

REFUSAL TO PERFORM MILITARY SERVICE AS A BASIS FOR A WELL-FOUNDED FEAR OF PERSECUTION

SUGGESTED FRAMEWORK OF ANALYSIS

Immigration and Refugee Board
Ottawa, Canada
September 1992

THE ISSUE

Under what circumstances may refusal to perform military service, by either evading draft or deserting a force, lead to the recognition of Convention refugee status?

GENERAL PRINCIPLES

Musial v. M.E.I., [1982] 1 F.C. 290 (C.A.):

...I do not read the [Immigration Appeal Board's] reasons as meaning anything more than that army deserters and conscientious objectors are not, as such, within the definition. That is, as I see it, far from saying that because a person is an army deserter or a conscientious objector he cannot be a Convention refugee. (pp. 292-293, per Thurlow C.J.)

...the Board was right in assuming that a person who has violated the laws of his country of origin by evading ordinary military service, and who merely fears prosecution and punishment for that offence in accordance with those laws, cannot be said to fear persecution for his political opinions even if he was prompted to commit that offence by his political beliefs. (pp. 294, per Pratte J.)

UNHCR Handbook on Procedures and Criteria for Determining Refugee Status, paragraphs 167-174, particularly:

167....Fear of prosecution and punishment for desertion or draft-evasion does not in itself constitute well-founded fear of persecution under the definition [of a Convention refugee]. Desertion or draft-evasion does not, on the other hand, exclude a person from being a refugee, and a person may be a refugee in addition to being a deserter or draft-evader.

168.A person is clearly not a refugee if his only reason for desertion or draft-evasion is his dislike of military service or fear of combat. He may, however, be a refugee if his desertion or evasion of military service is concomitant with other relevant motives for leaving or remaining outside his country, or if he otherwise has reasons, within the meaning of the definition, to fear persecution.

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.

ESTABLISHING THE EVIDENCE

A claim to Convention refugee status cannot be based solely on the fact that one is subject to a national ordinary law governing conscription for military service. There are several reasons for refusing to perform military service, and not all who evade or desert such service do so on valid grounds that could bring them within the scope of the Convention refugee definition. Therefore, a claim involving draft-evasion or desertion should be fully examined on its merits by paying particular attention to the following factors:

General:

- (1) Existence of compulsory military service (i.e. conscription) in the claimant's country, who is required to serve and the length of that service, as well as the manner in which the service is generally instituted and administered.
- (2) Legal recognition of, and procedures for obtaining, conscientious objector status and the ground(s) accepted by that country as valid for conscientious objection.
- (3) Availability of alternative service and the nature of that service (i.e. non-combat service within the military, civilian service in the social/developmental field, etc.).
- (4) The state of the judicial system in the claimant's country and its human rights record, particularly evidence of human rights violations by the armed forces.
- (5) The standards and demands of the international community regarding the purposes, means and methods of conscription and the use of armed force.

Specific:

- (6) Whether the claimant's draft-evasion or desertion took place in time of war/public emergency, or in peace time.
- (7) The nature of the particular military activity which the performance of military service would have required the claimant to participate in.
- (8) The specific reasons (beliefs, convictions, etc) for the claimant's refusal to perform the required military service, and the genuineness of those reasons.
- (9) The nature and severity of the possible legal penalty and/or extra-legal/extra-judicial treatment to be suffered by the claimant for the refusal to serve.
- (10) Whether the claimant may, besides his/her fear of prosecution and any harm resulting directly thereof, also have other pertinent reasons for fearing persecution.

THE ANALYSIS

A Convention refugee claim grounded in refusal to perform military service generally involves a two-step framework of analysis:

1. Examination of the **grounds for the claimant's refusal to serve**, and whether the authorities of the claimant's country consider those grounds in requiring the claimant to serve.
2. Evaluation of the **claimant's fear of persecution** resulting either from the fact of being forced to serve or from the consequences of the refusal to serve, and whether that fear is linked to one of the statutory reasons for persecution.

In general terms, a draft-evader or deserter may have a legitimate claim to Convention refugee status if it can be shown that the claim fits any one of the following three situations:

I. Institutionalized Discrimination

- (i) The conscription law of the country in question is **not one of a general application** but is rather designed and implemented in such a manner as to single out or discriminate against the claimant's racial, religious, national, social, or political group. For example,
 - (a) discriminatory conscription targeting certain groups;
 - (b) unfair delegation of military assignments while in service;
 - (c) unfair extension of service period beyond what is lawfully established.
- (ii) Although the conscription law itself is not discriminatory, the evasion of the draft or desertion of the force would result in a **disproportionately severe punishment** for the claimant on account of the claimant's race, religion, nationality, membership in a particular social group or political opinion. That is, the treatment that the claimant would be subjected to is significantly more severe than that of other evaders or deserters in similar circumstances.

The test for a finding of well-founded fear of persecution - Claims falling within this category can be assessed by applying the discrimination vs. persecution framework of analysis. The essential question is whether the measures of discrimination regarding the conscription law or its enforcement go beyond the borderline of "less favourable treatment" so as to lead to "consequences of a substantially prejudicial nature for the person concerned" (UNHCR *Handbook*, paragraph 54). For example, does the discriminatory military assignment place the claimant in a more life threatening situation than other fellow servicemen/women?

II. Conscientious Objection

That is, objection to performing military service for reasons of conscience, i.e. genuine beliefs or convictions of ethical, religious, moral, humanitarian or philosophical inspiration. At the centre of such objection is the individual's right to freedom of thought,

conscience and religion (Article 18 of the *Universal Declaration of Human Rights*). Clearly, as stipulated in Article 29 of the Declaration, this right is not an absolute right. Not only is society entitled to impose certain legitimate limitations on the exercise of this right, but there are also certain actions which society demands the individual to perform for the common good; military service is one such demand. When there is conscientious objection, therefore, there is a need to maintain a reasonable balance between the dictates of the individual's conscience and the demands and interests of the state. The compromise that has often been worked out is **alternative civilian service**.

A United Nations report, "Conscientious Objection to Military Service" (E/CN.4.Sub.2/1983/30), identifies two major categories of conscientious objection:

(i) **pacifist objection** - i.e. objection rooted in the conviction that it is wrong and immoral under all circumstances to take the life of human beings or to participate, directly or indirectly, in any kind of armed action, whatever its purpose or the means and methods used in carrying it out. The most common ground for such objection is religious conviction.

(ii) **partial or circumstantial objection** - i.e. objection built on the conviction that the use of armed force may be justified in some limited circumstances but not in others, and, therefore, it is necessary as a matter of conscience to object in those other cases. Such conviction may either derive from the individual's own moral/ethical considerations that are reasonably solid or built on respect for certain international standards which draw the legitimate dividing line between legal and illegal use of armed force.

Examples of partial objections justified under international instruments:

- Objection to participation in an armed force used for the purposes of expansion or aggression. The *Charter of the United Nations* provides in Article 2 that a state may use armed force only in self-defence against an armed attack from outside.
- Objection to participation in armed repression of self-determination. The UN General Assembly states in its resolution 2625 (XXV): "Every State has the duty to refrain from any forcible action which deprives peoples...of their right to self-determination, freedom and independence".
- Objection to serving in military or police forces used to enforce *apartheid* (UN General Assembly resolution 33/165).
- Objection to participation in acts of genocide. Under the *Convention on the Prevention and Punishment of the Crime of Genocide*, not only is the individual entitled to refuse participation in genocide but is also obliged to do so in order to avoid criminal liability.
- Objection to taking part in certain military actions that are contrary to basic rules of human conduct under the 1949 Geneva Conventions or that are used in

violation of basic and fundamental human rights as set forth in the *Universal Declaration of Human Rights* and other instruments.

Evidence of conviction:

A person claiming fear of persecution by reason of conscientious objection to performing military service must provide some proof that his or her professed belief/conviction is genuine and profound. If the claimant contends to be a **pacifist objector**, the central question is whether the claimant actually holds the ethical, moral or religious conviction that binds him or her not to bear arms or participate in any kind of armed action. The genuineness of the claimant's pacifism may be ascertained by assessing the evidence pertaining to, for example,

- the claimant's personality and background, including any previous manifestation of the belief/conviction;
- the timing of the claimant's objection to performing the military service, and the manner in which the claimant made the objection known to authorities or others;
- whether, in the case of a claimant who deserted a force by reason of conscientious objection to further service, the claimant has been drafted into compulsory military service or volunteered;
- whether the claimant's professed belief/conviction accords with known documentary and other sources of information about such belief/conviction in the claimant's country of origin.

In the case of a **partial or circumstantial objector**, it would be necessary to show not only the possession of such conviction but also the existence of a reasonable chance that he or she, if conscripted, would be required to participate in a military activity considered illegitimate under existing international standards.

The test for a finding of well-founded fear of persecution - The evidence must establish that the claimant, whether a pacifist or partial objector, does not have access to an alternative civilian service, that the punishment feared to be meted out for the objection is sufficiently serious to amount to persecution and that there is a serious possibility that the feared punishment would come to pass.

III. Political Objection

A person may refuse to perform military service not because of any objection to military service as such, but because of the person's total political opposition directed against the very foundation of the regime in power. At the root of the person's refusal to serve is neither the illegitimate purpose of the military service nor the illegality of the means and methods used in a particular military action that the person is required to participate in. In other words, the person's objection does not derive from ethical, moral or religious considerations, or from international norms regarding the use of armed force.

Mere disagreement with the government's political justification for military service is not in itself a sufficient reason for claiming Convention refugee status after draft-

evasion or desertion (UNHCR *Handbook*, paragraph 171). For the claim to succeed, it must be shown that the person's objection to performing military service is governed by his or her tenacious political dispositions against joining any agency of the state. Thus, a thorough assessment of the claimant's personality and background must evince that his or her political convictions are genuine, and that such convictions or any other political dissent are not tolerated by the authorities.

When evaluating political objection to performing military service, therefore, important considerations include whether the claimant has manifested his or her political opposition prior to the evasion or desertion or has already encountered any difficulties with the authorities because of that manifestation (UNHCR *Handbook*, paragraph 174). What, in the final analysis, the evidence must establish is that the claimant's refusal to serve is not motivated by opportunism or a desire to avoid the hardships and risks of military activity, but is rather part and parcel of his or her political makeup. As for a finding of well-founded fear of persecution, it must be shown that the punishment that the claimant fears to suffer as a result of his or her refusal to serve is in fact punishment that would be meted out **on grounds of his or her political opinion**.

NOTE: This Framework of Analysis does not necessarily apply to claims involving forcible recruitment, or punishment for resisting recruitment, by guerrilla or para-military forces. In contrast to a legitimate government's enactment and enforcement of military service, 1) guerrilla/para-military groups have no legal authority to conscript; 2) the force meted out by such groups can never be considered prosecution; 3) victims of forcible recruitment have neither access to due process of law nor the option of alternative service.

ADDITIONAL SOURCES OF JURISPRUDENCE AND DOCTRINE

Jurisprudence:

Padilla v. M.E.I., No A-398-89, dated 31 January 1991 (F.C.A.).

Mahjoor, Ramin v. M.E.I., No. A-1138-87, dated 23 May 1989 (F.C.A.).

Also see, although United States case law is not binding on Canadian decision-makers, *Canas-Segovia v. Immigration and Naturalization Service*, 902 F.2d 717 (9th Cir. 1990) where it was held:

We hold that punishment of a conscientious objector for refusal to comply with a policy of mandatory conscription may amount to persecution within the meaning of the INA [Immigration and Nationality Act], if the refusal is based upon genuine political, religious, or moral convictions, or other genuine reasons of conscience. (p. 726, per Wright)

Academic authorities:

James C. Hathaway, *The Law of Refugee Status* (Toronto: Butterworths, 1991), pp. 179-185;

Guy S. Goodwin-Gill, *The Refugee in International Law* (Oxford: Clarendon Press, 1983), pp. 33-35;

Atle Grahl-Madsen, *The Status of Refugees in International Law*, vol. 1 (Leyden: A.W. Sijthoff, 1966), pp. 231-238.

Bill Frelick, "Conscientious Objectors as Refugees", *World Refugee Survey* (1987), pp. 29-33.