N94/02638 [1994] RRTA 2733 (20 December 1994)

REFUGEE REVIEW TRIBUNAL
DECISION AND REASONS FOR DECISION

RRT Reference: N94/02638

Tribunal: Dr Judith Winternitz, Member

Date: 20 December 1994

Place: Sydney

Decision: The Tribunal finds that the Applicant is a refugee and remits the applications for reconsideration in accordance with the direction that the Applicant must be taken to have satisfied the criterion that he is a person to whom Australia has protection obligations under the Refugees Convention [1].

DECISION UNDER REVIEW

This matter concerns decisions made by a delegate of the Minister for Immigration and Ethnic Affairs (the Minister), in effect, to refuse to grant (...) (the Applicant) Australia's protection as a refugee, as provided for under the *Migration Act* 1958 (the Act) prior to amendments which came into effect on 1 September 1994.

The Applicant sought protection as a refugee by applications lodged with the Department of Immigration and Ethnic Affairs (the Department) on 16 June 1993. The decisions were made on 10 January 1994 and the Applicant was notified by letter of the same date. He applied for review of the decisions on 17 January 1994.

BACKGROUND

The Applicant, who was born in 1966 in (...) the Republic of Bosnia and Herzegovina as it was constituted within the former Socialist Federal Republic of Yugoslavia, is a citizen of the former Yugoslavia and holds a passport issued by the former Yugoslav authorities valid until December 1995. He is of Serbian ethnic/national background and lived virtually all of his life in (...) the Republic of Bosnia and Herzegovina in the former Yugoslavia. He arrived in Australia on 2 June 1991 as a visitor and has been granted a sequence of extensions of his original temporary entry permit primarily under the Australian Government's humanitarian stay arrangements for citizens of the former Yugoslavia. The Applicant has not been assisted by an adviser at either the primary or the review stages of his applications. He was accompanied to the Tribunal hearing by a friend who gave evidence in support of his claims.

JURISDICTION AND STANDING

Section 414 of the Act provides that if a valid application is made under s.412 of the Act for review of an RRT-reviewable decision the Tribunal must review the decision.

The decisions under review satisfy the definition of "RRT-reviewable decision" contained in s.411(1)(a) and (b) of the Act.

Section 412 of the Act provides that an application for review of an RRT-reviewable decision must be made in the approved form and within the prescribed time, and that the applicant for review must be the subject of the primary decision, and must be physically present in the migration zone when the application for review was made. The "migration zone" is defined by s.5(1) of the Act to include the area consisting of the Australian States and Territories.

The Tribunal is satisfied that the application for review has been validly made, and that the Tribunal has jurisdiction to review the decisions.

LEGISLATIVE FRAMEWORK

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 the Applicant's primary applications as applications for a protection visa.

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

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

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

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

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

Insofar as relevant to the present matter, Article 1A(2) of the Convention as amended defines a refugee as 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."
This definition of a refugee contains various elements.

Firstly, 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.

Secondly, an applicant must have a "well-founded fear" of being persecuted. The term "well-founded fear" was discussed in *Chan Yee Kin v. The Minister for Immigration and Ethnic Affairs (1989-90) 169 CLR 379* (Chan's case). It was observed that this term contained both subjective and objective requirements. "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 (at 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" (at 389 and 398, 407 and 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 389) and though it "does not weigh the prospects of persecution... it discounts what is remote or insubstantial" (at 407). Therefore, a real chance of persecution may exist notwithstanding that there is less than a 50% chance of persecution occurring (at 397-398).

Whether an applicant has a fear of persecution and whether that fear is well-founded must be determined upon the facts as they exist at the date when a determination is required. However, the circumstances in which an applicant has left his or her country of nationality remain relevant and this is ordinarily the starting point in determining the applicant's present status. (see Chan's case at 386-387, 399, 405-406).

Thirdly, an applicant must fear "persecution". The term "persecution" is not defined by the Convention, but not every form of harm will constitute persecution for Convention purposes. 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 (at 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 since a single act of oppression may suffice (at 429-430). The harm threatened may be less than a 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. Indeed Hathaway defines persecution as "the sustained or systemic violation of

basic human rights demonstrative of a failure of state protection": see Hathaway, *The Law of Refugee Status* (Butterworths Canada Ltd, 1991), pp. 104-105.

A question may arise as to whether financial grievance or economic hardship constitutes a breach of a basic human right. Hathaway pointed out that "socio-economic human rights are abrogated only where a state either neglects their realization in the face of adequate resources, or implements them in a discriminatory way.":see Hathaway, supra, p.119. The basic values contained in the *International Covenant on Economic, Social and Cultural Rights* (ICESCR) which came into force on 3 January 1976, do not create obligations that States are required to fulfil immediately and therefore persons whose sole reason for migration is to achieve a better economic standard of living are generally excluded from refugee protection under the Convention: See Hathaway supra at p.116ff.

Another issue arises as to whether the definition of "persecution" above covers the situation of people suffering severely or displaced as a result of armed conflict, civil war or general unrest in their country of nationality. As Hathaway points out, "persons who fear harm as the result of a non-selective phenomenon are excluded. Those impacted by...civil unrest, war, and even generalized failure to adhere to basic standards of human rights are not, therefore, entitled to refugee status on that basis alone" (Hathaway at 93). Nevertheless, persons coming from a strife-torn state may establish a claim to refugee status "where the violence is not simply generalized but is rather directed toward a group defined by civil or political status; or, if the war or conflict is non-specific in impact, where the claimant's fear can be traced to specific forms of disfranchisement within the society of origin" (Hathaway at 188). These principles have been interpreted in the Australian context in *Murugasu and Minister for Immigration and Ethnic Affairs*, unreported, 28 July 1987, where Wilcox J. stated "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...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 being persecuted." (p.13)

Fourthly, the applicant must fear persecution or be at risk of serious harm for a Convention reason, viz. for reasons of "race, religion, nationality, membership of a particular social group or political opinion". If the harm is related to some other reason, such as economic conditions, Convention protection is not available.

The phrase "particular social group" means "a recognisable or cognisable group within a society that shares some interest or experience in common" (see *Morato v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 39 FCR 401 at 416), such as "the nobility, land owners, lawyers, novelists, farmers, members of a linguistic or other minority, even members of some associations, clubs or societies" (ibid). However, to establish persecution for reason of membership of a particular social group, it must be shown "that persecution is feared for reasons of membership of that group" (at 405, see also 416). "The social group referrred to in the Convention and Protocol is intended to encompass groups of people who share common social

characteristics and might be the target of persecution but who do not fit into classifications of race, religion or political opinion" (at 416).

The phrase "political opinion" includes instances where the Applicant holds political opinions not tolerated by the authorities, which are critical of their policies and/or methods. Such opinions may have come to the notice of the authorities however the phrase is not restricted to applicants claiming to be politically active. Political opinion may be imputed to an applicant by, for example, family connections, place of residence or place of education. "Political opinion" within the terms of the Convention includes the perception by the authorities that an applicant has political opinions hostile to those of the government of their nationality (see Chan's case at 416).

BACKGROUND AND CONTEXT OF APPLICANT'S REFUGEE CLAIMS

The background to the Applicant's refugee status application is the distintegration of the former Yugoslavia as a unified, if federated, State. His claims must be seen in the context of that highly complex, dynamic and still unresolved situation.

The following summary of events is based on Marcus Tanner, "The Conflicts in the former Yugoslavia", pp 87-94 and the article on "Bosnia and Herzegovina" pp 182-195 in Eastern Europe and the Commonwealth of Independent States 1994, Second Edition, Europa Publications Ltd, London, 1994; Patrick Moore, "Bosnian Partition Plan Rejected", RFE/RL Research Report, vol 3 no 33, 26 August 1994, pp 1-5; and the Tribunal's own following of daily newsreports on the Bosnia and Herzegovina conflict through Reuters agency reports on the Department's Country Information System and as appearing in the Sydney Morning Herald, the Canberra Times and The Age newspapers, as well as the Guardian Weekly.

The Applicant arrived in Australia at the beginning of June 1991, less than a month before the former Yugoslavia began to break up in the face of declarations of independence from Slovenia and Croatia. The independence claims of these previous component Republics of the former Yugoslavia immediately resulted in warfare against the Belgrade-led former Yugoslav National Army and local opponents of independence, by the secessionist regimes first in Slovenia (1991), then in Croatia (1991-4). Macedonia also declared its independence in September 1991, but has managed to avoid becoming involved in any war.

The Applicant's own Republic of Bosnia and Herzegovina began to show signs of internal fracture in mid-1991 and throughout the second half of that year began to divide itself internally into two and then three increasingly ethnically-defined so-called separate "Republics", each claiming separate (but often overlapping) territories. The process of internal fracture swiftly brought on the most intractable complex and devastating warfare in Europe since the Second World War : a two/three/four/five-sided conflict which, at the time of writing, is continuing relentlessly into its third year, without sign of let-up.

There are three major players in the war proper, but two out of three have strong links with other former Yugoslav and now independent Republics, and the third player is internally disunited, so that the conflict is highly complex, massively dynamic and entirely unpredictable.

The first major player is the "Republic of Bosnia and Herzegovina", which declared itself independent of the former Yugoslavia at the beginning of March 1992 after a referendum boycotted by the Bosnian Serb community. This is the "Bosniak" Republic which has inherited the mantle of the "official" government from the previous Bosnian and Herzegovinian Republic as it was constituted under the former Yugoslavian federal state; it is predominantly led by members of the Muslim Party of Democratic Action. This "Bosniak" Republic has been recognised internationally, and has declared the Republic's territory as being those borders which had existed under the former Yugoslav state.

Virtually simultaneously, at the end of March 1992, districts of the former Yugoslav Republic dominated by a Serbian population also declared their independence as the "Serbian Republic of Bosnia and Herzegovina"; this latter Republic has not been recognised internationally and has consistently expressed its intention to be joined in some kind of federation with Serbia proper. Until very recently, the Bosnian Serbs have been consistently supplied and supported (including in terms of actual troops at some stages) by Serbia.

In July 1992, a third independent area was carved out of the former Yugoslav Republic : the "Croatian Union of Herzeg-Bosna", in August 1993 declaring itself the "Croatian Republic of Herzeg-Bosna"; this area has considered itself linked with Croatia proper and during 1993 at least fought against both "Bosniak" and the Bosnian Serb armies in order to establish its own Croatian-controlled territory. In March 1994, the Bosniak and Croatian Herzeg-Bosna Republics agreed to co-operate and confederate with each other and with Croatia proper. Meanwhile, in September 1993, another area was carved out : the "Autonomous Province of Western Bosnia" under a pro-Serb Muslim leadership : but the headquarters of this group has recently been overrun by the "Bosniak" army of the official Republican Government, its supporters have mainly fled into Serbian-held territory in Croatia and the future of this breakaway group is uncertain.

The conflict in Bosnia and Herzegovina has caused innumerable deaths and untold devastation; it would not be overly dramatic to say that it has become the despair and shame of the leading nations of the world, with the United Nations itself and NATO incapable of resolving it, despite the former's peace-keeping troops on the ground and the latter's most sophisticated international air-strike capability on standby in surrounding countries. As the Guardian Weekly recently put it (edition of week ending December 4, 1994, p. 1) :

"Bosnia...was a regional crisis, it became a European crisis and it is now undoubtedly a world crisis. The fate of the collective institutions on which the world depends has become entwined with that of the Bosnians, a nation of whom most people in Europe and the United States had hardly heard five years ago."

Reports and commentaries on the conflict appear daily in newspapers world-wide. International contact groups have hammered out several peace plans dividing the territory of the former Yugoslav Republic between the two/three major groups, but none have been accepted by all sides. At time of writing the Bosnian Serbs control more than 70% of the territory of the former Yugoslav Republic, with the Bosniak and Bosnian Croatians sharing the rest. While in late October/early November 1994, the

Bosniak army appeared to be regaining lost territory, by mid/late November the Bosnian Serbs were once again reasserting their military dominance. There are threats that Croatia, which has remained in a state of uneasy cease-fire with its own internal rebel Krajina Serbs since April 1994, will involve itself in the Bosnian conflict, in order to ensure that a large confederated "Greater Serbia" stretching from Serbia proper through Bosnia and into Croatia not be established. The war in Bosnia and Herzegovina grinds on, and the shape which Bosnia and Herzegovina might adopt in peace-time defies prediction.

With regard to the unprecendented crisis which the "wars of the Yugoslav succession", and particularly the Bosnian war, represent for the population of the region and for the international community, the Tribunal must stress its agreement with the view of the UN Special Rapporteur of the Commission for Human Rights that the conflicts on the territory of the former Yugoslavia "constitute a very serious test of and challenge to the international system of human rights protection" (sixth periodic report on the Situation of Human Rights in the Territory of the Former Yugoslavia, February 1994, cited above, para 279) because of the "massive violations of human rights and international humanitarian law" which have taken place and are continuing to take place there (ibid., para 360).

Applying this view to one of the main aspects of international humanitarian law - the refugee determination process using the Convention - the Tribunal believes, further in this context, that the situation in Bosnia is most particularly challenging to refugee determination, because of the constant presence and interplay of three factors : a) the threat of serious harm to practically the whole population in a wartime situation b) the general inability of the competing authorities involved to protect their populations from that harm and c) the common ability of those experiencing threats of harm to demonstrate that the causes are those nominated in the Convention : nationality, religion, political opinion.

With regard to the latter, the issue underlying the conflicts in the former Yugoslavia is a political one : the maintenance of a federated Yugoslav State under one Government or its breakup into independent Republics with their own chosen Governments. The Republics struggling for independence from the former Yugoslavia have essentially identified themselves in terms of the national/religious status of the majority of their population (Croatians/ Serbs/ Muslims/ Slovenians/ Macedonians). The result has been a general movement by all sides towards "ethnic cleansing" in order to create States with political and geographic boundaries that encompass populations homogeneous in their national/religious backgrounds (see UN Special Rapporteur's sixth periodic report on the Situation of Human Rights in the Territory of the Former Yugoslavia, February 1994, paras 283-293 on "ethnic cleansing").

The most intense struggles have taken place in areas of the former Yugoslavia populated by a mixture of national/religious groups (the clearest example is Bosnia and Herzegovina, but further examples are the "Serbian Krajina" area of Croatia; the Kosovo and Vojvodina regions of Serbia). The whole population of such disputed regions is effectively caught up in the process : whether in physical warfare and prevailing lawlessness or in terms of forced dislocations, appropriations of homes, rape, torture, verbal abuse, physical brutality and discrimination. In most of these areas the day to day struggles are beyond the power of any authority to control -

indeed the authorities themselves unashamedly instigate or actively collude with such activities.

Assessing the likelihood of persecution which is Convention-related in such circumstances involves fine judgements and may well be an impossible task. The Convention and Protocol are not framed to be applied to people fleeing situations of warfare or ongoing armed aggression between one State and another, or to such a massive extent within the one State. This is an inadequacy which has been the subject of debate, in that it appears unfair that the victims of such situations be denied refugee status protection, even if there are other international Conventions which seek to protect them (for example the Geneva Conventions for the Protection of Victims of War, 1949 and the Additional Protocol to the Geneva Conventions of 1949 Relating to the Protection of Victims of International Armed Conflicts).

Since 1951 the international community and the United Nations High Commissioner for Refugees have at times tacitly acknowledged the refugee-like status of people fleeing violence and civil war and have treated tham accordingly (for example in the case of people fleeing civil war and violence in El Salvador), though the Convention definition may not be strictly applicable. Confirming this practice, the Organisation of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa (1969) and the Cartagena Declaration on Refugees made by Latin American countries in 1984 both specifically extend the definition of refugee to include those "who have fled their country because their lives, security or liberty have been threatened by generalised violence, foreign aggression, internal conflicts, massive violations of human rights or other circumstances which have seriously affected public order" (Cartagena Declaration on Refugees, Part III, 3).

In an attempt to tackle the inadequacy of the 1951 Convention definition in respect of such situations Walter Kalin has argued that a survey of international case law shows two possible approaches to the question : applying on the one hand a liberal, or on the other hand, a restrictive interpretation to the definition ("Refugees and Civil Wars : Only a Matter of Interpretation?", International Journal of Refugee Law, vol 3 no 3, 1991 pp 435-451). On the other hand, Michael J Heyman has argued, using predominantly United States case law, that the 1951 Convention definition of refugee, however interpreted, is simply "too restrictive" and is inadequate to protect victims of civil strife ("Redefining Refugee : A Proposal for Relief for the Victims of Civil Strife", San Diego Law Review vol 24, 1987, pp 449-484).

Heyman's conclusion appears the more logical one, given that the Convention and Protocol cannot offer protection to victims of general violence or civil war, except in so far as the victims of such situations can demonstrate that their experience is specifically for a Convention reason. While this requirement may not need refugee applicants to prove that they have been "singled out" for persecution, it still requires that an individual or a group of individuals show that they are suffering differentially to others from their country, because of Convention-related factors (see "Civil War Refugees and the Issue of "Singling Out" in State of Civil Unrest", Discussion Paper no 4, Refugee Law Research Unit, Osgoode Hall Law School, York University, 1991).

The US Committee for Refugees (Yugoslavia Torn Asunder: Lessons for Protecting Refugees from Civil War, February 1992) supports the above analysis, and the Tribunal's view that the massive challenges to the application of the 1951 Convention posed specifically by the "wars of the Yugoslav succession" and the national/ethnic struggles on the territory of the former Yugoslavia reveal a major inadequacy at the heart of the 1951 Convention. The US Committee recommended, as a result, that a war refugee from the struggles in the former Yugoslavia actually be called "a refugee", whether as an individual his/her claims can be squeezed into the needle's eye of the Convention or not, and that "it doesn't make sense to enter Yugoslav war refugees into costly and protracted individualised asylum procedures based on the persecution standard. Their need for protection is obvious; that the violence that would likely harm them on return is "persecution" [demonstrably for the reasons defined in the 1951 Convention] is far less obvious." (see discussion of this whole question, pp 18-25).

Again, commenting on the same grave difficulties of assessing the large number of people fleeing from the situation in former Yugoslavia through the filter of the 1951 Refugee Convention, the well-regarded Canadian periodical Refuge, in a recent special issue devoted to the former Yugoslavia (vol 14 no 3, June-July 1994) has decried the tendency of European countries to insist on an unduly narrow reading of the 1951 Refugee Convention. Such a reading has excluded large numbers of asylum seekers from the former Yugoslavia from gaining permanent asylum; instead they have been offered a new kind of "quasi-refugee" or "de facto refugee" temporary asylum only (see the articles by Albrecht Schnabel, "Undermining the Refugee Convention: Germany's Civil War Clause and Temporary Asylum" pp30-31 and Michael Barutciski, "EU States and the Refugee Crisis in the Former Yugoslavia", pp 32-35). The commentators in this special issue of Refuge have concluded (in reinforcement of the Tribunal's view) that the 1951 Convention is entirely inadequate to handle the situation for asylum seekers from the former Yugoslavia.

States such as Australia which are party to the 1951 Convention and Protocol but not party to the African and Latin American Conventions have often indirectly recognised the inadequacy of the 1951 Convention, by extending forms of temporary protection or offering special humanitarian programs designed to assist victims of civil war, foreign aggression, violence or general unrest situations. For example temporary humanitarian extensions of stay in Australia have been granted to citizens of the Lebanon, and the former Socialist Federal Republic of Yugoslavia and indeed humanitarian intake programs have been set up at various times to accept people applying to come to Australia direct from those countries.

However, Australia has found no better or clearer longer-term solution to the issue of people fleeing the former Yugoslavia than the European states. For the purposes of permanent asylum for those people who have somehow already managed to get to Australia under other entry arrangements, the Tribunal remains bound by the restricted refugee Convention and Protocol definition. Existing legislation requires that, even if humanitarian intakes are bringing in victims of civil war or general violence situations from abroad into Australia without reference to the 1951 Convention, the Tribunal cannot grant refugee status to victims of the same civil war or general violence situations who are already within Australia unless they do fall within the scope of the 1951 definition. At the same time, a form of "temporary

asylum" has been granted to everyone from the former Yugoslavia since the second half of 1991, running for approximately 6 months at a time, and then reviewed and renewable, depending on the situation at the end of each period. As Barutciski (cited above) has commented, such a status leaves people "in a sort of legal limbo with minimal or no rights." (p.34)

In practice this may well lead to meaningless and unpalatable distinctions having to be made, to extend permanent protection in Australia to Convention refugees and beneficiaries of off-shore humanitarian programs, but not to others who may be already in Australia and need to seek refuge from the same violent situtations. The Applicant in this case is as aware of the irony and imbalance in this situation as the Tribunal : as detailed below, his witness at the Tribunal hearing was a young man of very similar background and experience who had, however, remained in Bosnia and has been granted residence in Australia direct from Bosnia apparently as part of the off-shore humanitarian program; meanwhile the Applicant, in a very similar situation, but by chance a visitor in Australia, must be put through the inadequate "needle's eye" of the Refugee Convention.

CLAIMS AND EVIDENCE

The Applicant's claims have remained consistent throughout the primary and review processes of consideration of his application. They can be summarised as follows:

The Applicant is of Serbian ethnic/national background and actively identifies himself as a Bosnian Serb. He completed 12 years of education in his home town of (...) in 1985, qualifying as an auto mechanic; then immediately went to work in this occupation in a local (...) auto transport company, being employed there continuously from 1985 until shortly before his departure for Australia in 1991. He came to Australia to visit on the invitation of two uncles who live here. He did not originally intend to stay permanently in Australia, but as the situation in the former Yugoslavia began to unravel and then degenerate into warfare, he did not want to return, and in any case was allowed to stay formally on temporary entry permits. He decided to apply for refugee status (rather than remaining on the humanitarian temporary stay visa) as he saw the war in Bosnia itself develop and become intractable.

The Applicant stated that his home town (...) is in a (currently) Serb-controlled area of Bosnia, but only 12 kilometres away from an area of Muslim control. His parents and brother are still in Bosnia. At the beginning of the current conflict (July 1992), his parents were detained by Muslim forces for a few days, during which they were locked up, bashed and deprived of food and water. They were freed by the advance of Serbian forces and the Red Cross. Since that time his father and his brother have both been forcibly recruited into the Bosnian Serb army. The Applicant indicated that his father has been fighting on the Serbian/Muslim front at (...) for more than one year continuously; his brother was involved in the Serbian onslaught on the Muslim-held town of (...).

The Applicant stated that earlier in 1994 his parents had been pressured by the Bosnian Serb military authorities to get him (the Applicant) to send the Bosnian Serb army a "war tax" of $2,000 (for arrears) plus $200 a month : a "tax" which is being

required of draft evaders abroad. They had threatened that if the money was not paid, his family's household goods would be expropriated by the army.

The Applicant fears to return to Bosnia because he does not want to become involved in the conflict and does not believe in the purpose of this war and in killing people of other ethnic/national backgrounds who had been his friends. He stated that he has received three sets of call-up papers and that if he returned to Bosnia, he would either be forcibly recruited into the Bosnian Serb army or be punished severely for refusing to do so. In the context of martial law which currently pertains in the Serbian-controlled areas of Bosnia, he might even be considered as a deserter, and shot immediately. His claims are expressed as a whole in a submission accompanying his application for review to the Tribunal in January 1994 (*spelling, grammar and punctuation as in the original*):

"If I return home I will be sent to the war to kill but I do not know what for. We in former Yugoslavia lived in peace for 45 years, we married different religion we are so mix we are all brother's ...

I am a Serb by berth, I do not know what else I can be, but I do not belive in the political standert that is going on thre. I just know if I return home that I will be forced to go to war, when I refuse I will be shot by Serbian army-ex-Yugoslavian for refusing by the wright of military obligation. I do not belive in this war. I will be treated as deserter if I return home, becauase I will not go and kill my friends and brother's I do not belive that war is for any benefit to Bosnia or Yugoslavia.

I am not afraid of war if I know what it is about, To my knowlige nobody know's what is going on. I refuse to kill for no cause."

The Applicant was accompanied to the Tribunal hearing by a friend, (...), who gave evidence as a witness on the Applicant's behalf. The witness stated that he knew the Applicant in Bosnia and had renewed his friendship with him in Australia. The witness himself arrived in Australia very recently, on 5 October 1993, and stated that he had been "granted refugee status" by Australia direct from Bosnia. He is a young man of Serbian background who had himself been forcibly recruited by the Bosnian Serb army in the current conflict. His father had been killed while serving in that army in the current conflict. He testified that the Bosnian Serb army practised instant, automatic and forcible conscription of men in the military age group (16-65) and allowed no exceptions. He stated that the atmosphere in the Serbian areas of Bosnia was of total war, involving the entire population without exception and without tolerance for reservations as to the validity of the war or the acts required to be undertaken in the course of the war. Those who, like the Applicant, had stayed away and avoided involvement in the conflict would never be forgiven for it. The witness spoke as someone who had himself experienced the trauma of the extreme Bosnian war situation, and impressed the Tribunal with his sincerity.

ASSESSMENT OF CLAIMS

Country of reference and period of reference for the purposes of refugee assessment

The disintegration of the former Yugoslavia and the present state of all-out war in Bosnia and Herzegovina between two/three/four separate groups poses considerable technical questions of formal nationality status for people from Bosnia and Herzegovina who are resident abroad, like the Applicant. While the Sarajevo-centred Government of the internationally recognised successor Republic of Bosnia and Herzegovina is apparently beginning to issue passports of its own, (by implication this may mean that it is also tackling the issue of citizenship of the Republic: see UNHCR advice to the Department, entitled "Response to DIEA Australia", dated 10 August 1994, document no CX2636, point 4 (b) which indicates that Bosnia [i.e. the internationally recognised Republic] will no longer accept passports from the former Yugoslavia; also document CX2097 from a Departmental officer, dated 15 June 1994, regarding the [im]possibility of gaining Bosnian passports in Australia), that Government only controls about 30% of the territory over which it claims sovereignty.

Meanwhile, the Bosnian Serb Republic, which controls 70% of the territory of the former Yugoslav Republic is ruled by martial law (i.e. has effectively no civilian administration) and wishes to federate or unite in some way with Serbia. Despite wide-ranging attempts, the Tribunal is not aware of any information on how the Bosnian Serb Republic is now dealing or in the future intends to deal with citizenship issues. Perhaps the very asking of such a question in the present dire total war situation is absurd. The Tribunal might speculate on the issue, based on the obvious drive of the Bosnian Serb military authorities to create an entirely ethnically homogeneous Serb territory, involving violent and forced expulsion ("ethnic cleansing") of any non-Serb population that remains within its area of control (this is the conclusion virtually all commentators have come to internationally, and equally that the process is a de facto mechanism to ensure the creation of "Greater Serbia" : see comments of the Special Rapporteur on the former Yugoslavia to the UN Commission on Human Rights in his Sixth Periodic Report on the Situation of Human Rights in the Territory of the Former Yugoslavia, February 1994, paras 283-293). However the Tribunal believes that it would be pointless to attempt to foretell the future outcome of the present conflict or the civilian administration and citizenship laws that will follow any peace settlement.

All that can be said with confidence is that the Applicant himself is of Serbian background and that his home town, where he was born and has lived all his life, does not come within the physical control of the Sarajevo Government, but that of the Bosnian Serb military authorities. From the extremely patchy information available, the Tribunal concludes that the current formal citizenship status of the Applicant is likely to be stateless : this is because the state of which he was a citizen (the former Yugoslavia) no longer exists, and because the physical territory, control and shape of a successor state of which the Applicant might eventually become a citizen is the very essence of the cause of the relentless war of the past three years. For the purposes of refugee determination, the Tribunal will proceed to assess the Applicant's claims of fear of persecution against the "country" (again, the country itself and its shape is in dispute) of his former habitual residence, (the former Yugoslav Republic of Bosnia and Herzegovina) more specifically, that part of the country which is currently under Bosnian Serbian military control.

Another challenging question in this case is whether the Applicant's refugee claims should be considered against the current total war situation in Bosnia or against the situation of some presumed peaceful state structures in a Bosnia and Herzegovina of the future. The Tribunal has already indicated that the outcome of the current war and the shape and structure of any presumed future state on the territory of the former Yugoslavia to which the Applicant might belong, defy prediction. In any case, the Tribunal believes that it is not required to attempt to predict the future: as stated in the Legislative Framework section of this decision (p.4 above), refugee law directs the Tribunal to determine whether the Applicant has a real chance of persecution on the facts as they exist at the time of determination of this decision : i.e. as at December, 1994.

Central core of claims

The Tribunal notes that, although the claims that the Applicant made at the primary level are identical with those made at review level in substance, the primary decision-maker appeared to be confused and rather off-the-point in dealing with them. In writing up the decision, the decision-maker appeared not to have grasped the facts about the situation in Bosnia, nor what the war was about, nor the complex political/military questions involved, nor even the technical issue of statelessness (this is evidenced by the very thin list of sources relied upon : only one source - a very general one - is related to the Bosnian country situation). The decision-maker appeared to think that the Applicant was arguing mainly that he would face persecution because of his Serbian background, and concentrated on rejecting this claim, stating that it had no substance because the Applicant came from and would be returning to a Serbian-controlled area.

Apart from the problem of the superficiality with which the Applicant's claims on all scores were approached and dismissed, the Tribunal finds the primary decision to be most particularly flawed because the Serbian nationality issue was not in fact the core of the Applicant's claims of fear of persecution. The Applicant's claims were that he did not want to be involved in the Bosnian war, that he did not believe in it or agree with it, and feared that he would be forced by the Bosnian Serb military authorities to become involved if he returned, or would be summarily and severely punished if he continued to try to avoid it. The primary decision-maker dealt with this issue only in a superficial and uninformed way, again missing the point:

" The Applicant stated at interview that he is not afraid of military service but fears he would be forced to kill his friends. I consider that this statement is conjectural and also there is no indication that the applicant would be treated as a deserter should he return to Bosnia... I accept that the applicant may be forced to join the Serb militia should he return to his home in Bosnia. However there is no indication that the applicant's fear of military service is based in civil or political status given that he is a Serb returning to a Serb dominated town in Serb controlled territory. In view of this I consider there is no real chance the applicant will be persecuted for this reason should he now return to Bosnia." (primary decision of 10 January 1994, paragraph 24.)

The Tribunal considers this to be an entirely inadequate attempt to deal with a deadly serious claim. The Tribunal is extremely concerned to underline that the claim of objection to military service - particularly in the context of so terrible a conflict -

deserves and demands an informed, thoughtful and sensitive assessment, which is also fully aware of the unprecedented and challenging nature of the situation for assessment of asylum seekers from the former Yugoslavia.

On the questions of objection to military service, liability for prosecution for draft evasion, and the force of these issues as refugee claims, the Tribunal notes the growing body of international opinion in support of the right of individuals to refuse to undertake compulsory military service in some exceptional circumstances. Common examples of such circumstances are "absolute" objections to military service based on strong convictions of conscience or religious belief (such as religious-based or secular/philosophically based pacifism) and "selective" objections to military service based on a refusal to become involved in a type of military action which is condemned by the international community or which would be likely to involve violations of basic standards of human conduct.

If the right to refuse compulsory military service in such exceptional circumstances is not respected by the State involved (say, by providing for exemptions or for a form of non-combat service for those who conscientiously object to active service), and if those who object to military service in such exceptional circumstances are then punished for their objection, there is considerable international support for the proposition that a serious infringement of basic human rights is involved, which places those refusing in the situation of having a well-founded fear of persecution for reasons of political opinion or religion (see Kevin J Kuzas, "Asylum for Unrecognized Conscientious objectors to Military Service: Is There a Right Not to Fight?", Virginia Journal of International Law, vol 31, 1991, pp 447-478).

In addition, Canadian refugee determination authorities have also increasingly taken the view that a fundamental infringement of basic human rights might occur in the case of conscientious objectors and draft evaders where the punishment for refusal to fight is so disproportionate and so severe - for example, execution - that it may in itself amount to persecution (see Arthur C Helton, "Resistance to military conscription or forced recruitment by insurgents as a basis for refugee protection: a comparative perspective", San Diego Law Review, Fall 1992, pp 581-596; see particularly p. 590).

The Office of the United Nations High Commissioner for Refugees Handbook (cited above) explicitly states that such exceptional conscientious objection/draft evasion/desertion-based claims to refugee status, assessed on a case by case basis and following a thorough individual investigation, may be considered valid (see paras 169-174).

In the Applicant's case, there have been no religious grounds invoked as the basis for his objection to military service, nor even an objection to engaging in warfare as such. Rather he has cited political and ethical grounds : his refusal to involve himself in this particular senseless war and to be involved in the "killing of his friends" (i.e. friends from other ethnic/national groups) which would be required of him if he did become involved. The Tribunal accepts that the Applicant's refusal to serve is indeed genuinely for these principled political and ethical reasons, and that it was the likelihood of forced involvement which has caused him to remain in Australia and to seek refugee status here.

The Tribunal considers therefore that it is dealing with a genuine claim of "selective" objection to military service within the context of the current Bosnian war. The Tribunal must proceed to assess whether the circumstances in the Applicant's case fall into the exceptional category that would allow him to claim persecution for reasons of (political/ethical) objection to military service.

The Tribunal considers that it is able to be established beyond question that the conflict into which the Applicant would inevitably be forcibly conscripted or, because of which, if he tried to avoid being conscripted, he would inevitably be prosecuted, is one which is condemned internationally. The international community has repeatedly expressed its dismay and disapproval of the warfare in the former Yugoslavia, particularly the warfare in Bosnia, in a series of Resolutions of the Security Council. They began with Resolution 713 of 25 September 1991 in which "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 equiment to Yugoslavia". International condemnation continued through Resolutions 721, 724, 727,740,743,749 and at least 48 further Resolutions until the present time, including the establishment of the United Nations Peace-keeping Forces (Resolution 724, 15 December 1991) in various parts of the country, which are still present (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 are perpetrated daily by all sides in this conflict, but probably most consistently and most excessively by Bosnian Serb military and paramilitary units have been overwhelmingly documented and universally condemned. The documentation of the horrific situation which has resulted from the war in Bosnia and Herzegovina of the resulting suffering of the entire Bosnian population is overwhelming and should need no detailing. The policy of all-out attack on the civilian population by any and all means ("ethnic cleansing") is the main subject of investigation by the first International War Crimes Tribunal to be set up since the Second World War (see Human Rights Watch: Helsinki, vol 5, issue 12, report entitled "Prosecute Now! Helsinki Watch releases eight cases for War Crimes Tribunal on Former Yugoslavia"; vol 6 issue 3, February 1994, report on "Former Yugoslavia: The War Crimes Tribunal : One Year Later"). In November 1994, the Tribunal indicted its first war crimes defendents : two Bosnian Serbs responsible for torturing Bosnian Mulsim civilians and executing them in concentration camps in Serbian held-land in Bosnia and Herzegovina in 1992 (see reports "War crimes body asks Germany to give up Serb", The Australian, 10 November 1994, p. 13 and "UN in tough stance on war crimes trials", The Australian, 9 November 1994, p. 12). Recent reports indicate that precisely the same methods are being used in systematic campaigns undertaken by Bosnian Serb military authorities right up to the present:

"Following international condemnation of continuing "ethnic cleansing" in early 1994, expulsions of non-Serbs from Bosnian Serb-held territory subsided somewhat between February and June 1994. But in July 1994, in both the Bosanska Krajina and Bijeljina areas, "ethnic cleansing" began again in earnest. There are frequent murders and beatings of non-Serbs and lawlessness is rife in both areas. Women, including Serbian women married to non-Serbs, are raped by military personnel and private

individuals who are not held accountable for their crimes. Non-Serbs are regularly expelled from their homes and are subject to extortion by the local Red Cross, civilian authorities and local military and paramilitary commanders before they are allowed to leave the area. The Bosnian Serb soldiers, military police and paramilitaries who commit these crimes do so with impunity." (Human Rights Watch, Helsinki, report of November 1994, vol 6 no. 16, "Bosnia-Herzegovina : Ethnic Cleansing" continues in Northern Bosnia", p. 2)

The above information places the Applicant's refusal to undertake military service in its proper context. Not only is he refusing to take part in a conflict with which he personally (politically and ethically) disagrees; he is in effect refusing to take part in a conflict and in a set of activities which is internationally condemned and which inevitably will involve him in collaborating with and/or actively undertaking atrocities and war crimes himself.

In choosing to stay abroad, the Applicant has adopted a method of draft avoidance which appears to be very common amongst his peers. There has been an estimate that 225,000 men from all over the former Yugoslavia have fled abroad since mid-1991 in order to avoid involvement in the conflicts in Croatia and Bosnia. They are amongst the estimated 3.5 million refugees from the former Yugoslavia which the "wars of the Yugoslav succession" have generated since mid-1991 (see Fabian Schmidt, "The Former Yugoslavia : Refugees and War Resisters", RFE/RL Research Report, vol 3 no 25, 24 June 1994, p. 47. and report from Inter Press Service, Belgrade 19 January 1994; Australian Department of Foreign Affairs cable BG 61225 of 31.12.93, paragraph A 7; Australian Department of Foreign Affairs cable BG 60031 of 23.03.93, paragraph 7). It is unknown precisely how many of the refugees overall and how many of the men fleeing involvement in the conflicts are precisely from Bosnia. It is estimated that of the prewar population (1991 census) of 4.36 million (Europa Publications, Eastern Europe and the Commonwealth of Independent States, 1994, article on "Bosnia and Herzegovina", p. 190), the UNHCR estimates in October 1994 only around 2 million, somewhat less than half, remain in the territory of the former Republic. That entire population is classed as refugees or displaced or war affected, and are targetted by UNHCR as planned beneficiaries of aid programs. Somewhere well over 250,000 Bosnian refugees have taken temporary refuge in Croatia alone. There are many others dispersed all over Europe (see UNHCR Information Notes on former Yugoslavia, no 10/94, October 1994, pp.5, 8, 16).

The Tribunal has solid information about what might befall the Applicant if he returned to any part of Bosnia (whether under Bosniak, Croatian or Serbian control) while the current conflict continued. UNHCR advised the Department on 10 August 1994 (Document CX 2640):

"UNHCR believes that male Bosnians of whatever origin risk being forcibly enrolled in territorial defence units or paramilitary groups and recommends that prima facie temporary protection be applied to draft evaders and deserters from all armies in Bosnia."
All citizens of Bosnia Herzegovina are under military/working obligation to the Bosnia Herzeogvina army unless discharged on medical grounds. Men between the ages of 16 and 60 are under military obligation, while men between the ages of 18 and 65 and women between the ages of 18 to 55 are under working obligations. In

addition the Bosnian Serb army has pressed Muslim men aged 16 to 65 into service in work brigades at the front line and the Bosnian Croat army allegedly detains Bosnian Serbs and Muslims for similar forced labor.

There is no right of conscientious objection under the law of BiH. In practice individuals who object to serving in the BiH army are usually assigned to more difficult tasks often at the front line."

Amnesty International further reinforced what will happen to the Applicant in a document dated June 1994 and entitled "Prisoners of Conscience, hostage taking" (Document CX2635):

"The Bosnian Serb Army reportedly tried and sentenced large numbers of men in 1993 for evading or deserting military service and almost certainly continue to do so. Reports indicate that some of these prisoners may have had conscientious reasons for refusing to bear arms."

Again, a Reuters report of 1 February 1994 indicates that the Bosnian Serb Republic was on war footing and quotes the Supreme Command of the Army of the Serbian Republic as stating that they will take "strict legal measures against deserters and all other people avoiding military service, especially those who do not report to their commands or army units at the earliest opportunity" (Document CX 1909). Once again, DFAT advice of August 1994 to the Department was that

"Bosnian Serbs can return to Serb held areas of Bosnia more safely than they can to any other part of BiH because they are less likely to be the focus of ethnic cleansing in their own regions. However their security and ability to live peacefully in even the Serb-held areas must be questioned...UNHCR considers that conditions do not yet exist for the encouragement of voluntary repatriation to BiH...

Since the rejection of the Contact Group's peace plan by the Bosnian Serbs, the future security of Serb-held areas of Bosnia Herzegovina remains even less predictable and certain. Already the Bosnian Serb authorities have announced war-time measures..." (Document CX2780).

Other Reuters reports since August 1994 have reinforced the picture of total war mobilization of the entire population in the Serb-held areas of Bosnia.

The Fabian Schmidt article referred to above indicates:

"In the self-proclaimed Serbian Republic within Bosnia and Herzegovina, about 1,300 men have been sentenced to up to five years' imprisonment for avoiding conscription or deserting. Belgrade peace activitists also report that property belonging to the families of deserters has been seized and the names of deserters have been broadcase by local Serbian radio. According to some reports 'conscripiton' has often, in fact, been nothing more than impressment. Men have been seized on the street, in restaurants, or at home and forcibly brought to the front. Press gangs have also visited refugee camps.

Bosnian Serb refugees in Serbia proper may be subject to a similar fate. Early this year there were reports that the Bosnian Serb authorities, with the support of officials in Serbia proper, were impressing young men among Bosnian Serb refugees in Serbia..." (pp 52-53).

All sources available stress that return to Bosnia for people in the Applicant's situation (or indeed for anyone) is "not reasonable" at this time : there are already more than 1 1/4 million internally displaced persons in Bosnia and Herzegovina, often living in precarious conditions, forced to seek safety or expelled as a result of ethnic cleansing and there is no possibility of internal flight (UNHCR advice to the Department of 10 March 1994, Document CX 1861; UNHCR advice to the Department of 14 April 1994 , Document CX2312).

The Tribunal concludes from the extensive information above that the Applicant's claims regarding what would happen to him if he returned to Bosnia now are well-founded. The Tribunal agrees with the Applicant that if he returned while the current conflict continues, he would inevitably be forced - "impressed" as the above reports indicate - into the Bosnian Serb army, or into the Bosnian Muslim army; that there are no internal flight options for him. If he attempted to refuse, he would be punished (by up to five years imprisonment or possibly even by being deliberately forced into the most dangerous positions on the front line).

The Tribunal considers that in the context of an internationally-condemned conflict, all of the possible outcomes for the Applicant if he were to return to Bosnia would amount to persecution of him for reason of political/ethnical opinion. It would be a serious abuse of basic human rights to force the Applicant to undertake military service obligations in an internationally condemned conflict that would involve him in perpetrating or collaborating with war crimes. It would equally be a serious abuse of basic human rights to punish him for refusing to undertake those military service obligations. In the present situation, there appears to be no way that the Applicant could avoid one or other of the above two outcomes : that is to say, he not only has a "real chance" of persecution, but a virtual certainty of it.

The Tribunal believes the Applicant's circumstances well fit the parameters described in the Office of the United Nations High Commissioner for Refugees Handbook on Procedures and Criteria for Determining Refugee Status (edition of January 1992) paragraph 171 :

"Where... 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."

The Tribunal concludes therefore the Applicant is a refugee within the meaning of the Refugees Convention. It follows that he satisfies the criterion for the grant of a protection visa that the Applicant is a person to whom Australia has protection obligations under that Convention.

DECISION

The Tribunal finds that the Applicant is a refugee and remits the applications for reconsideration in accordance with the direction that the Applicant must be taken to have satisfied the criterion that he is a person to whom Australia has protection obligations under the Refugees Convention.

[1]In accordance with s.431 of the *Migration Act* 1958 (Cth), (as amended), the published version of this decision does not contain any statement which may identify the Applicant or any relative or other dependant of the Applicant.