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 a decision made on 31 March 1995 refusing 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, in para (c) an "RRT-reviewable decision" to include a decision to refuse to grant a protection visa; 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.

BACKGROUND

The applicant is from the rump Yugoslavia and was born in xxxxxxx in Montenegro. His last place of residence in that country was a town in Montenegro. His parents and grandparents were Montenegrin and he calls himself a Montenegrin. He worked in the hospitality industry before coming to Australia. He is in his mid-thirties. He arrived as a visitor in December 1989 and made an application for Refugee Status in March 1992. In his application he describes himself as an adherent of the Orthodox faith.

On the grounds of his birth in the former constituent republic of Montenegro within the Federal Socialist Republic of Yugoslavia he is a citizen of the successor state, the Federal Republic of Yugoslavia (Serbia and Montenegro).

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 same 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 p. 396).

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 p.389 and p.398, per Toohey J at p.407, and per McHugh J at p.429). 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 p.389) and though it "does not weigh the prospects of persecution...it discounts what is remote or insubstantial" (p.407); "a far fetched possibility must be excluded" (at p.429). Therefore, a real chance of persecution occurring may exist "notwithstanding that there is less than a 50 per cent chance of persecution occurring" (at p.389). "... 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 *MIEA v Che Guang Xiang*, unreported, 12 August 1994, No. WAG61 of 1994, (Che), 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 *MIEA and Paterson v Mok*, 127 ALR 223, Sheppard J, (Mok), with whom the other members of the Court agreed, said at 248:

"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)."

In *Periannan Murugasu v. Minister for Immigration and Ethnic Affairs* (unreported, Federal Court of Australia, 1987), Wilcox J said:

The word "persecuted" suggests a course of systematic conduct aimed at an individual or at a group of people. It is not enough that there be fear of being involved in incidental violence as a result of civil or communal disturbances. I agree with counsel for the applicant that it is not essential to the notion of persecution that the persecution be directed against the applicant as an individual. In a case where a community is being systematically harassed to such a degree that the word persecution is apt, then I see no reason why an individual member of that community may not have a well-founded fear of persecution.

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 p.430 of Chan).

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'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 *Che*, 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 the case of *Mok*, supra (at p.250), it was said that:

the court [*in Chan*] decided that the time at which the status of refugee was required to be held was at the time the determination was made.

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 [an application 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).

Refugee *sur place*

A refugee sur place is a person who was not a refugee when he or she left his or her country of nationality or habitual residence , but who becomes one at a later date. This may be due to circumstances arising in the country of origin in his or her absence, or as a result of his or her actions subsequent to departure.(see UNHCR Handbook on Procedures and Criteria for Determining Refugee Status (1992) para 94-96.)

CLAIMS & EVIDENCE

Application

As Yugoslavia was a communist country, the applicant was never permitted to wear a cross or keep any religious literature. Religion was discouraged and had to be concealed.

In xxxx, the applicant was automatically made a member of the Montenegrin branch of the Communist party. He was compelled to attend communist study sessions after school from xxxxxx. If he had not attended these classes his membership would have been revoked and it would have been impossible for him to find a job. In xxxx when he travelled to xxxxxxx his membership was revoked.

In xxxxxxxxx 1989 the army reserve visited his home to conscript him but as he already held an Australian visa he refused to go. This visa was a premeditated precaution to protect himself from having to fulfil military service obligations.

In xxxx 1991 when tensions between Serbia and Croatia had mounted, the army reserve visited his mother's home demanding to know his whereabouts as he had been called to serve twice since he left for Australia. On return, he will be forced to fulfil his military obligations.

Statement

"I cannot safely reside in Yugoslavia while Serbia's war with Croatia, and other states seeking independence, continues. I have already been called to serve in the Yugoslav Army in its war against Croatia and Kosova (Macedonia) on three separate occasions.

In xxxxxxxxx 1989 when I was first called to the army I refused because I was in possession of an Australian visa - itself a premeditated precaution to protect me from having to fulfil military service obligations. While I was in Australia - from xxxx December 1989 until present - my mother informed me I had been twice called up for military service.

I conscientiously object to being forced to perform military service - particularly when it involves killing fellow Yugoslavians - I support the independence movements in Croatia, Slovenia, and Macedonia and therefore refuse to kill these peoples.

Because Montenegro is politically aligned with Serbia my political views are abhorrent to the rulers. In this context I am unable to benefit from the protection of Yugoslavia (which is now bitterly divided) or Montenegro, (which backs Serbia).

I rightly fear that I shall be forced into the Yugoslav Army against my will. Furthermore I shall be forced to wage war against fellow Yugoslavs, many of whom are my friends. If I refuse to serve I shall certainly be imprisoned for objecting to the killing that is currently occurring in Yugoslavia.

Ethnic problems emerged in Yugoslavia as early as 1981 when Kosova (an Albanian stronghold) declared its intention to gain independence from Yugoslavia. Since that time ethnic tensions have erupted - primarily between Serbia and Croatia. Despite the peace negotiations between Serbia and Croatia, initiated by the European Community (and later the United Nations) fighting continues and the situation remains volatile...

Because I am a male Montenegro the Serbian authorities expect me to join the Yugoslav Army and condone their policies. This is due to the fact that Montenegro and Serbia are closely aligned politically and socially. In addition, I have already been called to serve the army on three (3) occasions and would be expected to fulfil these last two calls to the military on my return...

It is clear...that the turmoil in Yugoslavia remains.

[I]... should not be punished by being forcibly returned to Yugoslavia particularly when [I am] on the military call-up list".

DIEA interview-October 1994

The following is a summary of the interview the applicant had with the Department. He gave his evidence throughout in English.

A friend helped him to fill out his application form.

Because his parents were never married, he was living in a place for abandoned children for twelve years in xxxxxx, then in xxxxxxxx in Vojvodina close to Novi Sad with his uncle and then after study he moved to xxxxxxx for two years to study German language. He returned to xxxxx and he received his ID cards for that place. This was where he lived before coming to Australia.

He said that in the past one was not allowed to have any religious symbols and he got into trouble for wearing a cross his aunt gave him. One was not supposed to be religious. There was no religious freedom. He is not attending any church in this country. He is religious in his way. He does not want to be fanatical in his religious belief like people in his home country, who are also nationalists. He does not believe he would have religious problems any more in Yugoslavia, although he still considers himself religious.

In Communist times you had to be a party member to be able to get a job and get on at school. In Montenegro there are a lot of people who want to separate from Serbia but it is very difficult because they have the same religion and if one is against Serbia then the authorities would treat one as being against Montenegro. One has to be careful about expressing an opinion on this subject. The applicant does not agree with the politics between the two countries because everything that happens in Serbia has to be the same in Montenegro. People should be free to choose.

The applicant disagrees with sending troops from Montenegro as a lot of young Montenegrins were killed in Bosnia. They had to go even if they disagreed with what Serbia was doing.

He believes that he will be charged in a military court because he did not go back when there was the mobilisation in 1991 and the army went to his home. Last year they sent his mother a letter for the army court. He fears prison or being sent to the front. He does not want to be a part of it; to kill people who were his friends. He was in the army for one and a quarter years, and everyone was together. He served first in xxxx. This was interrupted by university study and he completed a further three months in xxxx. He believes in freedom and choice.

The applicant was asked for what reason he does not wish to fight or be conscripted. He replied that it was because he disagreed with what Serbia and Montenegro were doing politically in that they were killing people. He was never a nationalist. He did not agree with punishing the peoples who wanted to be separate and lead their own life. The Serbs are the aggressors and he does not want to be a part of it.

He was a reservist and had to serve whenever he was mobilised.

The applicant had produced a copy of a court summons to attend the xxxxxxxxx xxxxxxxxxxx Court in xxx to answer charges pursuant to article 72 of the Military Conscription Act. The date of the summons was xxxxx 1993 and the hearing date was in xxx of that year.

He did not answer the summons. He does not believe that there has been any more documentation from the authorities.

The applicant explained that he thought the reason for the charge was the fact that they did not find him when they came looking for him, however, he was not sure about the law.

He objects to the war because he does not want to kill any one and he disagrees with the policy of the government. He was asked whether he was familiar with the term 'conscientious objectors', being people who do not want to perform service for reasons of conscience. He appeared unfamiliar with the term or did not understand the question as asked. The interviewer repeated that it was called conscientious objection. It was clear that the applicant either did not understand the question or was unfamiliar with the term. Various country information was put to him regarding the existence of alternative service. He replied that he was not sure about that. He referred to a case of a religious objector who went to court and had trouble when the applicant was doing national service.

There was still conflict in Yugoslavia and a risk of further conflict particularly in Kosovo.

Politics in Yugoslavia is still in the Communist mould. Both the government and the religious people are very nationalistic and he is part of neither group. The fanatics are the Chetniks. It is also bad in Montenegro.

He has no difficulty as a Montenegrin on the grounds of race. It was his solicitors decision to put this in the application.

The various states were trying to create pure racial states. This was not such a problem in Montenegro but the Albanians had problems. There were people from Kosovo and Muslims from Bosnia who had difficulties living in Montenegro.

The applicant believes that Montenegro should be independent. He does not accept that the fact that there are political parties in Montenegro makes it democratic.

RRT Submission-November 1995

[The applicant] holds a well-founded fear that he will be persecuted if he returns to the Federal Republic of Yugoslavia (FRY). [He] believes he will be punished by the Serbian authorities because he refuses to perform military service in the FRY Army. [He] holds a conscientious objection to service in the FRY army. This conscientious objection is based on his own well developed political and personal beliefs. [The applicant] will be conscripted into the FRY Army, if he returns to Serbia. There is a real chance that [he] will be prosecuted and punished by the Serbian authorities for upholding these conscientious beliefs.

Any punishment which [he] experiences will amount to persecution...

[The applicant] holds a general conscientious objection to military service. He is particularly opposed to military service which involves killing of fellow Yugoslavs. He considers fellow Yugoslavs' to be people from the different states of the Former Yugoslav. He believes that Yugoslavs living in the different republics; Croatia, Serbia Montenegro, Macedonia, Slovenia, and Bosnia Herzegovina should have the right to independence. He is opposed to any conflict between the different independent states. He is morally opposed to the conflicts which have continued in different regions of the former Yugoslavia since 1991, which have been characterised by internationally condemned actions. Driven by extreme nationalism and racial hatred, all parties to this conflict have been responsible for atrocities involving both military and civilian victims. [The applicant] would face imprisonment, rather than participate in such an inhumane conflict.

The basis of [his] conscientious objections may have originated in his youth. Born in 1961, he lived in an institution for abandoned children until xxxx. From xxxx until xxxx, he lived with an uncle in the town of xxxxxxxx in the Vojvodina. Under the SFRY, the Vojvodina was an autonomous region, comprised of a diverse range of mixed ethnic communities, including ethnic Serbs, Croats, Muslims, Hungarians, Slovaks, and many other groups It was an ethnic melting-pot' in which people of different racial origins were accepted. [The applicant] having no past family connections, identified with this melting-pot' environment. From xxxx until xxxx, [he] studied language in xxxxxxx. From xxxx until xxxx, [he] lived with his mother in Montenegro, working in the tourist industry, using his language skills as a tour guide. This also is significant, as it further developed [the applicant's] multi-racial and international perspective.

In December 1989, [the applicant] travelled to Australia. He came to attend his best friend's wedding. At that time he was concerned with developments in the Former Yugoslavia. Relations between Serbia and Croatia were becoming hostile. Tensions were rising between Belgrade and the ethnic Albanian community in the Kosovo region. [He] feared being conscripted into military duty in such a volatile environment. In 1989 authorities from the Yugoslav Army reserve visited [his] home to conscript him into military service He refused to perform this service, planning instead to travel to Australia. On several occasions since, he has been issued further conscription notices. In xxxx 1991 the military authorities came to [his]mother's home, demanding to know his location. [He] remained in Australia, monitoring the collapse of the SFRY and the escalation of conflict between the former republics.

We request the Tribunal makes no negative findings with regard to [his]having previously performed national service in the former Yugoslavia. From xxxxxxx xxxx until xxxxxx xxxx, [the applicant] performed compulsory national service. It is important that the Tribunal recognises that the circumstances in xxxx were completely different to the present. In xxxx, [the applicant] performed non-combat duty, aimed at national defence from external aggression, at a time of peace. Much of his training involved administrative duties. The current conflict in which FRY is participating, is in completely different political circumstances.

[He]will be persecuted by the FRY authorities. He is a draft evader, having escaped from Serbia and remained in Australia to avoid being conscripted to serve in the Yugoslav Army. Despite holding a conscientious objection to military service, he will be persecuted. We direct the Tribunal to the following information regarding the practical rights of conscience objectors to military service in FRY. These reports refer to the recent military mobilisations in Yugoslavia: [quoted in the reasons for decision]...

We direct the Member to the following information regarding the persecution of draft evaders in FRY:

"I refer in particular to the article, "The Former Yugoslavia; Refugees and War Resisters" by F. Schmidt, RFE/RL Research Report, vol. 3 no. 25, 24 June 1994. This article indicates that, although the legality of the Yugoslav Presidency's decree of an "immediate danger of war" of 18 October 1991 has been disputed by some Yugoslav lawyers (because only four of eight presidency members voted for the declaration), the decree has not been challenged in the courts, and the courts, when dealing with those who avoided military service during the period from 18 October 1991 to 22 May 1992, assume the existence of an "immediate danger of war".

Schmidt quotes statistical data published by the Yugoslav Government which shows that in the period from January 1991 to July 1992, 3,748 people stood trial for evasion of military duties and that an additional 5,497 criminal proceedings were instituted. He also quotes the Humanitarian Law Fund, an organisation which documents human rights abuses in Yugoslavia, to the effect that the total number of criminal proceedings related to military service in Yugoslavia is between 15,000 and 20,000 and there will probably be more. Schmidt cites the following joint statement by Yugoslavia's former Minister for Justice and former Minister for Human Rights issued on 18 November 1993: [quoted in the reasons for decision]...

Later in the article, Schmidt refers to the opinion of the UNHCR cited by the Frankfurter Allgemeine Zeitung on 9 March 1994 to the effect that deserters who are sent back to Yugoslavia are "not exceptionally endangered" and that the maximum prison sentence is rare - but also taking Western governments to be "especially careful" in expelling deserters and conscientious objectors to Yugoslavia. It is hard to know what to make of this apparently contradictory attitude of the UNHCR, but it does appear to represent a qualification to the UNHCR's position as stated on 2 December 1993...

A report of the United Nations Economic and Social Council in February 1994 stated that those who remain abroad are still liable to prosecution upon return to Yugoslavia. Strangely enough, notwithstanding the above advice of the Embassy, the Department of Foreign Affairs and Trade was prepared to say in a facsimile message of 11 May 1994 that at the beginning of 1994 a decision was taken to prosecute people from the 1992 draff intake who refused call-up, and that although minorities were specifically targeted, nevertheless a Serb who returned after having fled abroad to avoid a draff notice already served on him could be called up on return or prosecuted. (RRT, Decision and Reasons For Decision, V94/02609)

We refer the Member to a recent Tribunal decision (27/10/1995) which states that the Yugoslav Army is currently at war, even if this involvement is not officially recognised. This information confirms [the applicant's] fear that he will be called on to perform military service at a time of war, and prosecuted by the Yugoslav authorities as a draft evader at a time of war

"The other matter relied on by the Delegate, namely that Yugoslavia is not at present at war, has also been pointed out to be inaccurate in Tribunal decisions. There is clear evidence that Yugoslavia is at present mobilising young men and sending them to serve in Bosnia, notwithstanding that Yugoslavia is not officially involved in this war. For example, l refer to Amnesty International Index EUR70/07/95 of 22 June 1995 (supra); Amnesty, Conscientious Objection and the Forcible Return of Asylum Seekers', Amnesty International Concerns in Europe Nov 93 - April 94; P. Schwarm, 'Shot by both sides - A Mobilisation Campaign is Under Way in Serbia', War Report, June 1995; S. Nelson, op. cit; Serbs Declare Special Mobilisation, Continue Press-Ganging', OMRI Daily Digest, 19 June 1995; Belgrade continues roundup for Military Service', ibid., 22 June 1995; S. Markotich, Milosevic Backtracks' Transition, vol. 1 no. 14, 11 August 1995.....

It is clear, from this information, that whether or not Yugoslavia is officially at war there is forced conscription of men to fight in wars in other countries, that those who have a conscientious objection to such wars do not have their objections adequately taken into account, and that they are liable to suffer persecution if they attempt to avoid military service." RRT V95/03378 27/10/1995, pp: 15 - 16.

The process of determining refugee status involves consideration of an existing and future threat of persecution. With regard to this criterion, it is necessary to address the prevailing political climate in the former Yugoslavia. Presently, a cease-fire and peace settlement plans have been brokered for Bosnia Herzegovina. [The applicant] is sceptical of the long term, and even short term success of these plans. His doubts are wellfounded. The Balkans conflict has been the subject of numerous previous

unsuccessful peace plans. Each year previously, at the start of the European Winter, the more successful of these plans have been introduced, achieving temporary success as the different armed forces are unable to move through snow and ice. However with the arrival of Spring, these plans have collapsed as new military offensives have developed .

With regard to this issue, we refer the Member to recent findings of the Tribunal:

"It is true, of course, that a cease-fire has just been declared in the Bosnian conflict; however, it is far too early to say that this will hold; furthermore, it appears that there is an imminent threat of war between Yugoslavia and Croatia over Eastern Slavonia: see Croats prepare to invade Slavonia'; The Age, 18/10/1995; Croatia calls off talks as troops gather', The Age, 19/10/1995." RRT, V95/03378, 27/10/1995, P.17.

[The applicant's] objection is specifically towards participation in the nationalist-ethnic wars which have erupted in the Balkans since the break-up of the former Yugoslavia. He does not hold any personal opposition to people of any of the many mixed races which comprise the independent republics. He is opposed to those who are so dominated by racial hatred that they would go to war. They have fought a war characterised by atrocities and acts of inhumanity. Internationally, the Balkan conflict has been condemned for being in breach of all notions of just war. [The applicant] conscientiously objects to participation in military service which involves and supports these inhumane atrocities.

[The applicant] will be punished as a draft evader by the Serbian authorities, regardless of his conscientious objection As a conscientious objector to service in the FRY Army, [his]selective' objection to military service does fall within the scope of the UN Convention. The punishment he receives will amount to persecution.

We reiterate that [the applicant] maintains a genuine and well-founded fear of persecution should he be forced to return to FRY. We can only stress that the applicant has a very real fear of persecution on account of his political activities and opinions, and on account of his objection to military service in the FRY Army.

Further submission-November 1995

In support of this application we submit the following documentation relating to [the applicant's]health. [He] is suffering from xxxxxxxxxxx xxxxxxxx. It is a condition which he has suffered for six years. The severity of his condition has fluctuated considerably during this period. At all times he is under medical treatment, the therapy varying in accordance with his condition.

We refer the Tribunal to possible medical implications for [the applicant] if he returned to F.R. Yugoslavia (FRY):

"I understand that a decision is being made shortly regarding his application for permanency in Australia. It is certainly correct to say that xxxxxxxxxx xxxxxxx is a condition which may relapse and remit from time to time and, when it relapses, it can be very severe and, indeed life threatening. Relapses may occur in response to stress. [The applicant] is concerned about stress levels which may occur if he is forced to go

back to Montenegro where he understands he would be having to enter the armed services. I certainly would consider that, although he is in an excellent remission currently, there is a significant risk of his condition relapsing with reactivation of his disease should he be placed in such a stressful situation. I believe the Immigration Department should consider this aspect of the application to remain in Australia as part of the general application." xxxxxxxx xxxx,xxxx. 23/11/1995

[The applicant's] medical condition is highly relevant to his claims to refugee status. He has failed to respond to a summons from the xxxxxxxxx xxxxxxxxxx Court in xxxxx, Montenegro, on charges of violating Art. 72 of the Military Conscription Act. Accordingly, he will be found guilty of draft evasion / desertion, and imprisoned if he returns to FRY. In such an environment, [his] health would be at great risk. It is unlikely that the FRY authorities would provided adequate medical treatment to a person considered to be a traitor, particularly during economic sanctions.

We refer the Tribunal to the mistreatment of prisoners, including the death of political prisoner in FRY, who died from a perforated stomach ulcer, after being beaten when in detention;

"Four ethnic Albanians and a Rom in Kosovo province apparently died as a result of ill-treatment in police custody. They included Hajdin Bislimi, who was arrested in May in Kosovoska Mitrovica and beaten over three days by police who reportedly suspected his young sons of having bought stolen goods. He was admitted to hospital with a perforated stomach ulcer and died in early July. " Amnesty International, Amnesty International Report 1995 p.317.

[The applicant] will be imprisoned. The FRY Government introduced alternative military service for conscientious objectors such as [him] in May 1994. However, this will not stop [him] being persecuted as his offences were committed prior to this date. This is confirmed by Amnesty International: [quoted in reasons for decision].

In considering the implications of [the applicant's] health status toward his political claims, we refer the Member to a recent decision of the Tribunal. In the Application, V95/03256 (09/10/1995), Agnes Borsody set aside the primary decision, as she considered that denial of access to medical facilities of itself was such a denial of fundamental human rights that it amounted to persecution.

We request the Tribunal considers [the applicant's] serious health condition in the context of the directives of the Universal Declaration on Human Rights (UDHR) the right of the individual to adequate health care:

"Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control." Article 25, UDHR,

These fundamental human rights to adequate health are developed in the International Convenant On Economic, Social, and Cultural Rights, 1966, (ICESCR):

"The State Parties to the present Covenant recognise the right of everyone to the enjoyment of the highest attainable standard of physical and mental health." Article 12, ICECSR.

Australia has made a commitment to protect and uphold these fundamental human rights. [The applicant] is suffering xxxxxxxx xxxxxxx. If he were to return to FRY, he would suffer substantial illness. In Yugoslavia, rather than receive support and medical treatment, [he] will be imprisoned. In such an environment [his] health will be severely damaged.

Hearing

The applicant appeared and gave evidence predominantly in the English language but from time to time through a Serbian interpreter. He was represented by Mr. Smith from Barlows.

The applicant said that he did not go to church or have much familiarity with religion.

The institution he was placed in was close to xxxxx. Where he lived later with his uncle was close to xxxxxxxxxxxx in Vojvodina. After spending two and a half years in Germany with another uncle, he lived back in Montenegro and changed his ID registration to there.

During his year of national service in xxxx he did not have any leave. He spent the time first in recruit training and then in administration. That was the reason he served for about ten months. If one was a student then the period was only twelve months. In his case because he did not finish his degree he was obliged to do a further three months in the army which he spent at xxxxxxxx, effectively re-doing his basic training. He had no periods of reserve training.

In 1989 when he left Yugoslavia people were beginning to talk about the separation of the country between east and west. Nationalism was becoming more popular in Serbia, Croatia and Slovenia.

Before he left the country the applicant had to go to the military office to let them know he was leaving. They did not like the idea because at that time there was a mobilisation. It was in the summer of 1989. However, he was told that they would leave him alone because he already had documents for Australia. He did not receive a call-up notice at the time.

He had never been involved in politics because it had been against the law. He described his political beliefs as the right of everyone to be independent. It was inhuman to kill people because of their political opinion, nationality or religion. What is happening between Serbia and Montenegro is bad. Serbia only wants to continue to control Montenegro because it needs an outlet to the Adriatic. If he went back the applicant said that he would not have a chance to do anything politically as he would have to face court. Because he would not join political parties, there are extremists and nationalists who would make things worse for him.

He was against any kind of war waged on the basis of nationality or religion. He did not make distinctions on this basis. He grew up with all kinds of nationalities in schools and serving in the army. He had lots of friends from among the different ethnic groups. In Vojvodina he knew Hungarians, Romanians and Russyns. He also had friends who had Italian surnames and were from Dalmatia.

The applicant was asked directly if he would be prepared to fight if Montenegro was attacked by external forces. He replied 'Yes'.

When troops were mobilised the army authorities used to come late at night. In his case his mother was given the papers. She was asked about the applicant. She told them he was still in Australia. Nonetheless, they left the document. She took it back to the army office. She was asked to do this and was told that otherwise it could be used for refugee status since so many conscripts were avoiding service by escaping from Yugoslavia. The military police did not call again and there was no contact with the authorities. What was referred to as the 'second time' in his application was the occasion when the court summons was sent to him at his mother's home. He was surprised that he received a summons. He believes it was because when he left he told the military authorities that he was going to stay for six months as a tourist. He had not done so. This would be like refusing to serve in the army as he had not come back.

The same thing happened as before. His mother was asked to take the document back. This time she faxed a copy of the document to the applicant here before she handed the original back.

The applicant says that after returning home he will have to face the charges. He can not stay legally if he does not face the charges.

If he was made to do military service, he said ' I do not feel that I would do that'. It is a dirty war and a war against women, children, against civilians. He is 100% against this. Even if he had to go to prison he would not fight. He is aware of what has gone on in the conflict. They were taught in national service about a defensive war, but this is totally different. It is cruel, inhuman and an offensive war. He feels that he would probably go to prison and he would imagine the circumstances in prison for people who refused to serve would be very bad.

The applicant feels that the notion of Greater Serbia is scary and horrifying. The Serbs are trying to keep the territories around Serbia. He believes the war is wrong. Involvement in it is something he should not do if it means fighting other nationalities.

Oral submission by applicant's adviser

It was difficult to consider alternative service as a realistic option when people are mobilised in the middle of the night. It was six years since the applicant arrived here. Some of the details may be vague because of the length of time involved. The gap between the time of the call-up and the court summons could be explained by the large numbers of draft evaders who were to be charged, by the restructuring of the legal system for the new state of FRY, the fact that the country was officially and

unofficially at war during this period and the fact that the country was crippled by sanctions.

The applicant was currently taking nine tablets a day and his condition was stable. If bleeding occurs he requires two more different types of medication which triples his dosage. He has to be medically supervised. There would be real and life threatening difficulties for the applicant if he was imprisoned in Yugoslavia.

The fact of staying abroad would be construed as political opposition to the government. In the context of Serbia and Montenegro this would give rise to a claim of imputed political opinion. Because of his medical condition he would suffer disproportionately if he was punished for the military offence of draft evasion.

Due to his imputed political opinion, it could be argued that he would not have access to medical treatment and this would be persecution for a Convention reason. If he was a supporter of the ruling party, and not a political opponent, even if there were shortages of medicines he would have access to medical treatment.

DISCUSSION OF CLAIMS AND FINDINGS OF FACT.

The applicant asserts a claim on the grounds of persecution for reasons of political opinion. In essence he claims that he will be persecuted for reasons of imputed political opinion were he to return to the Federal Republic of Yugoslavia (Serbia and Montenegro) (FRY), be called-up for military service and required to serve in a war contrary to his conscience or be imprisoned for objecting to killing fellow Yugoslavs. He also fears that by reason of his failure to return to Yugoslavia he will be prosecuted as a draft evader and be punished for Convention related reasons. He says he has an objection of conscience to the war fought by all sides in the Yugoslav conflict, and particularly that waged by the Serbs into whose army he would be conscripted. He conscientiously objects to military service involving the killing of fellow Yugoslavs of whatever nationality. He supports the independence movements in Croatia, Slovenia and Macedonia, therefore he refuses to kill these people.

His claim is that he is a refugee *sur place*, since the events giving rise to his fear of persecution occurred after he had left what was then the Federal Socialist Republic of Yugoslavia.

I found the applicant to be a sincere, honest and credible witness who expressed himself with a quiet conviction about matters which were central to his claim. I have little doubt that he does have strong reasons of conscience for not wanting to be involved in fighting or killing members of other nationalities of the former Yugoslavia. I accept that he never has made distinctions based on ethnicity. I accept his adviser's submission that his personal experiences as a child and the multi-ethnic environment in which he grew up in Vojvodina and the number of friends in school and in the army he made from among the nationalities greatly influenced his attitude in this respect. I note that he counted members of the smaller minority groups in former Yugoslavia like the Hungarians, Romanians and Russyns among his friends. These various matters provide a solid foundation for the beliefs which he holds.

During the interview the basis of the applicant's conscientious objection to military service was not directly raised. He was asked a question about the reasons he did not want to fight to which he gave an answer. The interviewer asked about his grounds for this, and at the same moment he continued with his answer to the previous question by saying that he was not a nationalist. The interview returned to the subject again and referred to the issue of conscientious objection, but it was clear from the tape that the applicant did not understand the meaning of the interviewer's question. The interviewer then proceeded to put information about alternative service in Yugoslavia without any further examination of the issues of conscience prima facie raised in the initial application . While the applicant's English was good, it was by no means fluent. In all these circumstances, I am not prepared to draw any adverse inference from the apparent failure of the applicant to develop his reasons for objecting to participation in the war in former Yugoslavia in the course of this interview.

I draw no inference adverse to the applicant by reason of his initially undertaking his military service at a time of peace and now claiming to be opposed to taking part in the war in Yugoslavia. I accept that a person may genuinely reject the notion of taking up arms against 'fellow Yugoslavs' yet have in the past served in the army because practically speaking there had at the time been no realistic possibility of a war breaking out between the various parts of Yugoslavia which could have produced a moral doubt or uncertainty about involvement in fighting.

I have had the opportunity of listening to the applicant's evidence at the departmental interview and seeing and hearing him at the hearing. I was particularly impressed by his answer when asked during the hearing if he would fight for his country in the event of external aggression as compared with a situation involving fighting against other nationalities of former Yugoslavia. No doubt aware of the significance of the question, he paused and answered in the affirmative. In the light of this frank admission that his objection was limited to fighting fellow Yugoslavs, but he would be prepared to defend his country against external aggression, there is no basis for a proposition that the applicant has an absolute objection to military service.

I accept that he was mobilised as a reservist to serve in the Yugoslav Army at some time probably at the end of 1991. His mother on instruction from the military draft office returned his call-up papers to them. It seems clear that he was both registered as a reservist and the authorities knew he had remained abroad through out the relevant period of mobilisation. I infer from this fact and the existence of the summons, the significance of which I deal with later, that the applicant is 'known' to the military authorities.

When on 18 October 1991 the Belgrade government issued a formal declaration of "an immediate danger of war" and ordered "partial mobilisation", large numbers of reservists were called-up for active duty, mainly from the republics of Serbia and Montenegro. In practice, however, the JNA had been sending reservists to the front in Croatia for weeks before that decision was reached. *(IRBDC no YUG10630 of 8/4/1992 and IRBDC, Q&A Series, September 1992:5).* Subsequently, on 10 December 1991, the then Yugoslav presidency issued a decree which extended military service for conscripts by three months and which lengthened reservists' active duty for up to 4 months *(IRBDC, Q&A Series, September 1992).*

Objection to military service

The starting point is that it is an internationally recognised 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 that here under consideration.

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. For the applicant to lay the basis for a claim it is necessary for him to establish that any penalty imposed would be applied differentially and that he would suffer disproportionately severe punishment on the basis of any one of the Convention grounds; or that a penalty involving a term of imprisonment can be shown to be of unusual duration or to involve unusually harsh treatment by international standards so as to constitute persecution.

The Handbook states on the subject of conscientious objection to military service:

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)

The UN Report, 'Conscientious Objection to Military Service', by Eide and Mubanga-Chipoya, New York 1985, has this to say on the subject of conscience and objection.

By "conscience" is meant genuine ethical convictions, which may be of religious or humanist inspiration...Two major categories of convictions stand out: one that it is wrong under all circumstances to kill (the pacifist objection), and the other that the use of force is justified in some circumstances but not in others, and that therefore it is necessary to object in those other cases (partial objection to military service).

The UNHCR Handbook excludes most of these selective claims, stating that

[n]ot every conviction, genuine though it may be, will constitute a sufficient reason for claiming refugee status after desertion or draft-evasion. Specifically, [i]t is not enough for a person to be in disagreement with his government regarding the political justification for a particular military action.
Not all the claims of selective objectors should be excluded. UNHCR notes:
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, could, in the light of all other requirements of the definition, in itself be regarded as persecution. (para 171)

But as the UN Report states:

For those whose objection is circumstantial or partial, it is necessary to prove not only that they have this [ethical, religious or moral] conviction but also that they built it on considerations that are reasonably solid. They have to show some degree of probability that the purposes for which they are they are being inducted into the armed forces are likely to be illegitimate. They have to demonstrate that these purposes, or the means or methods used, would be illegitimate under international or national law. Since...many cases will refer to future possibilities, convincing evidence may be difficult to provide.

Partial objection

If the present applicant is to make out a case, he must establish that he is a selective objector to the war which has been in progress in Yugoslavia and that he faces the prospect of punishment on account of this objection should he return there.

In a particular case a reason of conscience for not being associated with military action by armed forces, whose conduct is condemned by the international community as contrary to the basic rules of human conduct, will found an entitlement to refugee status. The situation where this principle will apply is where the government in question is unwilling or unable to control those individuals or groups engaged in the offending conduct or the conduct is a matter of government policy or military strategy, and the applicant can show a reasonable possibility that he will be personally

forced to participate in such conduct (see K.J.Kuzas,"Asylum for Unrecognised Conscientious Objectors to Military Service: Is there a right not to fight?", Virginia Journal of International Law, vol 31, 1991), directly or indirectly, (see Zolfagharkhani 20 Imm.L.R.1), or that he will be punished for refusing or avoiding military service.

The legal basis for such a claim is discussed conceptually in RRT decisions V94/02609 and V94/02243 and I concur with the reasoning in those cases.

As to such selective objection, Kuzas, from whose writings the above formulation is principally taken,says that a claimant who cannot qualify as an absolute pacifist, but expresses a conscientious objection to a particular military action which is unrecognised by his country of origin, has established a well-founded fear of persecution if the requirements of either section (1) or (2) below are met:

Section 1: The conduct of the armed forces engaged in the military action is condemned by the international community as contrary to the basic rules of human conduct, the government in question is unwilling or unable to control those individuals or groups engaged in the offending conduct, and the applicant can show a reasonable possibility that he will be personally forced to participate in such conduct. Credible documented evidence that, for example, the rules of war are being violated, or that other human rights violations are widespread, establishes a prima facie case that the actions are condemned by the international community. Relevant factors for determining whether the government in question is unwilling or unable to control the offending individuals or group include, but are not limited to, the prevalence or pervasiveness of the violations, and whether the individuals who engage in the violations are captured, prosecuted, and convicted.
Section 2: The political justification or policy motivating the military activity of the country of origin is condemned by the international community, as evidenced by a resolution adopted by an international governmental organisation (such as the UN) by an overwhelming majority of states. (at p.472-3)

I would mention for the sake of clarity that it is the matters referred to in the second sentence of Section 1, and Section 2 itself, which are the alternative bases for such a claim.

I accept as was stated in RRT Decision V94/02609 (Dr. Hudson) that the recent decision of the Full Federal Court of Canada, *Ciric v. Minister of Employment and Immigration* (1994) 71 FTR 300, has persuasive value when it comes to dealing with similar issues with which I am confronted. It was held in *Ciric* that applicants were entitled to make a case for refugee status based on fear of punishment for avoiding military service in Yugoslavia because they considered it morally wrong to be fighting their own people, although they were not strict conscientious objectors to all wars and had not, so far as the case indicates, made an objection based on the nature of the war as outlined by Kuzas. I accept that it is appropriate for this Tribunal, in interpreting the Convention, to give weight to the views of judicial authorities in other countries on its interpretation: see *Somaghi v. Minister for Immigration, Local Government and Ethnic Affairs* (1991) 102 ALR 339 and *Jagpal Singh Benipal v. Minister of Foreign Affairs and Immigration and others* (High Court of New Zealand, 1985). The *Ciric* case is of persuasive value in the present situation, and, while I share the views of my fellow Tribunal member that one could wish that the court had

devoted more time to explaining its reasoning, the decision in that case provides strong support for the conclusion I have reached in this application.

In *Zolfagharkani v Canada*, supra, Mc Guigan JA delivering the judgment of the Full Federal Court, when accepting that conscientious objection which relates solely to the nature of the war being waged (which in that case was chemical warfare) can found a Convention claim, said at p. 12-13:

The probable use of chemical weapons,..., is clearly judged by the international community to be contrary to basic rules of human conduct, and consequently the ordinary Iranian law of general application, as applied to a conflict in which Iran intended to use chemical weapons, amounts to persecution for political opinion.
In Abarca v Minister...W-86-4030-W. decided 21 March 1986. the Board determined a conscientious objector from El Salvador to be a Convention refugee on the basis of political opinion, where it was found he would probably be forced to participate in violent acts of persecution against non-combatant civilians, which is contrary to recognised basic principles of human rights.
..the appellant's specific objection was ...a political act since as ...Goodwin-Gill states in The Refugee in International Law at 33-4:
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 limits of state authority:it is a political act.

The principle which the textual authority and these various cases stand for is that a person will be entitled to refugee status if he or she shows that there is a real chance that he or she will be punished for avoiding military service due to an objection of conscience to participating in a military conflict which is of the kind described in the passage quoted above from Kuzas. This, on the reasoning of the member in the two decisions to which I have referred, will be so whether or not his or her actual objection to that service is based on the fact that the conflict is of that kind.

In order for an applicant for refugee status to bring himself within these grounds it must be shown that the conflict to which the applicant is said to have objected was of the kind described, and there is a real chance that the applicant will be punished for desertion or draft evasion. This punishment may involve the failure to recognise a claimants conscientious objection by the imposition of penalties for past desertion or non-recognition per se by a failure to provide alternatives to military service which are consistent with the nature of the conscientious belief held.

Nature of military action

The military action in which the applicant has not been prepared to participate was almost from the start condemned internationally. The fact that atrocities and war crimes against civilians were being perpetrated by and/or facilitated by the Yugoslav National Army at that time was well-known. The international community has repeatedly expressed its disapproval of the warfare in the former Yugoslavia in a series of Resolutions of the Security Council. The first of these was Resolution 713 of 25 September 1991 in which it was stated that "The Council fully supports the collective efforts for peace and dialogue in Yugoslavia, and decides that all States

immediately implement a general and complete embargo on all deliveries of weapons and military equipment to Yugoslavia". International condemnation continued by the passing of Resolutions 721, 724, 727,740,743,749 and at least 48 further Resolutions until the end of 1994. Further, United Nations Peace-keeping Forces have been established in various parts of the country, (Resolution 724, 15 December 1991) and there has been a resolution demanding the withdrawal of the Yugoslav National Army from hostilities in Croatia and Bosnia (see The United Nations and the situation in the former Yugoslavia, United Nations Department of Public Information Reference Paper 15 March 1994).

The war atrocities and deadly "ethnic cleansing" activities which were perpetrated (inter alia) by Yugoslav National Army forces, collaborating with Serbian irregulars on the territory of Croatia in 1991/2 have been clearly documented. They were becoming known at the time the applicant was forcibly called-up. They are, among other crimes perpetrated by other parties to the conflict in former Yugoslavia, the subject of investigation by the first International War Crimes Tribunal to be set up since the Second World War. For example the Yugoslav National Army's "ethnic cleansing" of the area around Vukovar and their concerted bombing and utter destruction of the city of Vukovar itself over the period August -November 1991, complete with war atrocities, was internationally known at the time. (See US Committee for Refugees, Yugoslavia torn asunder, February 1992 pp 3-9 which documents some of the early civilian ethnic cleansing experiences in the Vukovar region; see also Human Rights Watch: Helsinki, vol 6 issue 3, February 1994, report on "Former Yugoslavia: The War Crimes Tribunal : One Year Later"). (see RRT Decision N94/02519)

The most recent example of atrocities committed by proxies associated with the Yugoslav army is the reported massacre of Muslim men in northern Bosnia carried out by Serbian paramilitaries led by Arkan, a Belgrade-based ex-bank robber and warlord suspected of atrocities in Croatia and Bosnia (Guardian Weekly, October 15, 1995)

The above information places the applicant's refusal to return to Yugoslavia for further military service in its proper context.

Examination of applicant's reasons for objection

The applicant has consistently claimed that he does not want to become involved in fighting or killing those who are members of other ethnic groups which used to make up former Yugoslavia.

In relation to this, as I have said before, I find that the applicant is genuine in his views and what he said to me in the hearing was consistent with what he had said at earlier stages of his application.

I consider that the applicant's refusal to fight in the Yugoslav Army reflects a partial conscientious objection to being involved in a war against people who given the nature of the former Yugoslavia he had considered to be his fellow countrymen.

I am satisfied that he is of that generation to whom the concept of a Yugoslav has some meaning.

The applicant has stated that he would refuse to fight, on pain of imprisonment, if he had to return to Yugoslavia. I find that such refusal would be on the grounds of a genuinely held objection to military service.

The applicant has therefore discharged the onus of showing that the rule stated by Kuzas is applicable in this case.

Consequences of draft avoidance

It has been put that the fact that the applicant remained outside Yugoslavia after the military authorities paid a visit to his home and served on his mother what appears to have been a call-up notice, exposes him to a risk of punishment for draft avoidance. He has explained the failure to produce this document in a satisfactory manner. He has produced an original facsimile copy of a summons to attend court for a breach of the military code. He says that he will be punished as a draft evader by the Serbian authorities, regardless of his conscientious objection. The applicant contends that the authorities knew he had stayed away for a longer period than he had indicated to them when he left the country in 1989. He relies upon the court summons as showing that he would face prosecution on return, and therefore that there is a real chance he will be persecuted.

I have no reason to doubt the authenticity of the document. I do not read any significance into the delay between call-up and service of the summons. It may well be due to one or more of the factors mentioned by Mr. Smith in his submissions at the conclusion of the hearing.

The document in question refers to Article 72 of the Military Conscription Act. I have no information about this section and whether it is substantive or procedural in nature. However, it is apparent from the following information that 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 constitutes a military offence.

The avoidance or refusal to perform military service and desertion is punishable under articles 201, 202 and 214 of the 1992 Yugoslav Criminal Code.

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) , 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 (my italics).

A DFAT report confirmed the fact that the penalty for not responding to call-up is one year. However, to enable prosecution, call-up papers have to be received personally by the individual. If a person is caught in hiding with the intention of avoiding call-up, the penalty is 3 months to 5 years. If a person escapes from the country with the intention to avoid military service, the penalty is from one to ten years. However, DFAT maintained that there have been only few prosecutions and with only minor prison sentences *(cable no BG 60031 of 23/3/1993).*

The sources available to the Tribunal comprise some contradictory reports about the severity of punishment for those who have avoided military service. These contradictions appear to rest on the interpretation of whether the offence was committed in wartime or peacetime.

For example, Fabian Schmidt, Radio Free Europe/ Radio Liberty's Eastern European specialist, indicated that, although the legality of the Yugoslav presidency's decree of an "imminent danger of war" of 18 October 1991 has been disputed by some Yugoslav lawyers (because only four of eight presidency members actually voted for the declaration), the decree has not been challenged in the courts which, when dealing with those who avoided military service during the period between 18 October 1991 and 22 May 1992 assume the existence of an "immediate danger of war" *(RFE/RL, Vol.3, No. 25 of 24/6/1994).*

Amnesty International claimed that all offences committed under the relevant Articles of the Yugoslav Criminal Code relating to the avoidance of military service and desertion during wartime carry a possible death sentence. However, Yugoslav military experts indicated that only professional soldiers who refuse to take up arms during the state of war and those who flee abroad to avoid military service face a possible death penalty *(IRBDC, Q&A Series, September 1992:14).*

However, other sources maintain that, in practice, the penalties were more lenient than those set out by law. *United Nations Economic and Social Council's report of 21/2/1994* stated that refusal to perform military service during the armed conflict has been usually punished with a sentence ranging from 3 to 4 months *(p.22).*

UNHCR Australia stated that, although the penalty for draft evaders and deserters may be substantially increased in wartime, in practice, these offences have been considered by courts as committed in peacetime and sentences are mild and in most cases suspended *(facsimile of 2/12/1993).* This earlier advice has been repeated in identical terms recently without apparently taking into account the present situation arising from the Croatian recapture of former Serb occupied territory and the threat of further conflict directly involving Yugoslavia (see UNHCR'S position regarding draft evaders and deserters from former Yugoslavia, UNHCR, 31 August 1995, CX 10085) .

This information has been corroborated by a Belgrade lawyer, who stated that:

Usually they [eg.those who refused to serve in the Yugoslav Army during the 1991 fighting against the Croats] get three months, whether they have a sick wife, a sick kid, or money. Any possible excuse they come up with, it's all the same - three months. If they say they won't go again, they got four months *(Nelson, Suzanne, " Yugoslavia: Draft Evaders Face Prison as Call-up Continues", Inter Press Service, 14/2/1994).*

In correspondence DFAT has stated that currently there is no comprehensive program of pursuing offenders who avoided draft prior to 1992. However, it also noted that:

humanitarian lawyers claimed that within the last few months [ie at the beginning of 1994] a decision was taken to prosecute people from the 1992 draft intake who refused call-up. Most of those against whom prosecution has been instigated belong to minority communities such as Hungarian or Slovak minorities. Sentences generally have been for 3-4 months *(DFAT facsimile message, 11/5/1994).*

The *UN Economic and Social Council* indicated in its February 1994 report that under Article 214, those who remain abroad are still liable to prosecution upon their return to Yugoslavia. *(p.22).* This view is shared by DFAT which stated that a Serb from Serbia returning after having fled abroad to avoid a draft notice already served on him, could be called-up on return or even prosecuted *(DFAT facsimile message, 11/5/1994).*

Recent information, which is a relevant consideration, is in an article by Fabian Schmidt : "The Former Yugoslavia: Refugees and War Resisters" (RFE/RL Research Report vol 3 no 25, 24 June 1994, pp 47-54) It deals specifically with the chance of prosecution facing deserters or draft evaders:

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 has been declared to be in "immediate danger of war".
A formal declaration of an immediate danger of war was made by the Belgrade government on 18 October 1991 and was in effect until 22 May 1992....and the courts assume the existence of a state of "immediate danger of war" when dealing with those who avoided military service during that period.
In peacetime the maximum penalty for desertion, disobeying orders, or draft evasion is ten years' imprisonment. The minimum penalty is between one and five years, depending on whether a state of immediate danger of war has been declared.
According to data published under Milan Panic's short-lived government between 1 January 1991 and 1 July 1992 3,748 people stood trial for crimes involving evasion of military service; criminal proceedings were initiated against an additional 5,497 individuals, but these people against whom criminal charges have been brought are incomplete.
Estimates do exist, however. According to the Humanitarian Law Fund... the total number of criminal proceedings related to military service that have been conducted in the FRY is between 15,000 and 20,000 and there will probably be more.
Yugoslavia's former minister of justice, Tibor Varady, and the former minister for

human rights, Momcilo Grubac, said in a joint statement that "those who took refuge in foreign countries in order to avoid participation in armed conflicts remain in serious [legal]danger...Thousands have been prosecuted and further thousands will in all probability be prosecuted in the future. .."
The Belgrade Center for Antiwar Actions estimates that in that city alone some 10,000 deserters or draft dodgers are in hiding in the homes of relatives and friends; the total in the rest of the FRY is thought to be about 200,000. There are reports that some people have been charged with desertion or draft evasion after being conscripted for a second time (p.52)

Later in the article, the author refers to the opinion of the UNHCR cited by the *Frankfurter Allgemeine Zeitung* on 9 March 1994 to the effect that deserters who are sent back to Yugoslavia are "not exceptionally endangered" and that the maximum prison sentence is rare - but also asking Western governments to be "especially careful" in decisions to expel deserters and conscientious objectors to Yugoslavia. I agree with what is said in decisions V94/02609 and V94/ 02243 that

It is hard to know what to make of this apparently contradictory attitude of the UNHCR, but it does appear to represent a qualification to the UNHCR's position as stated on 2 December 1993...

The Sixth Periodic Report on the situation of human rights in the territory of the former Yugoslavia of the Special Rapporteur notes (at para. 133) that:

During the armed conflict in the former Yugoslavia, refusing service in the military has usually been punished with a sentence ranging from three to four months. Under article 214, para 3, those who remain abroad are still liable to prosecution upon their return to Yugoslavia.

I find in the circumstances of this case that the applicant is exposed to the risk of punishment for draft avoidance to which his objection to the nature of the conflict would be no defence. This would constitute persecution.

I reach the same conclusion in relation to the consequences of his conscientious objection to any future participation in the military conflict in the former Yugoslavia.

An authoritative article this year pointed to the possibly severe consequences facing draft evaders or deserters returning to Yugoslavia and the negative attitudes of the authorities towards them.

Tens of thousands of young men from rump Yugoslavia consisting of Serbia and Montenegro are waiting in vain in Germany, the Netherlands and in the Czech Republic for an amnesty to return home. These conscientious objectors and deserters fled abroad as they were unwilling to participate in the Balkan war which broke out in the summer of 1991. Some 400,000 people have left rump Yugoslavia since then. Many of them are pacifists and conscientious objectors, opposition circles in Belgrade say. They risk prison terms up to 20 years and even the death sentence on return under the Yugoslav penal code, Belgrade lawyer Rajko Danilovic told German Press Agency dpa.

An opposition appeal for amnesty for the deserters in 1992 was rejected. "The deserters cannot expect anything from a society from where they fled," said rump Yugoslav President Zoran Lilic.
The negative attitude of the Yugoslav authorities to the objectors is also borne out by the bill which proposes to deprive the deserters of their right of inheritance.
The draconian punishments apply during times of war or impending war, according to law. Such a situation exists since the then rump Yugoslav leadership declared a state of war "illegally and unconstitutionally," in the summer of 1991, says Danilovic.
Civil and military courts then accepted the direction to mete out strict punishment to deserters, which was never countermanded.
The exact number of the condemned deserters and objectors is officially not known, but human rights activists claim that most of them are non-Serb minorities, mainly Hungarians and Slovaks.
No one has been condemned to death so far. "But this does not mean that a death sentence could not be imposed in a future case," says Danilovic. (Deutsche Presse-Agentur, March 28, 1995, Deserters face jail on return, says Belgrade, by Dubravko Kolendic)

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)

I refer again to the first part of the quotation from Schmidt, supra, in which he noted that 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 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.

In the same vein UNHCR advised the Department on 10 August 1994 that:

although the Yugoslav constitution provides for conscientious objection to military service, the implementing regulations have not been adopted.

The position now seems to have been altered at least in theory as far as national servicemen are concerned.

In May the right to perform civilian service for those refusing military service on conscientious grounds was introduced, but the length of service was twenty-four months, twice the length of military service. This right did not apply retroactively.Amnesty International Report 1995, p.316.

The article by S. Nelson, " Yugoslavia: Draft Evaders Face Prison as Call-up Continues", in *Inter Press Service* of 14 February 1994, notes the prosecution of "thousands of Yugoslavs" for draft evasion, with sentences of three and four months' imprisonment being imposed, and apparently scant regard being paid to any claims of conscientious objection.

Amnesty International recently stated (ref: AI Index EUR70/07/95 of 22 June 1995), with reference to recent mobilisations in Yugoslavia:

The manner in which these mobilisations had been carried out made it highly unlikely that any of those conscripted were given the opportunity to exercise their right to refuse to do military service on conscientious grounds.

Where there is conflict between sources, as here, I tend to the view expressed most recently in decision V95/03378 that:

in the case of a conflict between information coming from a diplomatic source and information coming from an informed source with no particular interests at stake, the latter is more likely to be accurate:cf Hathaway, The Law of Refugee Status, at p. 81, and the authorities cited in footnote 115 on that page...

In any event it would seem that where a person has already served in the Yugoslav army as a national serviceman, without making a claim to conscientious objection, he does not have the option of alternative service.

The information thus suggests that the right to conscientious objection may exist in theory in certain cases and not in others, and anyway has not been respected in practice. On any view, the applicant would face punishment if he refused to do military service after his return.

Having regard to all the information available to me I find that there is a real chance of punishment awaiting the applicant if he returns to Yugoslavia and refuses to do military service, as well as for a military offence of draft evasion. The Yugoslav army has been engaged in an internationally condemned conflict to which he holds a conscientious objection. There is in my view a real chance of the applicant being called-up and being then required to act contrary to his conscience on pain of imprisonment. I am satisfied that in the circumstances prevailing in Yugoslavia at the present time that there would be no means by which the applicant could exercise such

an objection. I find that he has established a well-founded fear of persecution on the grounds of political opinion.

Forced mobilisation

I find also that the applicant faces a risk that he may be faced with the choice of punishment or forced mobilisation in the army (with more severe consequences if he refuses). I accept the possibility continues to exist for the foreseeable future that the applicant would be required to participate in an internationally condemned military action (which would inevitably involve him in collaborating with and/or actively undertaking atrocities and war crimes himself), and/or to be prosecuted for refusal to serve. The risk that the applicant would be faced with forced participation in a war against his conscience has recently been increased by the prospect of a renewed conflict in Slavonia . The dispute over this territory became a major element in the search for a solution to the Balkan conflict.

Those fears had begun to materialise in recent months with the Croatian offensive into occupied Krajina, the ongoing conflict in Bosnia between the Bosnian Serbs and the prospect of a widening of the conflict to include the Yugoslav army which now can only conscript Serbs, Montenegrins and members of the national minorities within Serbia.

The prospect of conflict breaking out involving the VJ (Yugoslav Army) has been a genuine possibility. There have been a number of reports of the extremely tense situation which prevails between Yugoslav and Croatian forces in the region of eastern Slavonia. It was reported in The Australian of 9 August 1995, for example, that:

United Nations officials in Zagreb say that the situation in eastern Slavonia is tense with Yugoslav army tanks massing in the east and heavy Croatian artillery in the west near Osijek. "Militarily it would be stupid for Tudjman to strike on eastern Slavonia now, but we cannot rule it out", a UN official...commented.

On any view one could not expect a reduction in the level of mobilisation of forces by the Yugoslav army in the foreseeable future.

There is also evidence of the participation of regular Yugoslav Army officers in the Bosnian conflict assisting the Bosnian Serb army in the Bihac area. (Time, December 19, 1994)

The European Correspondent, Askold Krushelnycky, wrote in the edition of 5-11 October 1995 that:

...although the Serbs occupying eastern Slavonia and Baranja have agreed to drop previous demands to live in a separate Serb state, a huge gulf remains between them and Zagreb on how and when the region should be re-incorporated into Slavonia. The Serbs want the area, which as well as being agriculturally rich also contains oil reserves, to be placed under international supervision for a "transition" period of up to five years before reverting to Croat control. The Croats have agreed to give the region a measure of autonomy but want it to come under Zagreb's control within a

year...President Tudjman warned his country would use force to retake the region if a peaceful formula were not found before early November.

Western diplomats fear that any Croat attempt to recapture the area, which adjoins Serbia proper, would trigger retaliation from the powerful Yugoslav army controlled by Serbia's President Slobodan Milosevic. Were that to happen, they warn, the situation could quickly degenerate into a wider Balkan war.

Buoyed by his forces' victories of recent weeks, when the Croats retook first western Slavonia then the huge Krajina Serb-held territories, Tudjman was confident they could do the same in eastern Slavonia.
In case V94/02908, evidence was recently given by a journalist that the Yugoslav army had been engaged in a large scale-mobilisation surrounding Slavonia and would intervene to protect this region in the event of a Croat attack. She also gave anecdotal evidence that members of her family in Serbia had been mobilised and were currently serving in the vicinity of eastern Slavonia. I accepted her evidence.

On November 13, it was reported that rebel Serbs in the region had gone on a war footing while the Croatian army continued its own military build-up (The Australian). The following day, a breakthrough was announced whereby the parties at the Dayton peace conference had agreed to the hand-back of the disputed territory to Croatia over the next two years (The Age, 14 November 1995). Finally the three leaders of Bosnia, Serbia and Croatia reached an agreement to end the conflict with Bosnia to be a single state within its present borders, comprising a Bosnian-Croat Federation and a Bosnian Serb Republic.

A commentator made the following points at the time:

...there were ominous signs across Bosnia that signing the agreement would prove easier than implementing it. Even before the ink had dried, rebel Bosnian Serb leaders denounced it, raising questions as to whether the Serbian President...can deliver their cooperation. Army warlords on both sides grumbled about the territorial divisions the deal would cement...One of the greatest obstacles to implementing the Dayton deal is that the plan to a large extent has been imposed by the West on warring parties who believe they could have won- had they only had the means to continue fighting...
In the end...what Bosnian and rebel Serb leaders will find hard to do is to convince their followers to renounce the political beliefs that kept them fighting on. Rebel Serb leaders, who have preached Serbian independence, face the nearly impossible task of persuading their followers that they should submit to a national Government that has Muslims in it.
And Bosnian government leaders must shatter the hopes of those who believed that this war would reunite Bosnia ethnically-not divide it..(Elizabeth Neuffer, Boston Globe, in The Age 23 November 1995).

The Bosnian Serb leader, Karadzic, has been quoted as saying that:

" Until a ...better solution than that provided by the Dayton peace accords is found for the Serb portion of Sarajevo, the Serb army will maintain its position,..."(The Age 28 November 1995).

The various communities in Bosnia and their leaders have continued to reject those parts of the agreement which involve the ceding of further territory to their enemies. (see Sarajevo Serbs Reject Agreement, The Australian, 27 November 1995; Balkan Peace Force Faces Risk at every Turn, The Age 29 November 1995).

The completely interlinked nature of the Bosnian and Croatian territorial disputes mean the outcome in Slavonia will inevitably depend on the successful implementation of the peace plan for Bosnia.

I am unable to conclude that the possibility that a conflict involving the Yugoslav Army (VJ) might break out, which was reasonably foreseeable a few weeks ago, has ceased to be so by reason of recent events. In the light of the history of conflict in the region and failed peace agreements and ceasefires, it would require change of an evidently substantial, effective and durable kind before it could be said that the situation has materially altered.

I find that the risk that the applicant would be called-up as a reservist and thus be faced with forced participation in a war against his conscience still exists despite the agreement on the return of eastern Slavonia to Croatia and the Dayton peace accords on the future of Bosnia-Herzegovina.

Other matters

In the light of my finding that the applicant has established a well-founded fear of persecution on other grounds, I do not need to make a finding on the issue of whether the applicant can establish a nexus between persecution and a Convention ground of imputed political opinion derived from State perception of his draft evasion, aside from the issue of conscientious objection.

I concur with the reasoning in the RRT decision V94/02609 to which I have previously referred that in the particular circumstances of the Federal Republic of Yugoslavia (Serbia and Montenegro), it is arguable that the authorities in that country would regard a person who avoided military service in the 1991/2 conflict after having been served with call-up papers, as having thereby evidenced opposition to the policies of the present government of that country - irrespective of the actual motivation for his desertion.

It has been repeatedly recognised by the courts that in assessing a claim for refugee status the important consideration is the opinion imputed to the applicant by his home government rather than the opinion which he actually holds: see, for example, *Chan* at 396, 415-6, 433; *Pancharatnam v. Minister for Immigration, Local Government and Ethnic Affairs* (1991) 26 ALD 217 at 222-3. (at p. 11 of the RRT decision)
It could well be that in the particularly sensitive context of the Yugoslav conflict, a person who evades service by prolonged absence overseas would be treated by the Serb authorities as holding a political opinion by reason of which he would suffer punishment amounting to persecution, independently of whether he possessed a limited or absolute conscientious objection to military service. However, as I have already found the applicant to be a refugee on the ground of his conscientious objection, it is not necessary to reach a decision on the separate issue of imputation of political opinion unrelated to his conscientious objection.

For similar reasons, I do not propose to make any finding in relation to the claim of persecution on the grounds of political opinion arising from his support for Montenegrin independence.

The applicant said at a number of points in the review process that he did not have much familiarity with religion and did not consider that he would have any problems any more as regards religious practice if he went back to Yugoslavia. In the light of this concession, there is no basis for a claim on this Convention ground.

Finally, the applicant's adviser raised the issue that due to the applicant's medical condition, any imprisonment for avoidance of military service, would result in practical terms in a denial of access to necessary medication. This, it was said, was such a denial of fundamental human rights that it would amount to persecution. Article 25 of the Universal Declaration of Human Rights and Article 12 of the International Covenant on Economic, Social and Cultural Rights were cited in support of this proposition.

In decision V95/03176, what constitutes persecution is discussed at some length and the tripartite schema of Professor Hathaway, (The Law of Refugee Status, Butterworths, 1991) is adopted. The learned author considers that any failure to implement the rights to , inter alia, ...medical care, if this failure is discriminatory or not grounded in the absolute lack of resources, is persecution. It is possible that the applicant might be denied necessary medical treatment for Convention related reasons or due to shortages in the country. I am not in a position without more information to draw either inference. As I have already found the applicant to be a refugee on the ground of his conscientious objection, it is not, however, necessary to reach a decision on this issue.

I find therefore that there is a real chance that the applicant will face persecution if he were to return to Yugoslavia. It follows that the applicant's fear of persecution for reasons of political opinion is well founded. As a consequence, the applicant is a refugee and a person to whom Australia has protection obligations.

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.**