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Ottawa, Ontario, July 4, 2008

PRESENT: The Honourable Mr. Justice Barnes

BETWEEN:

**JOSHUA ADAM KEY, BRANDI RENEE KEY,
ANNA CHARLENE KEY, PHILIP JAMES KEY,
ZACKARY DANIEL KEY, ADAM KENT KEY**

Applicants

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review brought by Joshua Adam Key, his wife Brandi Renee Key, and their four children from a decision of the Refugee Protection Division of the Immigration and Refugee Board (the Board) rendered at Toronto on October 20, 2006. The Applicants are all citizens of the United States and their claims to protection arise from Mr. Key's desertion from the United States Army.

a. Background

[2] Mr. Key enlisted in the United States Army in 2002 and in April, 2003, he entered Iraq via Kuwait as a private in the 43rd Combat Engineer Company. Pte. Key and his Company were assigned to security duties in Iraq. This included the responsibility for conducting night-time raids of private Iraqi homes in search of weapons. Pte. Key's role in this was to blow open the doors with explosives and then to assist in both securing the premises and detaining the adult male occupants. Mr. Key alleged that during these searches he witnessed several instances of unjustified abuse, unwarranted detention, humiliation and looting by fellow soldiers, much of which he said was ignored by his superior officers. On other occasions while in Iraq, he witnessed or heard about the application of unwarranted physical abuse including lethal force against apparently innocent civilians.

[3] In November, 2003, Mr. Key returned to the United States on a 2-week furlough. He was then suffering from debilitating nightmares. Instead of reporting back to his unit, Pte. Key anonymously sought legal advice from a Judge Advocate General (JAG) representative who apparently told him to return to duty in Iraq or face imprisonment. Pte. Key elected to desert and he and his family relocated to Philadelphia. On March 8, 2005, the family came to Canada and they initiated their claims for refugee protection three days later.

The Board Decision

[4] The Board had no concerns about Mr. Key's credibility. It observed that he testified "in an honest and direct manner" and that he was "earnest," "sincere," "open," and "spontaneous." In the result, the Board accepted his allegations as truthful.

[5] The Board found that Mr. Key was not a conscientious objector in the usual sense of being opposed to war generally and that his objections to the conflict in Iraq were not politically or religiously motivated. Rather, what Mr. Key objected to were the systematic violations of human rights that resulted from the conduct of the United States Army in Iraq and the requirement that he participate. The Board summarized Mr. Key's evidence concerning these events and compared his experiences to the observations of the International Committee of the Red Cross (ICRC) detailed in its report from 2003.[1] It is apparent that the Board found Mr. Key's experiences to be consistent with the ICRC findings, as can be seen from the following passages from its decision:

> Mr. Key performed at least seventy raids on the homes of Iraqi citizens ostensibly looking for weapons. None of them was pleasant. In the blackness of night, doors blown in, homes ransacked, personal effects looted, residents violently roused from their beds and forced outdoors by heavily armed and uniformed soldiers hollering in a foreign language, Muslim women shamed by their exposed bodies, boys too tall for their age, and men cuffed and hauled away for interrogation in their nightclothes, regardless of weather conditions, never, at least as far as Mr. Key could ascertain, to return. Should there have been a belligerent that needed flushing out, Mr. Key had white phosphorous grenades at the ready, part of the standard issue for this type of job. Mr. Key indicated that the searches were largely ineffectual as his unit seldom found weapons or contraband, although they probably did work to the extent that any insurgents would soon

[1] The timeframe of the ICRC investigation documented in the *Report of the ICRC on the Treatment by the Coalition Forces of Prisoners of War and Other Protected Persons by the Geneva Conventions in Iraq During Arrest, Internment and Interrogation* was roughly equivalent to Pte. Key's tour of duty in Iraq.

learn to hide their guns and bomb-making paraphernalia outside their homes.

The *International Committee of the Red Cross* (ICRC) confirms that this type of military operation followed a "fairly consistent pattern." In its *Report of the ICRC on the Treatment by the Coalition Forces of Prisoners of War and Other Protected Persons by the Geneva Conventions in Iraq During Arrest, Internment and Interrogation*, covering the period between March and November 2003, the ICRC reported:

> Arresting authorities entered houses usually after dark, breaking down doors, waking up residents roughly, yelling orders, forcing family members into one room under military guard while searching the rest of the house and further breaking doors, cabinets and other property. They arrested suspects, tying their hands in the back with flexi-cuffs, hooding them, and taking them away. Sometimes they arrested all adult males present in the house, including elderly, handicapped or sick people. Treatment also included pushing people around, insulting, taking aim with rifles, punching and kicking and striking with rifles. Individuals were often led away in whatever they happened to be wearing at the time of the arrest – sometimes in pyjamas or underwear – and were denied the opportunity to gather a few essential belongings, such as clothing, hygiene items medicine or eyeglasses. Those who surrendered with a suitcase often had their belongings confiscated. In many cases personal belongings were seized during the arrest, with no receipt being issued.

While some of those who were arrested may have been involved in armed resistance to the US-led occupation of Iraq, it is apparent that most were not. Indeed, the ICRC reports that between 70% and 90% of those arrested had been arrested by mistake. In any event, though, it is the activities of the troops in carrying out the raids and not the guilt or innocence of a particular person arrested that is germane to

> this analysis. In other words, the issue is not whether the raids were justified based on the results yielded but whether the methodology employed in those raids crossed the line.
>
> [Footnotes omitted]

[6] The Board considered Mr. Key's description of these events and seems to have felt that some of the behaviour contravened international law intended to protect civilians, albeit not rising to the level of war crimes or crimes against humanity. The Board's views of this are set out in the following passages from its decision:

> In my view, the manner in which the military routinely invaded the homes of Iraqi citizens and the conduct of the soldiers may have been violations of articles 27, 31, 32 and 33 of the *Fourth Geneva Convention.* In so raiding the homes, the military showed little understanding that the residents were protected persons under the Convention. The wanton destruction of property, the intimidation of the entire family including children, the absence of any cultural sensitivity, the disrespect for human dignity and physical integrity, the pillaging and the violence could well be breaches of the *Geneva Conventions*.
>
> It could be argued that the home invasions were undertaken without any regard to the principle of proportionality. A score of young men brandishing weapons and armed with white phosphorous grenades descending on a sleeping family in the middle of the night, blowing up the front door is arguably disproportionate to the military objective of recovering contraband and bringing in men for questioning. One might conclude, the impact on the civilians far outweighs the advantages gained by the military in using this excessive methodology. Like the laws of war, occupation law is an ongoing application of the principals of necessity and proportionality. It is an exercise in finding an appropriate balance.
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> However, even if one were to assume that the raids under discussion were in breach of *Geneva Conventions*, I remain mindful that not all breaches of the *Geneva Conventions* are war crimes. As noted earlier, to reach the level of a war crime in the context of the *Geneva Conventions*, there must be a grave breach of the Conventions.

In my view, the home invasions in which Mr. Key participated, despite a disturbing level of brutality, did not reach to the level of a war crime. The invasions, in my opinion, do not reflect the heinous conduct anticipated by the definition of war crimes which according to the *Rome Statute* includes such misdeeds as murder, deportation to slave labour and taking civilian hostages. I am enured to this view given the recommendations or lack of same made by the ICRC in the aforementioned report with respect to home invasions. There was no suggestion that the invasions should be stopped, be less frequent or more targeted or that there be prosecutions of the transgressors; rather, it was recommended that the individuals involved receive adequate training enabling them to operate in a proper manner without resorting to brutality or using excessive force. The ICRC also reminded the military of its obligations to notify families of all prisoners of war or those arrested by the military of their place of detention. I would have expected a much stronger set of recommendations from the ICRC had it considered the military action to be war crimes.

Nor do I consider the home invasions to be crimes against humanity. In my view, they simply do not rise to the level of mistreatment as anticipated by the *International Military Tribunal Charter* or the *Rome Statute*. Mr. Waldman points out that the Federal Court has held that the following types of conduct will constitute war crimes or crimes against humanity: participation in systematic acts of torture; participation on a tribunal which systematically sentenced people to death in violation of principals of justice; murdering innocent civilians who were held in prison; participation in a secret police force engaged in systematic extrajudicial killings and torture; and, participation in a program that enforced sterilization of women.

[…]

I find that Mr. Key would not have been excludable from Convention refugee protection on the basis of his participation in the war in Iraq or upon his return to duty in Iraq if he was to serve there again and therefore cannot avail himself of paragraph 171 of the UNHCR *Handbook*.

[Footnotes omitted]

[7] What is clear from the above passages is that the Board was of the view that unless the events Mr. Key described were sufficiently egregious as to constitute war crimes or crimes against humanity, they could not, for the purpose of obtaining refugee protection, justify his desertion from the United States Army.

[8] The Board concluded by finding, on a balance of probabilities, that if Mr. Key were to return to the United States he would be arrested, court martialled and sentenced to at least a year of imprisonment.

[9] The Board also found that some of the events described by Mr. Key that arguably did constitute war crimes (for example, the use of unjustified lethal force against civilians, the physical abuse of detainees, etc.) were isolated events or were otherwise based upon speculation.

[10] The issue of state protection was effectively taken off the table by the Board at the commencement of the hearing on the basis that "the alleged agent of persecution in this case is the state itself." In the result, very little evidence was adduced concerning this issue beyond the testimony of Mr. Key that he had consulted a JAG representative and was advised that he had "two choices, either get back on the plane and go to Iraq or go to prison."

II. Issues

[11] (a) Did the Board err in law by holding that refugee status for a military deserter could only be conferred where there was an expectation of involvement in war crimes, crimes against humanity or crimes against peace?

(b) Did the Board err in its application of the principles of state protection and, if so, would the denial of refugee status to the Applicants be inevitable in the face of the state protection reasons given by the Federal Court of Appeal in *Hinzman v. Canada (M.C.I.)*, 2007 FCA 171, 282 D.L.R. (4th) 413 (referred to hereafter as *Hinzman* (C.A.))?

III. Analysis

[12] The first issue raised on this application is an issue of law. So, too, is the question of whether the Board erred in its application of state protection principles. These are matters which must be assessed on a standard of correctness: see *Hinzman v. Canada (M.C.I.)*, 2006 FC 420, 266 D.L.R. (4th) 582 at para. 113 (referred to hereafter as *Hinzman*). The question of whether the outcome of this application would necessarily be the same having regard to the principles of state protection does not attract a standard of review analysis. That is a question for the Court to resolve independently by determining whether the claim was hopeless or the outcome was inevitable notwithstanding any errors made by the Board.

[13] For the sake of argument, I am prepared to accept the Board's conclusion that the conduct of the United States Army in Iraq as described by Mr. Key would not meet the definition of a war crime or a crime against humanity.[2] Nevertheless, the Board's observations that some of that conduct reflected "a disturbing level of brutality" and that many of these reported indignities would represent violations of the Geneva Convention prohibition against humiliating and degrading treatment cannot be seriously challenged.

[14] The Board concluded that refugee protection could only be extended to Mr. Key if he had been or would be expected to be complicit in the commission of war crimes, crimes against peace or crimes against humanity. Put another way, the Board indicated that refugee status can only be conferred where a soldier's past combat experiences or the expectations for further combat service would constitute excludable conduct under the *Convention Relating To The Status Of Refugees*, 189 U.N.T.S. 150, Can. T.S. 1969 No. 6 (entered into force April 22, 1954.) In my view, the Board erred in its interpretation of Article 171 of the UNHCR Handbook[3] by concluding that refugee protection for military deserters and evaders is only available where the conduct objected to amounts to a war crime, a crime against peace or a crime against humanity.

[15] The relevance of the UNHCR Handbook was considered by the Supreme Court of Canada in *Chan v. Canada (M.E.I.)*, [1995] 3 S.C.R. 593, 128 D.L.R. (4th) 213 at para. 46 where it was accepted as a "highly relevant authority": also see *Hinzman* above at para. 116. Accordingly, I

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[2] Pillaging is generally considered to be a war crime and a policy of carrying out widespread and systematic inhumane acts against a civilian population can constitute a crime against humanity.

[3] *Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the status of Refugees*, UNHCR, 1992, HCR/IP/4/Eng/Rev.1.

consider that reference and the legal authorities which have considered and applied it, to be determinative of the first issue raised on this application.

[16] Article 171 of the UNHCR Handbook states:

> Not every conviction, genuine thought it may be, will constitute a sufficient reason for claiming refugee status after desertion or draft-evasion. It is not enough for a person to be in disagreement with his government regarding the political justification for a particular military action. Where, however, the type of military action, with which an individual does not wish to be associated, is condemned by the international community as contrary to basic rules of human conduct, punishment for desertion or draft-evasion could, in the light of all other requirements of the definition, in itself be regarded as persecution.

[17] The Board's narrow interpretation of Article 171 of the UNHCR Handbook seems to me to rest upon a misreading of both Justice Anne Mactavish's decision in *Hinzman* above, and the earlier Court of Appeal decision in *Zolfagharkhani v. Canada* (*Minister of Employment and Immigration),* [1993] 3 F.C. 540, 155 N.R. 311.

[18] The decision of Justice Mactavish in *Hinzman* thoroughly canvasses the developing law in this area and it is, therefore, unnecessary for me to repeat that analysis here. The material facts, though, in the *Hinzman* case and the legal issues they raised were different from those which arise in the case at bar. Although Mr. Hinzman had objected to the conduct of the American armed forces in Iraq, the Board held that the events he described were isolated and were not the

consequence of deliberate combat policy or official indifference. This finding was upheld by Justice Mactavish and later described by the Court of Appeal in the following way:

> …According to the Board, the appellants failed to adduce sufficient evidence to show that if deployed to Iraq they would personally have been required to engage in conduct condemned by the international community as contrary to basic rules of human conduct.

Mr. Hinzman also challenged the legality of the conflict in Iraq and argued that refugee protection was available where the conflict itself was illegal. This, he said, was sufficient to trigger Article 171 of the UNHCR Handbook which extends protection beyond circumstances of "on the ground" misconduct.

[19] It is apparent to me that the Board in *Hinzman* did not have before it the kind of evidence that was presented by Mr. Key and, therefore, neither the Board nor Justice Mactavish were required in that case to determine the precise limits of protection afforded by Article 171 of the UNHCR Handbook. I do not consider Justice Mactavish's remarks to be determinative of the issue presented by this case – that is, whether refugee protection is available for persons like Mr. Key who would be expected to participate in widespread and arguably officially sanctioned breaches of humanitarian law which do not constitute war crimes or crimes against humanity.

[20] I recognize that there is a compelling policy rationale for affording refugee protection to persons faced with the choice of either being punished for refusing to serve or being placed at risk of participating (or being complicit) in the commission of war crimes or crimes against humanity: see *Tagaga v. INS* 228 F.3d 1030 (9th Cir. 2000) at para. 14. Where the requirements of military

service would put a person at risk of being excluded from refugee protection, the law must provide a meaningful anticipatory option. The idea that a refugee claimant in such circumstances ought to be returned to his home country to face such a dilemma is repugnant and inimical to the furtherance of humanitarian law. It does not follow from this, however, that widespread violations of international law carried out by a military force but not rising to the level of war crimes or crimes against humanity can never support a refugee claim by a conscientious objector. The caselaw I have reviewed does not support the idea that refugee protection is only available where the particulars of one's objection to military service would, if carried out, exclude a claim by that person to protection.

[21] The language of Article 171 of the UNHCR Handbook is not the language either of direct participation or even complicity; rather, it speaks to unwanted association with objectionable military action. While that provision also incorporates the notion of international condemnation, the response of the international community to the legitimacy of a particular conflict or to the means by which it is being prosecuted has generally been seen as a relevant but not a determinative consideration: see *Krotov v. Secretary of State for the Home Department*, [2004] EWCA Civ 69. Nevertheless, in some cases it will suffice: see *Al-Maisri v. Canada (Minister of Employment and Immigration)*, [1995] F.C.J. No. 642, 55 A.C.W.S. (3d) 375 at para. 6. That this is so is not surprising: there are many reasons for countries to be reticent to criticize the decisions or conduct of an ally or a significant trading partner even where the impugned actions would, in some other political context, draw widespread international condemnation. Article 171 of the UNHCR Handbook speaks of the need for international condemnation for "the type of military action" which

the individual finds objectionable. Thus, even where the response of the international community is muted with respect to objectionable military conduct, the grant of refugee protection may still be available where it is shown that the impugned conduct is, in an objective sense and viewed in isolation from its political context, contrary to the basic rules or norms of human conduct.

[22] The Federal Court of Appeal decision in *Zolfagharkhani*, above, has been widely recognized as authoritative in this area of the law. The decision was applied with approval by the House of Lords in *Sepet et al v. Secretary of State* for *the Home Department* [2003] 3 All E.R. 304 and it is cited in the von Sternberg text, *The Grounds of Refugee Protection in the Context of International Human Rights and Humanitarian Law* (Martinus Nijhoff, The Hague, 2002) for the following propositions:

> The original position of the Court of Appeal has undergone significant modification in the case law. Modern Canadian law has adopted an approach similar to that of the Ninth Circuit in the area of conscientious objection. In *Zolfagharkhani v. M.E.I.,* the Court of Appeal granted the applicant refugee status finding that his conscientious opposition to the use of chemical weapons in Iran's internal war against the Kurds was reasonable. The holding of *Zolfagharkhani* is considerably broader than any of the United States decisions discussed above and it adopts the correct standard for adjudicating such claims.
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> […]
>
> The view that the intent of the law provides the critical consideration in "conscientious objector" cases seems incomplete. The claimant in *Zolfagharkhani* had adopted a position in which he had refused to violate fundamental international humanitarian norms relating to the protection of human rights in armed conflict as set forth in a critical treaty. His relationship to the law must be seen then as one of comparative privilege. His right not to violate such peremptory norms is not qualified; the claimant is not, in other words, obligated to demonstrate that application of the law would entail, as to him, a

> disproportionately severe punishment. *Rather, the privilege obtaining with respect to a claimant's fundamental right not to violate the dignity of others is absolute. Any harm of a serious nature occasioned as the result of the claimant's having made this choice is persecution.*
>
> [Footnotes omitted]

[23] It appears to me that *Zolfagharkhani*, above, did not turn on whether the claimant would be required to commit war crimes or crimes against humanity in order to obtain refugee protection. Indeed, it is at least implicit from that decision that no such finding was required to support a protection claim. While the Court of Appeal observed that the expectation that Mr. Zolfagharkhani's work as a medic might implicate him in the commission of a war crime in the context of combat involving chemical weapons, it did not make such a finding the *sine qua non* of a successful claim to protection. Rather, the Court was fundamentally concerned with the moral weight to be assigned to the obligation to provide any form of material assistance to a regime that was conducting a revulsive military campaign. The Court held that where a reasonable person "would not be able to wash his hands of guilt" the claim to refugee protection will be made out.

[24] To the same effect is the decision of the Federal Court of Appeal in *Al-Maisri*, above. In that decision the Court cited with approval a passage from James C. Hathaway's text, *The Law of Refugee Status* (Toronto: Butterworths, 1991) which recognized that refugee protection is available where the impugned military activity violates basic international standards, including the violation of basic human rights and breaches of the Geneva Convention standards for the conduct of war. The Court concluded by saying that official military action that is contrary to the basic rules of

human conduct will support a refugee claim by a person unwilling to participate for that reason. It is also interesting that the Court held that essentially any form of punishment that might have been meted out by the Yemeni authorities for desertion would amount to persecution and thus support a claim to protection.

[25] In *Sepet*, above, the House of Lords was not directly concerned with claims to refugee protection where the compulsory military service would or might have required the claimants to commit war crimes or to otherwise violate international law. The sole evidentiary basis for those unsuccessful claims to asylum was a stated political opposition to the military policies of the Turkish government in relation to the Kurdish minority. The decisions there under review also included explicit factual findings that the claimants would not be required to engage in military action contrary to the basic rules of human conduct (see the decision of Lord Hoffman at para. 26). It was thus unnecessary for the Court to determine the exact scope of the relevant articles of the UNHCR Handbook in relation to oppressive or unlawful military conduct. Lord Bingham did, however, take note of the Joint Position Paper of the Council of the European Union which recognized that such claims could be allowed if the conditions under which military duties are performed constitute persecution and <u>also</u> if the performance of military duties would fall within the exclusion clauses of the Refugee Convention. Lord Hoffman similarly observed in an *obiter* remark that a claim to refugee protection might be founded upon a risk of punishment for desertion that was discriminatory or where the conditions of military service were persecutory or would otherwise require the claimant to "commit war crimes or the like," (see para. 52.) It seems fairly obvious that

these judgments did not purport to restrict refugee claims for desertion or draft evasion to situations involving the likely commission of war crimes or crimes against humanity.

[26] Similarly, in *Krotov*, above, the Court dealt with the interpretation of Article 171 of the UNHCR Handbook in the following pertinent passage at paras. 29 and 30:

> In considering the rival submissions of the parties, I should say at once that, whereas Mr Wilken has made much before us of the differing nuances of expression employed in paragraph 171 of the Handbook and the recent jurisprudence as indicative of an undesirable vagueness surrounding the concept of a claim for asylum on the grounds of fear of persecution for refusal to participate in a repugnant war, I do not regard those differences as irreconcilable in respect of the test to be applied to the nature of the war or conflict to which objection is taken. In *Sepet* and *Bulbul*, Laws LJ simply adopted the wording of paragraph 171 (absent the reference to condemnation by the international community), namely military action involving acts "contrary to basic rules of human conduct". Lord Bingham on the other hand referred to "atrocities or gross human rights abuses". However, I do not doubt that both had in mind in this context conduct universally condemned by the international community, in the sense of crimes recognised by international law or at least gross and widespread violations of human rights. The Tribunal in *B v SSHD* propounded a test based upon paragraph 171 and an expansion of the words of Laws LJ as follows:
>
> > "Where the military service to which he is called involves acts, with which he may be associated, which are contrary to basic rules of human conduct as defined by international law."
>
> In this respect, there is a core of humanitarian norms generally accepted between nations as necessary and applicable to protect individuals in war or armed conflict and, in particular, civilians, the wounded and prisoners of war. They prohibit actions such as genocide, the deliberate killing and targeting of the civilian population, rape, torture, the execution and ill-treatment of prisoners and the taking of civilian hostages.
>
> [Emphasis added]

The Court then went on to identify the international law sources that could be invoked in support of a refugee claim. Included in that review were several articles of the four Geneva Conventions of August 12, 1949 which explicitly require humane treatment of civilians and which prohibit "outrages upon personal dignity, in particular humiliating and degrading treatment" and "unlawful confinement". The Court completed its analysis with the following conclusion at para. 37:

> In my view, the crimes listed above, if committed on a systemic basis as an aspect of deliberate policy, or as a result of official indifference to the widespread actions of a brutal military, qualify as acts contrary to the basic rules of human conduct in respect of which punishment for a refusal to participate will constitute persecution within the ambit of the 1951 Convention.

[27] Even the legal authorities from the United States do not seem to adopt such a restrictive standard. In *Tagaga*, above, refugee status was accorded to the claimant who was simply unwilling to participate in race-based arrests and detentions. This was based on a standard defined by participation in acts "contrary to basic rules of human conduct" and not by one restricted to war crimes or crimes against humanity.

[28] To the same effect is the decision of the United States Federal Courts of Appeal in *M.A. A26851062 v. U.S. Immigration & Naturalization Service*, 858 F.2d 210 (4th Cir. 1988), where the following standard was applied:

> 44 Similarly, we do not think that M.A. must wait for international bodies such as the United Nations to condemn officially the atrocities committed by a nation's military in order to be eligible for political asylum. Paragraph 171 of the Handbook shelters those individuals

> who do not wish to be associated with military action "condemned by the international community as contrary to basic rules of human conduct...." These basic rules are well documented and readily available to guide the Board in discerning what types of actions are considered unacceptable by the world community. The Geneva Conventions of August 12, 1949 represent the international consensus regarding minimum standards of conduct during wartime. They include the following, as to all of which M.A. has presented evidence to show their contravention by the Salvadoran military: the obligation to treat humanely persons taking no active part in hostilities, and the prohibition of certain acts, including violence to life and person, specifically murder of all kinds, mutilation, cruel treatment, and torture; and the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court. See Art. 3, Geneva Conventions of August 12, 1949, reprinted in United States Treaties and Other International Agreements Vol. 6, part 3 (1955).
>
> 45 We hold that M.A. has made out a prima facie case that he merits refugee status and thus consideration for political asylum on the basis of his sincere refusal to participate in the actions of the Salvadoran Armed Forces, and the likelihood that he will be punished for his refusal to serve. We think that M.A. has presented the evidence to show "an objective situation" from which it can be inferred that "persecution is a reasonable possibility." Stevic, 467 U.S. at 424-425, 104 S.Ct. at 2498.
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> [Footnotes omitted] [Emphasis added]

[29] It is clear from the above passages that officially condoned military misconduct falling well short of a war crime may support a claim to refugee protection. Indeed, the authorities indicate that military action which systematically degrades, abuses or humiliates either combatants or non-combatants is capable of supporting a refugee claim where that is the proven reason for refusing to serve. I have, therefore, concluded that the Board erred by imposing a too restrictive legal standard upon Mr. Key.

[30] I would add that the Board's assertion that Mr. Key's past combat participation would not be sufficient to support his claim to asylum unless it constituted excludable conduct cannot be correct. This would give rise to an unacceptable 'Catch-22' situation where the factual threshold for obtaining protection would necessarily exclude a claimant from that protection.

[31] That, however, does not end the matter because the Court has made it very clear in *Hinzman (C.A.)*, above, that soldiers facing punishment in the United States for desertion must, as a rule, pursue the available options for state protection at home before seeking protection in Canada. In light of this recent decision, there is no question that the Board erred by adopting the "state as persecutor" principle as the basis for finding that state protection was not available to Mr. Key.

[32] In the *Hinzman* case considerable evidence was developed around the issue of the likely punishment that would be meted out by the United States authorities. The Court of Appeal was critical of the Board's assessment of that evidence and found that much of it had been overlooked. The Court was also of the view that the Mr. Hinzman had not adduced sufficient evidence to excuse his failure to pursue protection at home. In the absence of reasonable efforts to seek alternatives to combat duty or prosecution, the Court held, on the record before it, that it was not possible to assess how he would have fared. The circumstances of this case are very different from those which were considered in *Hinzman* and *Hinzman* (C.A.), above, most notably because, unlike Mr. Hinzman, Mr. Key was not required to address the state protection issue. I do not believe, therefore, that the state protection findings of the Court in *Hinzman* (C.A.), above, are determinative of the outcome of this case.

[33] There is not much doubt that Mr. Key would now likely face some form of punishment for desertion if he returned to the United States and, indeed, the Board found that he would, in all probability, be court martialled and sentenced to a year of imprisonment.

[34] Unlike many cases where state protection is invoked as the basis for denying refugee status, here the 'die may have been cast' by Mr. Key's decision to enter Canada before exhausting his protection options at home. Having completed a tour of duty in Iraq and in the face of his medical status it may have been the case that something other than the dubious choice presented to him by the JAG officer would have been available. Whether an administrative process leading to a dishonourable discharge is now the likely outcome for Mr. Key should he return is perhaps a matter for speculation on this record. Such an outcome may well be unfair to Mr. Key but it would not constitute persecution. I do not, however, agree with counsel for the Respondent that Mr. Key's claim is bound to fail on the issue of state protection. The Board removed that issue from consideration and, in the result, very little evidence was put forward on the point. I do not think it fair or appropriate that Mr. Key's claim should fail at this point on the basis of the subsequent development of the law of state protection in *Hinzman* (C.A.), above, and where, because of the Board's stipulation, Mr. Key did not have the opportunity to present a meaningful case on that issue. If there is clear and convincing evidence presented that Mr. Key faced a serious risk of prosecution and incarceration notwithstanding the possible availability of less onerous, non-persecutory treatment, he is entitled to make that case and to have that risk fully assessed. The significance of a failure to exhaust the options for domestic protection is not, after all, assessed in a vacuum. Such

protections must be actually available and not illusory. It is also not a complete answer to the problem presented in cases like this to point to the presence of due process guarantees (although that is an aspect of the analysis).

[35] While the *Hinzman* (C.A.) decision has certainly set the bar very high for deserters from the United States military seeking refuge in Canada, the Court of Appeal acknowledged in that case the point made in *Ward v. Canada (A.G.)*, [1993] 2 S.C.R. 689, 103 D.L.R. (4th) 1 that one's failure to fully pursue state protection opportunities will not always be fatal to a refugee claim. Clear and convincing evidence about similarly situated individuals who unsuccessfully sought to be excused from combat duty or who were prosecuted and imprisoned for a refusal to serve, may be sufficient to rebut the presumption of state protection in the United States. I would add that because Pte. Key would have been deployed back to Iraq within 2 weeks of his arrival in the United States, the opportunity to pursue a release or re-assignment may not have been realistic. Because the outcome of this case cannot be considered to be a foregone conclusion, Mr. Key should be given the opportunity to address fully the issue of state protection in a rehearing before the Board.

[36] In the result, this application for judicial review is allowed with the matter to be remitted to a differently constituted panel of the Board for reconsideration on the merits.

[37] As indicated at the time of the hearing, I will allow the Respondent 10 days to propose a certified question. In the event of a question being posed, I will allow the Applicants 7 days to respond.

JUDGMENT

THIS COURT ADJUDGES that this application for judicial review is allowed with the matter to be remitted to a differently constituted panel of the Board for reconsideration on the merits.

" R. L. Barnes "
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-5923-06
STYLE OF CAUSE:	Key, et al v. MCI
PLACE OF HEARING:	Toronto, ON
DATE OF HEARING:	April 2, 2008
REASONS FOR JUDGMENT AND JUDGMENT BY:	Mr. Justice Barnes
DATED:	July 4, 2008

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