Federal Court  Cour fédérale

**Date: 20110718**

**Docket: IMM-5834-10**

**Citation: 2011 FC 899**

**Ottawa, Ontario, July 18, 2011**

**PRESENT: The Honourable Mr. Justice Scott**

**BETWEEN:**

**CHRISTOPHER MARCO VASSEY**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION**

**Respondent**

**REASONS FOR JUDGMENT AND JUDGMENT**

## I. INTRODUCTION

[1] This is an application for judicial review of a decision of a member of the Immigration and Refugee Board (the Board), pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001 c 27 [the *Act*] by Christopher Marco Vassey (the applicant). The Board determined that the applicant was neither a Convention refugee nor a person in need of protection

under sections 96 and 97 of the *Act*. The applicant requests that the decision be set aside and the claim remitted for re-determination by a different member of the Board.

## II. BACKGROUND



[2] The applicant is an American citizen. He was very involved in the Junior Reserve Officer Training Corps during high school and enlisted in the New Jersey Army National Guard after he turned 17, in September 2003. After completing basic training, the applicant became a recruiter assistant for the National Guard. Feeling disillusioned with the recruitment process in the National Guard, the applicant joined the US Army in April 2006 and was sent to Fort Bragg, North Carolina. The applicant was assigned to an infantry unit to be deployed to Afghanistan in 2007. During the lead up to the mission in Afghanistan, the applicant became concerned about the lack of organization and training of his unit as well as the capabilities of the commanders.

[3] The applicant deployed to Afghanistan in January 2007 and was originally scheduled to end his tour in April 2009. After several months, the applicant learned that his service would be involuntarily extended until at least May 2010. Instead, the applicant chose to voluntarily re-enlist in the Army in April 2007 to secure himself a promotion and tuition funding upon completion. On December 1, 2007, the applicant was promoted to Sergeant.

[4] While on duty in Afghanistan, the applicant alleges that he was ordered to perform actions contrary to the rules of armed conflict. These orders included raiding civilian homes and recognizance by fire where his unit pre-emptively fired on a location where they believed the enemy forces were located without taking any precautions to ensure that civilians were not harmed. The

applicant further stated that he was part of the supervision of the Afghan National Army which he learned were placing detainees in “hot boxes” under extreme conditions to obtain information. Finally, the applicant alleges that his unit strapped the dead bodies of Afghan insurgents to US military vehicles and drove through villages in order to intimidate local populations.



[5] The applicant described growing mental health concerns during and after his deployment to Afghanistan. Following his voluntary reenlistment, the applicant began to feel depressed. On leave for two weeks in July 2007, the applicant suffered from nightmares, insomnia and mood swings. He did not describe any of his mental health issues to a superior officer nor did he seek medical assistance. After returning to the United States on April 8, 2008, the applicant stated that he could not spend time with others or be around children and that he was emotionally unstable and felt on edge.

[6] During President Bush’s speech at “all American week” in 2008, the applicant realized that in addition to no longer agreeing with the mission in Afghanistan, he did not agree with the war in Iraq, as it had nothing to do with the events of September 11, 2001. The applicant began researching options to leave the Army and he determined that because he was a Sergeant with four years left on his contract, he would face severe punishment for going absent without leave [AWOL]. The applicant felt that he could not file for conscientious objector status because his objections were based on specific wars and not grounded in religious beliefs.

[7] On July 7, 2008, the applicant collected his things from Fort Bragg and went AWOL from the US Army. He entered Canada on August 4, 2008, and claimed refugee protection the same day.

[8] The refugee hearing was held on October 9, 2009. The Board's negative decision was issued on August 27, 2010.



## III. THE DECISION UNDER REVIEW

[9] The Board issued a lengthy decision, in which state protection was the determinative issue.

[10] The Board reviewed the relevant jurisprudence on state protection, noting that there is a presumption of state protection which a refugee claimant can rebut with clear and convincing evidence of the state's inability to protect. The Board noted that the protection does not have to be effective but rather adequate and that there is a higher burden on the claimant when the state in question is a developed democracy such as the United States of America.

[11] The Board spent several pages reviewing the case of *Hinzman v Canada (Minister of Citizenship and Immigration)*, 2007 FCA 171 [*Hinzman*]. The appellants, Mr. Hinzman and Mr. Hughey, members of the US military, deserted because of their belief that the war in Iraq was illegal and immoral. The Board found that Justice Sexton of the Federal Court of Appeal held that it was not possible to conclude that the appellants would not have been adequately protected in the United States because they did not access the legal protections available to them.

[12] The Board also reviewed Mr. Justice Beaudry's decision in *Colby v Canada (Minister of Citizenship & Immigration)*, 2008 FC 805 in which he held that even where the facts raised by a

refugee claimant might fall under paragraph 171 of the *UNHCR Handbook on Procedures and Criteria for Determining Refugee States* (the UNHCR handbook), the claimant must still establish that state protection is unavailable to him.



**A. Ability to Raise the Defence of an Illegal Order**

[13] The Board then assessed the applicant's submission that if the motive for desertion is deemed irrelevant and inadmissible in US court-martial proceedings then there is no opportunity to raise a proper defence against desertion charges.

[14] The Board summarized the affidavit evidence of several professors and US military sergeants presented by the applicant.

[15] The Board then considered the case of Captain M Huet-Vaughn in *United States v Yolanda M Huet-Vaughn*, 43 MJ 105, (1995 CAAF) of the United States Court of Appeals for the Armed Forces [*Huet-Vaughn*]. The Board found that *Huet-Vaughn* does not show that the defence of an unlawful order only applies to extreme cases such as war crimes of grave breaches of the Geneva Conventions. Rather, the Board concluded that the United States Court of Appeals for the Armed Forces has not decided whether an individual could raise the question of whether he or she had been ordered to commit an unlawful act and that the duty to disobey extends to acts that are manifestly beyond the legal power or discretion of the commander as to admit to no rational doubt of their unlawfulness.

[16] The Board found that the avenues of appeal were not exhausted in the case of *Huet-Vaughn* and that since the issue of raising an unlawful order in defence of a desertion charge has not been appealed to the Supreme Court, the examples of individuals who were not able to raise the defence do not rebut the presumption of state protection.



[17] The Board also found that there was not sufficient evidence to show that the applicant could not have requested a medical discharge for his psychiatric condition.

**B. Differential Prosecutorial Discretion**

[18] The Board then assessed the applicant's submission that there is no state protection or procedural protections against the differential, and therefore persecutory, application of prosecutorial discretion by his commanding officer on whether to initiate charges and court-martial proceedings.

[19] The Board reviewed the examples presented by the applicant of James Burmeister and Robin Long, where evidence of these individuals' public comments against the war in Iraq was introduced at their courts-martial. The applicant submitted that these statements were used as aggravating factors and were ultimately the reason for pursuing prosecution as opposed to an administrative discharge for desertion. The Board found that prosecutorial discretion benefits that justice system. If aggravating factors, including public comments against a war, are presented in a proceeding, this does not necessarily suggest that prosecutorial discretion has been used in a discriminatory manner.

**C. Independence and Impartiality of the US Military Justice System**

[20] The Board then assessed the applicant's submission that the system of military justice in the United States violates basic human rights by not being independent and impartial.



[21] The Board spent several pages recounting the evidence presented from Donald G. Rehkopf, Jr., Professor Eugeen Fidell, Marjorie Cohn and Kathleen M. Gilberd for the applicant and Professor Victor Hansen from the respondent.

[22] The Board acknowledged that the applicant's argument that the US military justice system does not comply with the requirements of the *Canadian Charter of Rights and Freedoms* (the *Charter)* or the factors outlined by the Supreme Court in *R v Genereux,* [1992] 1 SCR 259 [*Genereux*], where the Court considered the Canadian court-martial system. These factors included the lack of security of tenure, financial security and institutional independence.

[23] The Board recounted that Professor Hansen, for the respondent, described the US military justice system as having sufficient checks and balances. He stated that the most important protection against Unauthorized Command Influence (UCI) is article 37 of the *Uniform Code of Military Justice* [*UCMJ*]. Article 37 precludes a commander from censuring, reprimanding or admonishing any military members, judge or counsel with respect to findings or sentences of the court. Subsection 37(*a*) prevents unauthorized influence on a member of the military court. The Board noted that Professor Hansen stated that the commander acts on the advice of military lawyers before

taking action and that there is a robust appellate system for preventing errors, such as UCI and other trial errors. The system is further protected by the presiding Judge Advocate.

[24] The Board found that both the respondent and applicant's affiants agree that the military commander has a central role in the US military justice system, including initiating investigations, determining what charges will be brought to what level of court-martial and selecting the panel of jurors and adjudicating the cases.



[25] The Board noted that, generally, the applicant's affiants stated that the US military justice system does not conform to the factors in *Genereux* above. Under the *UMCJ*, the judges are appointed at will and lack security of tenure, and institutional independence is lacking as the judges are appointed by the Judge Advocate General. They stated that a discipline model operates where a commander could choose to make an example of a soldier. Further, article 37 of the *UMCJ* aimed at correcting UCI is ineffective as complaints of UCI continue and are rarely successful. Mr. Rehkopf stated that the system lacks fundamental aspects of due process and that the checks and balances are insufficient and UCI continues.

[26] The Board Member found, at paragraph 89 of his decision, that:

> I accept the evidence in the affidavits of Donald G. Rehkopf, Jr., Professor Eugeen Fidell, Professor Victor Hansen, Marjorie Cohn and Kathleen M. Gilberd…. I accept the affidavits for the information provided in regard to the US military justice system. Any conclusions drawn from this evidence is the sole responsibility of the Board…

[27] The Board then stated that the test for determining whether state protection is available to a person in the claimant's position is set out in the *Canada (Minister of Employment & Immigration) v Satiacum*, 99 NR 171 [*Satiacum*]:

> …In all but the most extraordinary circumstances all the events leading up to a prosecution and all of the events of a trial in a free and independent foreign judicial system must be taken to be merged into the judicial process and not open to review by a Canadian tribunal. Extraordinary circumstances would be those, for example, which tended to impeach the total system of prosecution, jury selection or judging, not discrete indiscretions or illegalities by individual participants which, even if proved, are subject to correction by the process itself…



[28] The Board acknowledged that the US military justice system has not changed as much as the Canadian and British systems over the past decades.

[29] Concerning UCI, the Board found that in the evidence before it, there is disagreement as to the prevalence of UCI within the US military justice system. The Board concluded that the appellate case *United States v Justin M Lewis*, 63 MJ 405 shows that the problem of UCI is recognized and can be raised as a defence. The Board stated that "this would presumably extend to the misuse of prosecutorial discretion".

[30] The Board concluded that on the balance of probabilities, the evidence does not substantially impeach the US military justice system.

**D. Hazing**

[31] The Board then assessed the applicant's submission that there was not adequate state protection against cruel and unusual "hazing" that he could face as discipline from his commanding officer or unit if he were returned to the Army.

[32] The Board found that the case of *Lowell v Canada (Minister of Citizenship & Immigration)*, 2009 FC 649 [*Lowell*] demonstrates that there is a mechanism for appealing treatment of authorized non-judicial punishment under Army Regulation 27-10. The Board further found that the applicant could also use the tactic of going to the media if he experiences unauthorized hazing. The Board also noted that the Eighth Amendment of the US Constitution prohibits cruel and unusual punishment.

[33] The Board concluded by finding that the applicant was not a Convention refugee or person in need of protection as he had not rebutted the presumption of state protection with clear and convincing evidence. It was therefore unnecessary to consider article 171 of the *UNHCR Handbook* and the claim was dismissed.

**IV. RELEVANT LEGISLATION**

The relevant portions of the *Act* are appended to this decision.

## V. ISSUES AND STANDARD OF REVIEW

[34] There are two principal issues in this application:

1) **Did the Board ignore or misinterpret evidence or fail to provide adequate reasons for its treatment of the evidence?**

2) **Did the Board err in its analysis of state protection?**



[35] Where previous jurisprudence has determined the standard of review applicable to a particular issue before the court, the reviewing court may adopt that standard of review (*Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at paragraph 57 [*Dunsmuir*]).

[36] The question of whether the Board failed to consider the evidence before it is a factual one that usually attracts deference and will be reviewed on the standard of reasonableness (see *Dunsmuir* above, *Miranda Ramos v Canada (Minister of Citizenship & Immigration)*, 2011 FC 298 at paragraph 6; *Osorio v Canada (Minister of Citizenship & Immigration)*, 2010 FC 907 at paragraph 19).

[37] Assessments of the adequacy of state protection raise questions of mixed fact and law. As such, these issues are also reviewable against a standard of reasonableness (see *Hinzman* above at paragraph 38; *SSJ v Canada (Minister of Citizenship & Immigration)*, 2010 FC 546 at paragraph 16).

[38] In reviewing the Board's decision using a standard of reasonableness, the Court in concerned with whether the Board has come to a conclusion that is transparent, justifiable, and intelligible and within the range of acceptable outcomes based on the evidence before it (see *Dunsmuir* above, at paragraph 47; *Canada (Minister of Citizenship & Immigration) v Khosa*, 2009 SCC 12, [2009] 1 SCR 339 at paragraph 59).



## VI. PARTIES SUBMISSIONS

### Applicant’s Submissions

[39] The applicant submits that his evidence and arguments are vastly different than those put forward in *Hinzman* above, relied on by the Board. Unlike the applicant, the appellants in *Hinzman* put forward no information to rebut the presumption of state protection. The applicant’s evidence in this regard included demonstrating that the US court-martial system fails to meet international standards of fairness and that a soldier is unable to raise his motives for desertion as a defence against such charges.

[40] The applicant argues that the Board mistreated the evidence on the fairness of the military justice system in the US. The Board stated that it accepted the evidence provided by the applicant in the affidavits of Donald G. Rehkopf, Jr., Professor Eugeen Fidell, Marjorie Cohn and Kathleen M. Gilberd. However, the Board did not provide any reasons for why, despite accepting the information in the expert affidavits, it nonetheless concluded the opposite from what was contained therein.

[41] The applicant submits that the significance and probative value of evidence before the Board reasonably increases when it emanates from a more expert source and the responsibility of the decision maker to outline their reasons for dismissing the evidence that directly contradicts their conclusions also increases. The Board erred by failing to properly consider this evidence.

[42] The Board also did not analyze the evidence provided by these individuals demonstrating that the jury selection process, as well as the lack of tenure provided to military judges and appellate judges are inadequate.

[43] The applicant further contends that the Board misinterpreted and ignored evidence on the issue of available defences to the charge of desertion.

[44] The applicant submits that the Board misinterpreted the US case law on this issue. The applicant submits that the case of *Huet-Vaughn* above stands for the proposition that the motive for why an individual soldier deserted the military is irrelevant and inadmissible on the question of whether the soldier is guilty of desertion. The applicant submits that an unlawful order defence is only applicable to orders offences and not to the charge of desertion. Further, the applicant submits that the Board erred in finding that the *Huet-Vaughn* decision does not limit the scope of the unlawful order defence to war crimes. There was ample evidence before the Board by experts and members of the US military on the application of the *Huet-Vaughn* case. The Board did not provide reasons for why it preferred its own interpretation of the law in the US to that of military law professor and practitioners and military members. This renders the Board's reasons inadequate.

[45] The applicant submits that this is important because he would not be able to raise the conduct that he was ordered to perform in Afghanistan at a court-martial for the charge of desertion. He argues that there is therefore no state protection for being prosecuted for desertion despite the fact that he deserted because he was ordered to perform acts which would satisfy section 171 of the UNCHR Handbook.



**A. State Protection**

[46] The applicant submits that in addition to the mistreatment of evidence, the Board made several errors in its state protection analysis.

[47] The applicant argues that if the Board did truly accept the evidence of the applicant's four affiants named above that the US military justice system is not an independent or impartial tribunal and is not in conformity with international standards or the *Charter*, then its conclusion must be that there exists adequate protection for the applicant nonetheless is an unreasonable conclusion.

[48] Under paragraphs 3(3)(*d*) and (*f*) of the *Act*, decisions made under sections 96 and 97 of the *Act* must be consistent with the *Charter* and must comply with Canada's obligations under international human rights instruments. The applicant submits that interpreting adequate state protection to be that which falls below standards set out in international human rights instruments and the *Charter* is unreasonable and contrary to the *Act*. The applicant submits that this is also contrary to the UNHCR handbook which states at paragraph 60:

> In such cases, due to the obvious difficulty involved in evaluating the laws of another country, national authorities may frequently have to take decisions by using their own national legislation as a yardstick. Moreover, recourse may usefully be had to the principles set out in the various international instruments relating to human rights, in particular the International Covenants on Human Rights, which contain binding commitments for the States parties and are instruments to which many States parties to the 1951 Convention have acceded.



[49] In addition, the applicant argues that the Board made conclusions about differential prosecution that were not based on the evidence before it. The Board concluded that "the ability to raise UCI as a defence presumably applies to the exercise of prosecutorial discretion." The applicant argues that there is no basis in the evidence for this conclusion and that in fact the evidence contradicts it. The decision on whether to initiate charges in the first place in the US is completely within the purview of the Command and therefore would not be considered "unlawful" and is not subject to review on the basis of UCI. The Board's conclusion was therefore unreasonable.

[50] The applicant further submits that the Board concluded that it is appropriate to punish certain soldiers over others for desertion where the prosecution feels there are aggravating factors such as speaking out about the war, because prosecutorial discretion benefits the justice system. However, the applicant submits that if the "aggravating factor" motivating the prosecution is the individual's expression of his political beliefs, then the prosecutorial discretion has been exercised in a discriminatory and persecutory manner according to section 169 of the *UNHCR Handbook.* Aggravating factors cannot include an individual's race, religion, sexual orientation, gender or political opinion. The Board erred by concluding otherwise. Further, the Board did not provide any meaningful analysis on the evidence before it indicating that members of the US military have been singled out for prosecution because of their political beliefs.

**Respondent's Submissions**

[51] The respondent submits that the Federal Court of Appeal's decision in *Hinzman* and the Supreme Court's decision in *Canada (Attorney General) v Ward*, [1993] 2 SCR 689 were binding on the Board. That is, states are presumed capable of protecting their own citizens and this presumption is only displaced with clear and convincing confirmation of the state's inability to protect a claimant. This presumption is particularly strong with respect to a developed democracy like the United States. The Court of Appeal in *Hinzman* concluded that the US is a fully functioning democracy with a robust judicial system, that provides significant procedural protection to an individual who is the subject of a court-martial proceeding. These include the presumption of innocence, assessment by an impartial adjudicator the right to know the case against oneself and a high standard of proof to meet before conviction. Further, the Federal Court of Appeal held, in *Satiacum* above, that a foreign legal system is presumed to be fair absent evidence that substantially impeaches its processes. Given this, the applicant was required to seek out and exhaust all avenues of protection before he could rebut the presumption of state protection.

[52] The applicant made no attempt to seek recourse through any means other than refugee protection. He did not complain to his superiors, choose not to re-enlist, seek re-assignment, seek treatment for mental health issues or seek a discharge on medical grounds before deserting. The respondent submits that the *Hinzman* above principle that where applicants have not adequately accessed the legal protection available to them in their country, they cannot assert that their rights would not be adequately protected.

[53] The respondent submits that the Board did not ignore evidence but rather undertook a detailed and meticulous examination of the evidence before it. The respondent argues that the Board accepted the qualifications of each of the applicant and respondent's affiants and carefully detailed the evidence provided by all five individuals. The Board weighed the evidence and noted the disagreement between the affiants, but concluded that the self-correcting mechanisms in the military justice system meet the requirements for adequate state protection. The conclusions of the affiants could not be substituted for the determination the Board itself was required to make. The Board also addressed US jurisprudence that while UCI can be a concern with prosecution, there is redress for an accused to raise it as a defence. The applicant is faulting the Board for preferring the evidence of Professor Hansen to that of the applicant's.

[54] The respondent submits that neither of the applicant's main concerns substantially impeaches the US military justice system; namely, the persistence of UCI and the possibility that prosecutorial discretion could be misused. The evidence provided by the affiants does not indicate that even if the accused's political opinion was considered an aggravating factor in the use of prosecutorial discretion, the accused could not appeal the decision. Similarly, there was no evidence to suggest that persons alleging UCI are unable to exercise their appeal rights.

[55] The respondent further submits that the Board reasonably interpreted the case of *Huet-Vaughn* above to provide that, where a soldier receives an order to commit a positive act that would be considered a war crime or other crime "so manifestly beyond the legal power of a commander" to order, the defence of "unlawful orders" is available. The applicant did not put evidence before the Board that the conduct he observed would rise to the level contemplated in paragraph 171, nor that

he was ever ordered to perform such acts. The applicant also put no evidence before the Board about the duties he would be assigned if re-deployed and whether they would put him at risk of breaching the rules of armed conflict.



[56] The respondent argues that the Board did not ignore evidence regarding the unlawful order defence. It fully appreciated the evidence given by Ms. Cohn and Mr. Gespass and concluded that this evidence did not demonstrate that the defence of illegal order could not be advanced as a defence on a desertion charge, or that the applicant would not be able to advance it in the circumstances of his case. The respondent submits that pursuant to *Colby v Canada (Minister of Citizenship and Immigration)*, 2008 FC 805 the applicant must first establish that the state would be unable or unwilling to protect him before the Board can consider whether particular facts would bring him within paragraph 171 of the UNHCR handbook. The applicant did not do so.

[57] The respondent further submits that the test for adequate state protection is not conformity with international or *Charter* standards. The respondent submits that the Supreme Court in *Genereux* above, did not determine the degree of judicial independence required by international law of any court-martial system. Further, the criteria in *Genereux* and the *Findlay v United Kingdom*, [1997] ECHR 8, 24 EHRR 221 decision relied on by the applicant have not risen to the level of peremptory international legal norms. The American court-martial system meets the criteria of independence established by the UNHCR General Comment No 32: it is independent of the executive, judges enjoy protections guaranteeing security of tenure, and the executive is not able to control or direct the conduct of a court-martial. Further, absent a demonstration that the standards

highlighted in the *Genereux* decision represent minimum international norms, they cannot be used to assess a sufficiency of the protection offered by a foreign legal system.

[58] The respondent submits that on the basis of the evidence before it, the Board could reasonably find that the applicant would be adequately protected within the US military justice system. The continued existence of UCI does not rise to this level.



## VII. ANALYSIS

### 1) Did the Board ignore or misinterpret evidence or fail to provide adequate reasons for its treatment of the evidence?

[59] Subject to a complete breakdown of the state apparatus, states are presumed to be able to protect their citizens. The applicant bears the onus to rebut this presumption on a balance of probabilities with clear and convincing evidence of the state's inability to protect. This evidence can be either "testimony of similarly situated individuals let down by the state protection arrangement or the claimant's testimony of past personal incidents in which state protection did not materialize" (*Ward* above at 724-725).

[60] The evidentiary burden to rebut the presumption is higher when the state in question is a developed democracy. As the Federal Court held in *Kadenko v* Canada *(Minister of Citizenship and Immigration)* (1996), 143 DLR (4th) 532 (FCA) at paragraph 5:

> When the state in question is a democratic state, as in the case at bar, the claimant must do more than simply show that he or she went to see some members of the police force and that his or her efforts were unsuccessful. The burden of proof that rests on the claimant is, in a way, directly proportional to the level of democracy in the state in question: the more democratic the state's institutions, the more the claimant must have done to exhaust all the courses of action open to him or her.



The Federal Court of Appeal has further considered this elevated burden with respect to the United States, noting in *Hinzman* above at paragraph 46, that*:*

> The United States is a democratic country with a system of checks and balances among its three branches of government, including an independent judiciary and constitutional guarantees of due process. The appellants therefore bear a heavy burden in attempting to rebut the presumption that the United States is capable of protecting them and would be required to prove that they exhausted all the domestic avenues available to them without success before claiming refugee status in Canada. In *Satiacum v. Canada (Minister of Employment & Immigration)* (1989), 99 N.R. 171 (Fed. C.A.) at page 176 ("Satiacum") this Court was called upon to consider a claim of insufficient state protection in the United States and commented on the difficult task facing a claimant attempting to establish a failure of state protection in the United States:
>
> > In the case of a non democratic State, contrary evidence might be readily forthcoming, but in relation to a democracy like the United States contrary evidence might have to go to the extent of substantially impeaching, for example, the jury selection process in the relevant part of the country, or the independence or fair-mindedness of the judiciary itself.

[61] The Court agrees with the respondent that the findings of the Federal Court of Appeal in *Hinzman* and *Satiacum* above are binding on this Court and were so on the Board, it cannot interpret these cases as overturning the Supreme Court’s decision in *Ward* above. The Supreme Court clearly stated in *Ward* that a refugee claimant can rebut the presumption of state protection with evidence of similarly situated individuals let down by the arrangement of state protection.

[62] It was therefore open to the applicant to present evidence of similarly situated individuals showing that the system of military justice in the United States was not a domestic avenue available to him in seeking state protection due to the lack of independence, impartiality or the lack of defences to the charge of desertion. But he also had to show that on a balance of probabilities that all of the avenues that were open to him would have resulted in an unfair treatment because of the US military system of justice. [emphasis added]



[63] The Board, in turn, was under a duty to consider all evidence before it. This duty did not require the Board to summarize all of the evidence in its decision so long as it properly addressed evidence which contradicted its conclusions (see *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*(1998), 157 FTR 35 (FCTD); *Florea v Canada (Minister of Employment and Immigration)*, [1993] FCJ No 598 (FCA)(QL)). The duty to assess this evidence increased with the expert nature of the affiants providing it (see *Gunes v Canada (Minister of Citizenship and Immigration)*, 2008 FC 664; *LYB v Canada (Minister of Citizenship and Immigration)*, 2009 FC 462).

[64] The Board's duty to explain itself increases directly with the relevance of the evidence provided.

[65] The evidence presented by the applicant on the independence and impartiality of the court-martial system in the US emanated from several individuals arguably experts in US military law. Mr. Fidell is a Professor of law at Yale University and the President of the National Institute of

Military Justice since 1991. Mr. Rehkopf was a Judge Advocate in the US Air Force since 1976 and has been practicing military law for 34 years. Ms. Cohn is a law professor and has published widely on disengagement from the military in the United States.



[66] After summarizing the evidence on for several pages, the Board's analysis of the five affiant's evidence was somewhat limited. The only conclusion drawn by the Board is that while UCI is a problem, it can be raised as a defence. This and the self-correcting mechanism of article 37 demonstrate that state protection is available. The Board did not comment specifically on all the evidence of the affiants which directly stated that these self-correcting mechanisms were ineffective. The Board did not address the findings of the affiants on the jury selection process, the lack of tenure provided to military judges and the inadequacy of appellate judges. Nor did it indicate why it preferred the evidence of Professor Hansen to that of the four other affiants. But nonetheless it concluded, at paragraph 93 of its decision, that: "Effectiveness in state protection is a consideration but I find that, on a balance of probabilities, the evidence does not substantially impeach the US military system." Was this conclusion of the Board reasonable?

[67] As Mr. Justice de Montigny held in *Smith v Canada (Minister of Citizenship and Immigration)*, 2009 FC 1194, also commenting on the Board's assessment of Mr. Rehkopf: "…it was not sufficient to summarize the evidence presented by the applicant. The Board Member should have addressed that evidence and discussed it in his reasons…". Justice de Montigny further held at paragraph 69 that:

> …«I am of the view that his affidavit was not just a lay opinion which the board could reject without providing reasons for doing so. Mr. Rehkopf obviously had a long experience as a military lawyer and has acted as defense counsel, prosecutor and judge for

> many years. It was open to the Board, of course, to prefer other evidence to that provided by Mr. Rehkopf.»…

The Court finds the Board's lack of analysis of the evidence before it concerning the independence and impartiality of the US court-martial system, as well as the lack of reasons for preferring contrary evidence to that of the applicant to be unreasonable since the documentary evidence ignored by the Board in its reasons goes to the one of the central issues of applicant's claim.



[68] Concerning the US Court of Appeals for the Armed Forces case *Huet-Vaughn*, the Court agrees with the applicant that the Board's interpretation of the case was unreasonable. The US Court of Appeals for the Armed Forces held that:

> 43. To the extent that CPT Huet-Vaughn quit her unit because of moral or ethical reservations, her beliefs were irrelevant because they did not constitute a defence…
>
> 45. To the extent that CPT Huet-Vaughn's acts were a refusal to obey an order that she perceived to be unlawful, the proffered evidence was irrelevant. The so-called "Nuremberg defense" applies only to individual acts committed in wartime; it does not apply to the Government's decision to wage war. […] The duty to disobey an unlawful order applies only to "a positive act that constitutes a crime" that is "so manifestly beyond the legal power or discretion of the commander as to admit of no rational doubt of their unlawfulness." […] CPT Huet-Vaughn tendered no evidence that she was individually ordered to commit a "positive act" that would be a war crime.

[69] The Board concluded that this decision did not stand for the principle that "the defence of an unlawful order only applies to extreme cases such as war crimes or grave breaches of the Geneva Convention" and that the "United States Court of Appeals for the Armed Forces has not decided whether an individual could raise the question of whether he or she had been ordered to commit an unlawful act".

[70] However, the applicant's submissions before the Board were that for the charge of desertion, not disobeying orders, there is no defence. This was corroborated with evidence before the Board from two experts and three members of the US military. While the Board summarized this evidence in the decision, it did not analyze it or provide reasons for rejecting it. Rather, the Board focused on the right of appeal within the court-martial system and found that similarly situated individuals would be able to appeal their cases to the US Supreme Court, which they have not done, and therefore avenues of state protection remain.



[71] The Court finds this to be an unreasonable conclusion. First, as the applicant noted in reply, leave to the US Supreme Court was denied in the case of *Huet-Vaughn,* making this the prevailing law. Further, the evidence of the professors, practionner, and military members in addition to the case of *Huet-Vaughn* demonstrate that the charge of desertion operates as a strict liability offence where motive for desertion is not relevant.

[72] The UNHCR Handbook acknowledges that, as a general rule, prosecution of deserters does not amount to persecution. However, paragraph 171 provides a caveat:

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

[73] While the Board correctly noted that Justice Zinn held in *Lowell above*, that the applicant must first show that state protection is unavailable before raising the facts under paragraph 171 of the UNHCR handbook, the applicant's argument went directly to the issue of state protection.



[74] Given that the applicant would not be able to present evidence of his motive for desertion nor of the illegality of the conduct that he was required to perform in Afghanistan which could demonstrate a breach of the Geneva Conventions on the rules of armed conflict, this goes directly to the availability of state protection.

[75] As noted above, the Board was under a duty to consider the evidence before it and address that which conflicted with its conclusions. It had to provide adequate analysis and reasons for rejecting such evidence. The failure to do so with respect to the issue of applicable defences to the charge of desertion in US court-martial proceedings was unreasonable.

**2) Did the Board err in its analysis of state protection?**

[76] The applicant argued before Board that there is no state protection for the discriminatory application of prosecutorial discretion. The applicant presented evidence before the Board indicating that while the large part of deserters are administratively discharged, those who speak out publicly against the war in Iraq were selected to be court-martialled and prosecuted for desertion. This Court recognized the disproportionate prosecution for desertion of those who have spoken out against the wars in Iraq and Afghanistan.

[77] For example, in *Rivera v Canada (Minister of Citizenship and Immigration)*, 2009 FC 814 Mr. Justice Russell reviewed a decision of the Board concerning the use of prosecutorial discretion to target individuals more severely through the court-martial process who have spoken out against the war. At paragraph 101, Justice Russell concluded of the Board's decision that:

> …the whole state protection analysis needs to be reconsidered in the light of the stated risk, and supporting evidence, that the U.S. authorities will not neutrally apply a law of general application, but will target the Principal Applicant for prosecution and punishment solely because of her political opinion in a context where other deserters, who have not spoken out against the war in Iraq, have been dealt with by way of administrative discharge.

[78] The Board in the case at bar largely ignored the evidence presented by the applicant about similarly situated individuals and prosecutorial discretion. The Board concluded that using prosecutorial discretion is a benefit to the justice system and is appropriate where there are aggravating factors.

[79] Paragraph 169 of the UNCHR handbook indicates that:

> A deserter or draft-evader may also be considered a refugee if it can be shown that he would suffer disproportionately severe punishment for the military offence on account of his race, religion, nationality, membership of a particular social group or political opinion. The same would apply if it can be shown that he has well-founded fear of persecution on these grounds above and beyond the punishment for desertion.

[80] As such, the UNHCR handbook, as well as the jurisprudence above, hold that where prosecutorial discretion is used to inflict a disproportionately severe punishment on a deserter because of his or her political opinion, this may amount to persecution.

[81] The Court finds that the Board's failure to assess the evidence before it concerning the application of prosecutorial discretion on the grounds of political opinion was unreasonable.

[82] Similarly, the Board speculated that "the ability to raise UCI as a defence presumably applies to the exercise of prosecutorial discretion." There was no evidence before the Board to support such a finding.



[83] As the Federal Court of Appeal held in *Satiacum* above, the Board's findings cannot be based upon evidence that is the "sheerest conjecture or the merest speculation". As such, the Court finds that Board's analysis on the misuse of prosecutorial discretion in US court-marital proceedings was unreasonable.

[84] Given the analysis above concerning the Board's mistreatment of the evidence about the availability of state protection and its unreasonable conclusions on the use of prosecutorial discretion, the Court concludes that it would be incorrect to allow this decision to stand.

[85] The application for judicial review is allowed.

**JUDGMENT**

**THIS COURT'S JUDGMENT is that**:

1. The application for judicial review is allowed.

2. There is no question of general importance to certify.

« Andre F.J. Scott »
Judge

**ANNEX**

***Immigration and Refugee Protection Act,* SC 2001 c 27**



| | |
|---|---|
| Objectives and Application | Objet de la Loi |
| 3. (3) This Act is to be construed and applied in a manner that | 3. (3) L'interprétation et la mise en oeuvre de la présente loi doivent avoir pour effet : |
| … | […] |
| (d) ensures that decisions taken under this Act are consistent with the Canadian Charter of Rights and Freedoms, including its principles of equality and freedom from discrimination and of the equality of English and French as the official languages of Canada; | d) d'assurer que les décisions prises en vertu de la présente loi sont conformes à la Charte canadienne des droits et libertés, notamment en ce qui touche les principes, d'une part, d'égalité et de protection contre la discrimination et, d'autre part, d'égalité du français et de l'anglais à titre de langues officielles du Canada; |
| … | […] |
| (f) complies with international human rights instruments to which Canada is signatory. | f) de se conformer aux instruments internationaux portant sur les droits de l'homme dont le Canada est signataire. |

| | |
|---|---|
| Convention refugee | Définition de « réfugié » |
| 96. A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, | 96. A qualité de réfugié au sens de la Convention — le réfugié — la personne qui, craignant avec raison d'être persécutée du |

religion, nationality, membership in a particular social group or political opinion,

(*a*) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themself of the protection of each of those countries; or

(*b*) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.

fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques :

*a*) soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de chacun de ces pays;

*b*) soit, si elle n'a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle, ne peut ni, du fait de cette crainte, ne veut y retourner.



Person in need of protection

97. (1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally

(*a*) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or

(*b*) to a risk to their life or to a risk of cruel and unusual treatment or punishment if

Personne à protéger

97. (1) A qualité de personne à protéger la personne qui se trouve au Canada et serait personnellement, par son renvoi vers tout pays dont elle a la nationalité ou, si elle n'a pas de nationalité, dans lequel elle avait sa résidence habituelle, exposée :

*a*) soit au risque, s'il y a des motifs sérieux de le croire, d'être soumise à la torture au sens de l'article premier de la Convention contre la torture;

*b*) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant :

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|---|---|
| (i) the person is unable or, because of that risk, unwilling to avail themself of the protection of that country, | (i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays, |
| (ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country, | (ii) elle y est exposée en tout lieu de ce pays alors que d'autres personnes originaires de ce pays ou qui s'y trouvent ne le sont généralement pas, |
| (iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and | (iii) la menace ou le risque ne résulte pas de sanctions légitimes — sauf celles infligées au mépris des normes internationales — et inhérents à celles-ci ou occasionnés par elles, |
| (iv) the risk is not caused by the inability of that country to provide adequate health or medical care. | (iv) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats. |
| Person in need of protection | Personne à protéger |
| (2) A person in Canada who is a member of a class of persons prescribed by the regulations as being in need of protection is also a person in need of protection. | (2) A également qualité de personne à protéger la personne qui se trouve au Canada et fait partie d'une catégorie de personnes auxquelles est reconnu par règlement le besoin de protection. |

**UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, HCR/IP/4/Eng/REV.1**

60. In such cases, due to the obvious difficulty involved in evaluating the laws of another country, national authorities may frequently have to take decisions by using their own national legislation as a yardstick. Moreover, recourse may usefully be had to the principles set out in the various international instruments relating to human rights, in particular the International Covenants on Human Rights, which contain binding commitments for the States parties and are instruments to which many States parties to the 1951 Convention have acceded.

60. En pareil cas, compte tenu des difficultés que présente manifestement l'évaluation des lois d'un autre pays, les autorités nationales seront souvent amenées à prendre leur décision par référence à leurs propres lois nationales. En outre, il peut être utile de se référer aux principes énoncés dans les divers instruments internationaux relatifs aux droits de l'homme, en particulier dans les pactes internationaux relatifs aux droits de l'homme, qui ont force obligatoire pour les états parties et qui sont des instruments auxquels ont adhéré nombre des états parties à la Convention de 1951.

B. Deserters and persons avoiding military service

169. A deserter or draft-evader may also be considered a refugee if it can be shown that he would suffer disproportionately severe punishment for the military offence on account of his race, religion, nationality, membership of a particular social group or political opinion. The same would apply if it can be shown that he has well-founded fear of persecution on these grounds above and beyond the punishment for desertion.

B. Déserteurs, insoumis, objecteurs de conscience

169. Un déserteur ou un insoumis peut donc être considéré comme un réfugié s'il peut démontrer qu'il se verrait infliger pour l'infraction militaire commise une peine d'une sévérité disproportionnée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un certain groupe social ou de ses opinions politiques. Il en irait de même si l'intéressé peut démontrer qu'il craint avec raison d'être persécuté pour ces motifs, indépendamment de la peine encourue pour désertion.

170. There are, however, also cases where the necessity to perform military service may be the sole ground for a claim to refugee status, i.e. when a person can show that the performance of military service would have required his participation in military action contrary to his genuine political, religious or moral convictions, or to valid reasons of conscience.

170. Cependant, dans certains cas, la nécessité d'accomplir un service militaire peut être la seule raison invoquée à l'appui d'une demande du statut de réfugié, par exemple lorsqu'une personne peut démontrer que l'accomplissement du service militaire requiert sa participation à une action militaire contraire à ses convictions politiques, religieuses ou morales ou à des raisons de conscience valables.

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

171. N'importe quelle conviction, aussi sincère soit-elle, ne peut justifier une demande de reconnaissance du statut de réfugié après désertion ou après insoumission. Il ne suffit pas qu'une personne soit en désaccord avec son gouvernement quant à la justification politique d'une action militaire particulière. Toutefois, lorsque le type d'action militaire auquel l'individu en question ne veut pas s'associer est condamné par la communauté internationale comme étant contraire aux règles de conduite les plus élémentaires, la peine prévue pour la désertion ou l'insoumission peut, compte tenu de toutes les autres exigences de la définition, être considérée en soi comme une persécution.

**United States Army *Uniform Code of Military Justice***

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| 37. Unlawfully Influencing Action of Court | No Translation |
| (*a*) No authority convening a general, special, or summary court-martial, nor any other commanding officer, may censure, reprimand, or admonish the court or any member, military judge, or counsel thereof, with respect to the findings or sentence adjudged by the court, or with respect to any other exercises of its or his functions in the conduct of the proceedings. No person subject to this chapter may attempt to coerce or, by any unauthorized means, influence the action of a court-martial or any other military tribunal or any member thereof, in reaching the findings or sentence in any case, or the action of any convening, approving, or reviewing authority with respect to his judicial acts. The foregoing provisions of the subsection shall not apply with respect to (1) general instructional or informational courses in military justice if such courses are designed solely for the purpose of instructing members of a command in the substantive and procedural aspects of courts-martial, or (2) to statements and instructions given in open court by the military | |

judge, president of a special court-martial, or counsel.

(*b*) In the preparation of an effectiveness, fitness, or efficiency report on any other report or document used in whole or in part for the purpose of determining whether a member of the armed forces is qualified to be advanced, in grade, or in determining the assignment or transfer of a member of the armed forces or in determining whether a member of the armed forces should be retained on active duty, no person subject to this chapter may, in preparing any such report (1) consider or evaluate the performance of duty of any such member, as counsel, represented any accused before a court-martial.

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | IMM-5834-10 |
| **STYLE OF CAUSE:** | CHRISTOPHER MARCO VASSEY v<br>THE MINISTER OF CITIZENSHIP AND IMMIGRATION |
| **PLACE OF HEARING:** | Toronto, Ontario |
| **DATE OF HEARING:** | May 4, 2011 |
| **REASONS FOR JUDGMENT AND JUDGMENT:** | SCOTT J. |
| **DATED:** | July 18, 2011 |

**APPEARANCES:**

| | |
|---|---|
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| Martin Anderson | FOR THE RESPONDENT |

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| Vander Vennen Lehrer<br>Barristers and Solicitors<br>Toronto, Ontario | FOR THE APPLICANT |
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