V95/03161 [1995] RRTA 2134 (22 September 1995)

REFUGEE REVIEW TRIBUNAL

DECISION AND REASONS FOR DECISION

RRT Reference : V95/03161

Tribunal : John A. Gibson

Date : 22 September 1995

Place : MELBOURNE

Decision[1] : Application for a protection visa remitted pursuant to paragraph 415(2)(c) of the *Migration Act* 1958 ("the Act") for reconsideration with a direction that the criterion requiring the applicant to be a non-citizen in Australia to whom Australia has protection obligations under the Convention relating to the Status of Refugees done at Geneva on 28 July 1951 as amended by the Protocol relating to the Status of Refugees done at New York on 31 January 1967, is satisfied in relation to both applicants.

DECISION UNDER REVIEW AND APPLICATION

This is an application for review of a decision made on 28 March 1995 refusing to grant a protection visa.

The jurisdiction of the Tribunal arises by virtue of -

(i) sub-s 414 (1) of the Act which requires the Tribunal to review an "RRT-reviewable decision" where a valid application is made under s 412;
(ii) sub-s 411(1), which defines, in para (c), an "RRT-reviewable decision" to include a decision to refuse to grant a protection visa; and
(iii) s 412, which prescribes the criteria for a valid application.

I am satisfied that the jurisdictional requirements listed under paras. (i) to (iii) *supra* exist in this matter.

BACKGROUND

The applicant is an ethnic Croatian woman in her mid-forties who was born in xxxx in Slavonia, which is part of the Republic of Croatia. However, she lived for twenty-seven years in xxxxxx which is a town on the outskirts of Sarajevo close to the xxxxxxx in the Republic of Bosnia-Herzegovina (BiH). It has been under Serb control throughout the duration of the siege of Sarajevo which commenced in April 1992. She moved there when she married and was a permanent resident of Bosnia-Herzegovina when it was a constituent republic of the Socialist Federal Republic of Yugoslavia (SFRY). The applicant describes herself as an accountant by occupation. She fled Bosnia accompanied by her elderly mother in xxxx 1994 and travelled to Croatia

where she obtained a Croatian passport that same month at her birthplace. She then promptly proceeded to England where her children were living. In November 1994 the applicant arrived in Australia on a visitor visa and made her application for refugee status almost immediately upon arrival.

At the time of the lodging of her refugee application her husband who initially was stated to be a person included in the application had not arrived in Australia. By the time of the interview this position had changed in that he was present in the jurisdiction and he appeared with his wife to give evidence. The primary decision-maker treated the applicant's husband as a person included in the application for a protection visa but as having no separate claims of his own.

The applicant's husband is an ethnic Croat in his early fifties who was born In Sarajevo and lived his whole life in Bosnia-Herzegovina. His fled his home some time after his wife, went to Croatia and having obtained a Croatian passport in Zagreb took the same route to Australia as had his wife.

I propose to refer in the course of this decision to the female applicant as either the wife or the primary applicant where applicable, and the male applicant as the husband or the secondary applicant.

There is a threshold question as to what approach I should take to the husband's application.

Although he was not in the migration zone at the time the applicant lodged her application for a protection visa in late November 1994, he arrived in Australia shortly after she had done so. On his arrival, he attended his wife's interview with the Onshore Refugee Program (ORP) officer in February 1995 and submitted an application for a protection visa (866) in that same month. This application was headed 'Application for a member of the family unit: this part is for a member of the family unit who does NOT have their own claims to be a refugee, but is included in this application. If you DO have your own claims to be a refugee, complete a Part C instead'. The applicant had already lodged a Part C application in November 1994. The ORP officer made the following file note on 20 February 1995, '[The Applicant's] spouse unexpectedly turned up at [interview], having arrived in [Australia] recently. To be included in PV [protection visa] system'. The ORP officer refused the grant of a protection visa to both the applicant and her husband on 28 March 1995. In his statement of reasons for his decision, the ORP officer stated that the applicant had made specific claims under the Convention, while her husband was a member of the family unit included in the decision record who had not made specific claims of his own. However, the officer's discussion of the applicant's claims also deals with the situation faced by her husband (eg his potential liability for military service).

The applicant's RRT application specifically states that '[t]his application will include any person included in the application made to the Department of Immigration and Ethnic Affairs'. On the basis of the above material, I consider that I am bound to consider the claims of the applicant's husband as part of the application.

THE LAW

On 1 September 1994 the *Migration Reform Act* 1992 (MRA), by amendment to the Act, introduced a visa known as a protection visa for people who seek protection as refugees: see s.36 of the Act. This visa replaces the visas and entry permits previously granted for that purpose. Section 39 of the MRA provides, in effect, that refugee related applications not finally determined before that date are to be dealt with as if they were applications for a protection visa. Accordingly, for the purposes of this review the Tribunal regards an applicant's primary application(s) as (an) application(s) for a protection visa.

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

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

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

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

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

The central issue for determination in this matter is whether or not the applicant is a non-citizen in Australia to whom Australia has protection obligations under the Convention and the Protocol.

Refugee defined

In terms of Article 1 A(2) of the Convention and Protocol, Australia has protection obligations to any person who:

"Owing to well-founded fear of being persecuted

for reasons of race, religion, nationality,

membership of a particular social group or political

opinion, is outside the country of his nationality

and is unable or, owing to such fear, is unwilling

to avail himself of the protection of that country;

or who, not having a nationality and being outside the country

of his former habitual residence, is unable or, owing

to such fear, is unwilling to return to it."

(The five specified grounds are compendiously referred to as Convention reasons).

Outside the country of nationality.

First, the definition includes only those persons who are outside their country of nationality or, where the applicant is a stateless person, country of former habitual residence. The applicant in this case meets that requirement being outside his country of nationality.

Well-founded fear.

Secondly, an applicant must have a "well-founded fear" of being persecuted. The term "well-founded fear" was the subject of comment in *Chan Yee Kin v. The Minister for Immigration and Ethnic Affairs*(1989) 169 CLR 379 (Chan's case). It was observed that the term contains both a subjective and an objective requirement. "Fear" concerns the applicant's state of mind, but this term is qualified by the adjectival expression "well-founded" which requires a sufficient foundation for that fear (see per Dawson J at p.396).

The Court in Chan's case held that a fear of persecution is well-founded if there "is a real chance that the refugee will be persecuted if he returns to his country of nationality" (per Mason CJ at p.389 and p.398, per Toohey J at p.407, and per McHugh J at p.429). It was observed that the expression " 'a real chance'... clearly conveys the notion of a substantial, as distinct from a remote chance, of persecution occurring..." (at p.389) and though it "does not weigh the prospects of persecution...it discounts what is remote or insubstantial" (p.407); "a far fetched possibility must be excluded" (at p.429). Therefore, a real chance of persecution occurring may exist "notwithstanding that there is less than a 50 per cent chance of persecution occurring" (at p.389). "... an applicant for Refugee Status may have a well-founded fear of persecution even though there is only a 10 per cent chance that he will be shot, tortured or otherwise persecuted, (at p. 429).

The Full Federal Court (see *MILGEA v Che Guang Xiang*, unreported, 12 August 1994, No. WAG61 of 1994, Jenkinson, Spender, Lee JJ in a joint judgment, at p. 15-16) has recently stated:

" According to the principles expounded in Chan the determination of whether the fear of being persecuted is well-founded will depend on whether there is a "real

chance" that the refugee will be persecuted upon return to the country of nationality. A "real chance" that persecution may occur includes the reasonable possibility of such an occurrence but not a remote possibility which, properly, may be ignored. It is not necessary to show that it is probable that persecution will occur."

The question of how far into the future it is proper to look when examining the question of whether an applicant's fear is "well-founded" were he or she to return to their country of origin is answered in the judgment of the Full Federal Court (Black CJ, Lockhart and Sheppard JJ) in the case of *MILGEA and Paterson v Mok*, 127 ALR 223, Sheppard J, with whom the other members of the Court agreed, said:

"I do not read into the evidence any question which puts the matter in the way it should have been put, namely as a matter to be considered in relation to the immediately foreseeable future."

Persecution.

Thirdly, an applicant must fear "persecution" or more accurately "being persecuted". The term "persecuted" is not defined by the Convention or Protocol. Not every threat of harm to a person or interference with his or her rights constitutes "being persecuted". The Court in Chan's case spoke of "some serious punishment or penalty or some significant detriment or disadvantage" if the applicant returns to his or her country of nationality (per Mason CJ at p. 388). Likewise, it stated that the "notion of persecution involves selective harassment" whether "directed against a person as an individual" or "because he or she is a member of a group which is the subject of systematic harassment", although the applicant need not be the victim of a series of acts as a single act of oppression may suffice (at p.429-30) " ...Harm or the threat of harm as a part of a course of selective harassment of a person, whether individually or as a member of a group subjected to such harassment by reason of membership of the group amounts to persecution if done for a Convention reason (at p.388)."

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

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

The threat need not be the product of any policy of the Government of the persons country of nationality. It may be enough, depending on the circumstances, that the government has failed or is unable to protect the person in question from persecution (at p.430 of Chan).

The harm threatened may be less than loss of life or liberty and includes, in appropriate cases, measures "'in disregard' of human dignity" or serious violations of core or fundamental human rights

".....persecution ...has historically taken many forms of social, political and economic discrimination. Hence the denial of access to employment, to the professions and to education or the imposition of restrictions on the freedoms traditionally guaranteed in a democratic society such as freedom of speech, assembly, worship or movement may constitute persecution if imposed for a Convention reason. "(at p.430-1)

It appears from these passages that the High Court's view is that in some cases, infringement of social, political and economic rights will constitute persecution in Convention terms, while in other cases it will not. The Court did not set out any guidelines by which the point such infringements become persecution could be determined other than the reference by Mason CJ to "some serious punishment or penalty or some significant detriment or disadvantage".

In *Minister for Immigration, Local Government and Ethnic Affairs v. Che Guang Xiang*, the Full Federal Court said :

Denial of fundamental rights or freedoms, or imposition of disadvantage by executive act, interrogation or detention for the purpose of intimidating the expression of political opinion will constitute persecution...

Later on they stated:

To establish whether there was a real, as opposed to a fanciful, chance that Che would be subject to harassment, detention, interrogation, discrimination or be marked for disadvantage in future employment opportunities by reason of expression of political dissent, it was necessary to look at the totality of Che's circumstances.

Insofar as the first passage states that denial of fundamental rights and certain acts of a State done for the purpose of intimidation will, rather than may, constitute persecution, it may appear to go beyond what the High Court stated in *Chan*. However, the Federal Court was, of course, bound by *Chan*; furthermore, it expressly cited *Chan* as authority for its decision; it did not claim to be extending or questioning the concept of persecution enunciated in *Chan*; and it did not refer to any jurisprudence or policy considerations which might suggest that it was reconsidering the concept of persecution and intending it to apply to infringements of social, economic and political rights whatever the circumstances. If it was intending to disagree with *Chan* one would expect the Court to have stated this. I am therefore persuaded that the Federal Court in *Che* was not, after all, intending to modify or extend the concept of persecution endorsed by the High Court, but was simply restating the *Chan* test. The reference in *Che* to situations of denial of fundamental rights or freedoms, imposition of disadvantage by executive act, interrogation or detention for the purpose of intimidation, harassment, detention, discrimination and marking for future employment disadvantage must be read as a reference to such circumstances which satisfy the criteria set out by Mason CJ in *Chan* of amounting to a serious punishment or penalty or a significant detriment or disadvantage. Where

these criteria are satisfied, then, there is persecution; but where they are not, there is no persecution.

Date for determination of Refugee Status.

Whether or not a person is a refugee for the purposes of the legislation is to be determined upon the facts existing at the time the decision is to be made. (see *Chan,* supra; *Che*, supra, at p.14) In the case of *Mok*, supra (at p.250), it was said that

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

In this regard, however, it is proper to look at past events and, in the absence of evidence of change of circumstances, to treat those events as continuing up to the time of determination (see Chan, supra).

In some circumstances, a person who would have satisfied the definition before the change may no longer be eligible.

In the case of *Lek v MILGEA* 117 ALR 455 (at pp. 462-3), Wilcox J. rejected a contention that Chan decided that the relevant date for considering [an application for refugee status] was the date of application, rather than the date of determination. His Honour did, however note the " High Court's emphasis [in Chan] upon the necessity to pay attention to the factors that gave rise to an applicant's departure from his/her country of nationality" (at p. 462). He stated that the correct methodology was to separate out

" two logically distinct questions: whether the applicant had a continuing subjective fear of persecution on a Convention ground at the date of determination and whether that fear was objectively founded. [The approach taken by the Department] addressed the second question by taking as the starting point the position as at the date of departure and asking whether the available evidence establishes that the position has since changed, so that the fear is no longer well founded even though subjectively continuing. In regard to the latter inquiry, and because of the practical problems noted by the High Court, there is in substance an onus of proof on those who assert that relevant changes have occurred" (at p.463).

These comments are entirely consistent with the observation of Mason CJ. in Chan that:

"in the absence of facts indicating a material change in the state of affairs in the country of nationality, an applicant should not be compelled to provide justification for his continuing to possess a fear which he has established was well-founded at the time when he left his country of nationality" (at p. 391).

CLAIMS & EVIDENCE

Application and interview

The 'ethnic cleansing' perpetrated by the Serbs means that many Croatians from Bosnia have ended up in Croatia as refugees. Croats have become prisoners in concentration camps. Her own home at xxxxxxx had been bombarded and demolished. She had to leave her home when the Serbs occupied the area. The flat in central Sarajevo she then moved into was bombarded and destroyed as well. She and her husband then went from place to place to relatives, wherever they could stay. Inhabitants of the city live their days and nights under constant fear and threat of death. Her fear is that the situation is getting worse and she has nothing to return to in Bosnia.

The applicant said that she and her husband used to live quite comfortably with Muslims and Serbs. They relied on and depended on each other. Then, the people who started coming from other parts such as refugees who came in to Sarajevo began to cause problems. They said that the Muslims were taking over Sarajevo. Neither the applicant nor her husband ever came face to face with any of the combatant forces in Bosnia-Herzegovina, or mistreated, although the privations associated with the war situation since 1992, namely hunger and cold, and the destruction of their house and flat, prompted the applicant to avail herself of the first available opportunity to flee. This was in xxxx 1994, via a tunnel under the main Sarajevo highway, to Croatia. She was accompanied by her mother, who had been wounded in the shelling of the flat at the start of the year. The applicant's mother had received basic medical treatment in the period since the shelling but she had received psychological injuries as well. Being over the age of 55, he mother was issued with an exit pass, whereas the applicant, lacking such authorisation had to find an illegal way out. She was obliged to pay a bribe to a soldier guarding the tunnel entrance. Her husband was compelled to remain behind at the time, lacking enough funds for a bribe to facilitate his own escape and still have enough money to exist.

Having obtained Croatian passports, the applicant and her mother promptly proceeded to London to visit her children, who are seeking asylum there, having arrived before the commencement of hostilities in Sarajevo. The applicant did not have any set idea of what she was going to do. She only wanted to see her children. The applicant's mother subsequently chose to return to Croatia, where she is receiving assistance from Caritas, the Croatian government having limited capacity in this connection due to the serious economic difficulties it was experiencing. Her mother is looking after a house in a town near Dubrovnik which is owned by family friends who are currently in Germany. Feeling lost and uncertain about future prospects, the applicant in due course travelled to Australia at the invitation of her brother here, without any prior concrete intentions of remaining.

The applicant's husband remained in hiding at his mother's house in order to avoid being mobilised. There were a number of calls to go into the army. Men also were disappearing. He received letters to go into the Bosnian-Herzegovinan army which were orders that he go and present himself for service. He said that at the onset of the war he had to make a decision where he belonged. As he was Croatian he *belonged to that side. When 'that was militarised' he did not want to join anybody. He was fearful because people were disappearing.

He ultimately raised sufficient proceeds from the sale of the family's electrical goods and borrowing money from friends for the sum required to enable him to depart

Sarajevo via the same means as the applicant. He paid 2000DM, twice what his wife had paid. He left in xxxxxxxxx 1994. He likewise obtained his travel passport, in Zagreb, then travelled to London before obtaining a visitor visa for Australia.

The applicant was advised at interview that, apart from considering the circumstances attendant to her departure from Bosnia-Herzegovina, it would be necessary to assess her against Croatia of which country she is a national (Up to the war she had a Yugoslav passport which was issued in Sarajevo). She pointed out that all Croatians wherever they were living could get a Croatian passport. In this connection, it was put to her that, according to Department of Foreign Affairs reporting from Vienna (O.VI989 of 10 January 1994), there was no restriction on Croats entering Croatia. In response, the applicant stated that she does not consider return to Croatia to be a viable option, asserting that this would entail a life on the streets, given that, as Croatians from Bosnia, she and her husband would not have accommodation and employment. Furthermore, although she is unaware of what military service obligations are applicable to Croats from Bosnia, she nevertheless assumes that her husband would be liable for conscription into the Croatian army.

In assessing the claims against Bosnia, it is impossible for them to return there because they would be classified as deserters.

RRT application

The primary applicant made her own submission for review of the primary decision which I summarise.

She and her husband are citizens of Bosnia-Herzegovina and seek protection on this basis. They are not citizens of Croatia. The Act of Citizenship of Croatia clearly stated who can be a citizen. To be lawful citizens of Croatia they should have permanent residency there granted by the Croatian government which they do not have. Her passport and driving licence both show her address as Sarajevo. She and her husband were unable to obtain Bosnian passports as not all people can get them. At the time it was only possible to obtain a Croatian passport therefore this is what they did when they were in Croatia but only as citizens of Bosnia.

They escaped from Bosnia because of heavy fighting and forced mobilisation into the Bosnian army. The relationship between Government forces and Herzeg-Bosnian Croat army has not been good.

Her husband was born in Sarajevo and lived there for fifty years while the applicant after marrying him lived there for twenty-seven years. They have close friends relatives and lots of friends there. Unfortunately they were fighting on different sides against each other. Lots of atrocities have been committed by both sides. Her husband could not make the decision to join either side and he does not believe anything can be solved by force; by killing and destroying.

The primary applicant and her husband could not stay in Croatia because her husband would be deported back to Bosnia or mobilised to the Herzeg-Bosnian Croatian army and returned to the front lines in Bosnia-Herzegovina. Most probably they could have obtained refugee status in Croatia but due to the just mentioned consequences they did

not try. However, as refugees in Croatia they would be second class citizens without a right to work. As citizens of Bosnia in Croatia they can have refugee status and be settled in one of the refugee centers without any rights and any income but depending on the mercy of Caritas. They do not have close relatives in Croatia so they have no one to support them.

She submitted on behalf of herself and her husband several documents including copy driving licences and a copy call-up (mobilisation) notice for him from the Bosnian government army dated in xxxxxx 1994 which stated that the recipient could be prosecuted if the call-up was not answered. The applicant also supplied a letter concerning her mother who is currently in Dubrovnik which purported to show that a Bosnian Croat born in Croatia has only Refugee Status in Croatia. I have no reason to doubt the authenticity of the originals of these documents.

Hearing

The primary applicant appeared at the hearing and gave evidence through a Croatian speaking interpreter.

Their witness is a Croatian speaking volunteer at an agency assisting newly arrived migrants. She translated a medical report prepared for the husband in Sarajevo several weeks before he managed to escape from the city. It deals with the husband's psychological state before his departure and I quote from it in full.

It is from the Institute for xxxxxxxxxx of xxxxxxx xxxxxx, xxxxxxxxxxxxxxxx xxxxxxx, Sarajevo.

It is dated xxxxxxxx 1994 and reads :

He expresses depressing mood swings. He describes a loss of interest in all activities. Emotionally unstable. Psychologically tense reflecting in stiff neck muscles and trembling hands. He suffers from insomnia and undefined fear. He says he is on the edge of coping. Diagnosis: Psychosis Depressive. Treatment....

The various documents tendered with the RRT application were translated by the interpreter. There were identification cards for the husband and wife issued by the City Council of Sarajevo of the Socialist Republic of Bosnia and Herzegovina which were issued in xxxxx 1990 and the end of 1989 respectively. They are valid for ten years.

There were two call up notices. The first of these read as follows:-

Republic of Bosnia-Herzegovina - Sarajevo Internal Security Forces - Department of Defence Mobilisation for Conscripts.
To serve the armed forces of Bosnia-Herzegovina - call up - you are requested to immediately join the armed forces of Bosnia-Herzegovina [and the notice dated where the applicant should report]. Warning: Failing to obey the request will make the applicant subject to the regulation of criminal law of Bosnia-Herzegovina and the regulations of the Ministry of Defence.

This notice, addressed to the applicant, he found in his letter box towards the end of 1993. It was not delivered personally to him because he was in hiding from his residence.

The second notice marked "Urgent" was dated xxxxl 1994. The applicant said that it was sent to him because he did not reply to the first one. This one was left at the door of his home. The wife interposed that if they had found the applicant personally, they would have taken him with them. This document read:-

[The applicant] is to immediately answer this call up upon reception of it and attend the armed forces of Bosnia-Herzegovina [it is stated the location that he must go to].

The document had the same warning as the other document. On its back it states the following:-

1. Obligations after receiving this call. You should take the shortest route to get to the position where you have been allocated.
2. If there is a point of embarkation stated, you should go there immediately.
3. If the notice does not say you have been given particular transport to your war unit, you should walk there; however if there are any other possibilities, you can use public transport going in the same direction. Do not talk to any unauthorised persons; the operation is secret.
4. You should be cautious and alert and wary of persons who will try to interfere with the performance of your duty. About any such case as this, you should immediately inform the authorities (the police and your military officials) when you arrive at your unit.
5. Do not waste any time, make your journey as quick as possible. You are requested to have this notice, booklet, military equipment etc ...
6. Do not use your own vehicle and report to the military unit dressed in military uniform if it has been issued.

The husband said that his old military book was still in Sarajevo; this was the one issued by the former Jugoslav National Army (JNA). He was never issued with a booklet by the authorities of Bosnia-Herzegovina. They were not issuing these during the war. However, he received something from the Croatian army (the HVO) which was in Sarajevo. The Croatian Council of Defence issued a card which only referred to Croatians living in Sarajevo who had their own unit but under the auspices of the Bosnian Government forces. He got involved with the Croatian forces immediately; he had to. He was given something looking like a card which was valid then, the beginning of 1992. It was issued for that unit. Everyone under 65 had to join the military force and then to be allocated to the front line, in fact anywhere where they may be ordered to attend. He served in the HVO but only in Sarajevo itself because they were physically unable to get out of the city due to the siege. He was in a Croatian unit from the beginning of February until the end of December 1992. That unit had to be transferred to the Bosnian army and they could not keep their title. Their headquarters then were that part of Bosnia where the Bosnian Government was in control. Before this group had worked as an independent body under the auspices of the Bosnian Government forces. The change was very painful for people. Practically it looked like the unit was disarmed and forced to join the Bosnian military forces. The wife said that she knew of cases where Bosnian soldiers made Croatians

swallow their crowns (a pendant worn by them). The records relating to this unit were all confiscated by the Bosnian Government.

The registration card issued by the HVO showed he was a participant in their forces; it was removed from his home. The husband said that the headquarters of the HVO in Croatian control, Bosnia would know that he had been one of their soldiers. As an ethnic Croatian he had been forced to join that body at the beginning.

Documents were submitted after the hearing. The first of these was a card dated March 1993. On one side it said "Army Identity Card" under the heading of Croatian Community Herceg-Bosna- Croatian Council of Defence (HVO) with the name and photograph of the applicant. On the reverse side It stated " Army Identity Card which proves that this person is a member of Croatian Council of Defence", with his ID number, unit number, signature of authorised person. It bears a stamp of the Croatian Council of Defence, City Command, Sarajevo.

The Tribunal was also provided with a document which seems to be a release from military service in the Croatian unit of the BiH forces for a period of time in xxxxxxx/xxxxxxxxx1993. It is headed "Republic of Bosnia-Herzegovina-Croatian Community Herceg-Bosna-Croatian Council of Defence (HVO) and below that "Exit Permission". It states the applicant's absence from barracks was approved by a military commander and bears the stamp of the Republic of BiH, Croatian Community Herceg-Bosna, Sarajevo, xxxx xxxxxx xxxxxxx, Defence Unit.

The claims made by the wife and husband concerning his attitude to military service which were stated in the interview and in the RRT applications were read out to him. He said that it was correct that he could not make the decision to join either side in the conflict and he did not believe anything could be solved by force. He said that he had friends amongst all the three ethnic groups; his best man was a Serb. In relation to his attitude he said that half a year ago a soldier in the Bosnian army would have been fighting against Serbs, Muslims and Croatians. In Bihac the Bosnian army fought against both Serbs and Muslims. In Mostar it was against Croatians. He had an objection to fighting against his fellow Yugoslavs, meaning those who are members of these various ethnic groups. He had lived in Sarajevo all his life with these people. He could not see any situation where he could fight in the present conflict at the moment. It is a terrible thing to prosecute war and ask people to leave and say that what was other peoples is mine now. That happened to them. First the shelling, then the robberies and then persecution, then they learnt everything was destroyed, in this case by the Serbs. The husband and wife had an apartment in central Sarajevo but had not lived in it for seven or eight years before they had to move in there.

When there was a later mobilisation it was of a general kind and it was compulsory to take up arms. One had to join to pursue the conflict; it could not be avoided. When he received the Bosnian Government call up, of which evidence has already been given, he avoided it. His reasons were what he had said before, because there was confusion and everyone was shooting everyone. He avoided military service for almost a year. It was his fear of the penalties for evasion of military service which brought him to his present condition; he had to look for medical help in Sarajevo but medicines were not freely available. He said that he had no shelter and nowhere to go. He does not know the particulars of punishment for avoidance of military service, but he knows that

such penalties exist in the form of imprisonment. The wife commented that when the authorities find a man who should be fighting, they take him to the front line so that he gets a bullet from one of the sides they are fighting, or he goes to prison. The husband said that the attitude was that if you are not with them, you are against them; you could not have your own personal opinion about the war. If you do not go to war, the side which has forced you to go could kill you.

The husband said that he always was a citizen of Yugoslavia but considers himself Bosnian (in a broader sense of the term). The wife said that one could be registered in one's town of birth. She believes she was registered while living in Croatia but then it was only one country, Yugoslavia. When she left Sarajevo and had to apply for a passport in order to travel, she considered that by reason of being born there, she would be considered a Croatian citizen. She was told that all Croatians on the territory of former Yugoslavia can get a Croatian passport, but only with the residential address where they came from. To be able to have a *Croatian address, regardless of being born in Croatia or not, one has to possess a property in Croatia. Therefore she was told that she was not a Croatian citizen. She does not satisfy the requirements in Croatia. Both parties were asked regarding the documents they presented by the Croatian authorities. They found in the file where she was born and the passport was issued on the basis of that, but she had to prove that she had been baptised in a Croatian church. She received a domovnica with the Sarajevo address but she was not able to receive the ID card (*Osobna Iskaznica*). The husband presented his personal ID card from Sarajevo and a domovnica was issued on the basis of his Certificate of Baptism. Like the case with the wife, the passport was issued soon after that. She spent two weeks in Croatia before going to London, in both Zagreb and xxxxxxx. He spent only two days, one day in Split and one day in Zagreb. The husband spent a very short time in Croatia because he had a fear of remaining any longer. He was sure that he would have been picked up and been returned to the Croatian forces in Bosnia as this happened to friends of his. The wife said that they had no place to live and nothing to tie them to Croatia.

The secondary applicant had done his national service in towns in Slovenia and Croatia. He performed his reserve training on about ten occasions which lasted from two to seven days, always in Sarajevo. The last occasion was in 1989.

The secondary applicant has no close relatives in Croatia. The primary applicant has some cousins with children there and her mother has returned to Dalmatia. They have no property or other links to Croatia. They obtained a Croatian passport so they would have a travel document and could leave Yugoslavia. It was not possible at that time for anyone to get a passport from the Bosnian authorities in Sarajevo.

WITNESS

The witness to whom reference has already been made gave evidence in support of the applications. She spoke of being told by the husband that he had a call to the army on three occasions. She said that everyone has mutual obligations, including him. She knew that before the war the applicants had friends of all nationalities; the husband was never nationalistic, even when the war started. When most of his neighbours and friends and decided to flee, both the husband and wife had faith in the people there in Sarajevo so that they did not believe what in fact did happen, would happen. They

even tried to convince their friends to stay. Both of them are not militant people; they thought that if they behaved properly that they would not be harmed. But that was not the case. For more than two years they had tried to get the family out of Sarajevo. First the children left, then the wife and then finally the husband. He was against the war from the beginning; he was the one who was so traumatised by what had happened; it is hard for him because he still has family there, he nephews and nieces. The witness spoke of the manner in which the husband had bribed his way out of the city by paying 2,000 Deutschmark, but she commented that there was no guarantee, even in those circumstances, that he would have been able to leave. She spoke of him going through the tunnel and being passed by another soldier who could have easily stopped him. Indeed, the Croatians fighting in Bosnia were not happy that Croatians were leaving Sarajevo and indirectly helping the ethnic cleansing by the Serbs. He met a Croatian brigade when he was fleeing Bosnia, but fortunately a member of that brigade was a neighbour of his and that person gave him false papers. Otherwise he might not have been allowed past and would have been sent back to Sarajevo or, even worse, to the front. There is no place for Croats in Bosnia to go if they do not agree with the war policy; if you do not go and fight and kill you are not accepted. He has even been told by Croatians here as well as in Croatia that his place is there to protect Sarajevo, not in this country.

There is also a handwritten statement by the applicant in which she repeats substantially the history of their difficulties since the beginning of the war.

DISCUSSION OF CLAIMS AND FINDINGS OF FACT.

The primary applicant asserts a claim on the grounds of persecution for reasons of race and nationality; the secondary applicant asserts a claim on the same grounds but in addition says that he is at risk of persecution on the grounds of political opinion in that he holds a conscientious objection to military service in the war in Yugoslavia against any of the nationalities who used to make it up but particularly in the Bosnian government forces from whom he has already received a call-up notice.

I found both applicants to be truthful and credible witnesses whose account of their suffering and flight is consistent with the historical record of the events in Bosnia and its capital since 1992. I have also been provided with a number of authentic documents which evidence that the secondary applicant was a member of a Croatian unit which was within the Bosnian government army but also a part of the HVO (Croatian Council of Defence), the militia led by Mate Boban. The two call-up notices from the Sarajevo Internal Defence Unit of the Army of the Republic of Bosnia-Herzegovina corroborate his evidence that he was indeed required to serve in that armed force. I accept that he managed to avoid what would have been in all probability forced conscription in the period leading up to his departure from Sarajevo. The evidence which the secondary applicant gave at the hearing that he was in the Croatian unit until it was absorbed into the Bosnian army at the end of 1992 is at variance with the two documents from the HVO which he produced. In all the circumstances and in view of the fact that he supplied the documents in question which highlighted the discrepancy I do not place any weight upon it.

I have no hesitation in accepting the secondary applicant's contention and that of his wife that they have always been strong believers in a multi-ethnic Bosnia and have,

despite the forced division of the country into warring ethnic blocks, strived to maintain that belief. I accept that they sought to persuade friends belonging to all ethnic groups to stay in Sarajevo in the first year of the conflict hoping that things would improve but that ultimately they were forced to make arrangements so their children could leave and finally themselves.

The applicants' witness who was not present in the hearing room when they gave their evidence made the telling point when referring to the secondary applicant that he was never a nationalist and only gradually did he face the reality of the breakdown of the multi-ethnic community in which he had grown up. I accept this picture of the secondary applicant as confirming a genuinely held objection which I find he holds to taking up arms against former fellow citizens of Bosnia of whatever nationality including persons of his own Croatian ethnicity. The personal situation of both these applicants is really a paradigm of the tragedy which has befallen the inhabitants of Sarajevo and their attitudes a reflection of the mutual tolerance amongst different nationalities for which that city was famous. The secondary applicant's state of clinical depression which the medical report tendered evidenced further suggests to me that his natural tendency is to internalise the difficulties he was facing rather than to identify external enemies as the source of his problems.

Before proceeding to examine the applicants' claims in relation to Bosnia of which country the secondary applicant, and possibly the primary applicant are nationals, and if this should prove not to be so in either of their cases, of which both certainly were former habitual residents until their flight, it is necessary to ascertain what legal connection in terms of citizenship or nationality each of them possesses to the Republic of Croatia.

Country of reference

If the applicants are nationals of Croatia as well as citizens or former habitual residents of Bosnia they must first seek protection from Croatia unless they have a valid reason, based on a well-founded fear, for not availing themselves of the protection of that country. The second paragraph of Article 1A(2) of the Convention is as follows:

In the case of a person who has more than one nationality, the term 'country of nationality' shall mean each of the countries of which he is a national, and a person shall not be deemed to be lacking the protection of the country of his nationality if, without any valid reason based on a well-founded fear, he has not availed himself of the protection of one of the countries of which he is a national

The ***UNHCR Handbook on Procedures and Criteria for Determining Refugee Status*** in reference to this part of the definition states at paragraph 106:

This clause, which is largely self-explanatory, is intended to exclude from refugee status all persons with dual or multiple nationality who can avail themselves of the protection of at least one of the countries of which they are nationals. Wherever available, national protection takes precedence over international protection.

The authoritative text, ***The Law of Refugee Status***, James C. Hathaway, Butterworths Canada 1991 makes the following point in relation to the operation of the Convention and Protocol to persons who may be nationals of more than one country (at page 57):

It is an underlying assumption of refugee law that wherever available, national protection takes precedence over international protection. In the drafting of the Convention, delegates were clear in their view that no person should be recognised as a refugee unless she is either unwilling or unable to avail herself of the protection of all countries of which she is a national. Even if an individual has a genuine fear of persecution in one state of nationality, she may not benefit from refugee status if she is a citizen of another country that is prepared to afford her protection

It is clear that where an applicant has more than one country of nationality he is obliged to establish his unwillingness or inability to avail himself of the protection of each of his countries of nationality before he can be considered to be a Convention refugee. (see Article 1 A (2))

In refugee law there is also a further question which needs to be answered, that is, whether formal or legal nationality affords protection in reality. It is this latter concept which lies at the foundation of the Convention.

In this regard Hathaway states at page 59:

The major caveat to the principle of deferring to protection by a state of citizenship is the need to ensure *effective* (author's emphasis), rather than merely formal, nationality. It is not enough, for example that the claimant carries a second passport from a non - persecutory state if that state is not *in fact* (author's emphasis) willing to afford protection against return to the country of persecution. While it is appropriate to presume a willingness on the part of a country of nationality to protect in the absence of evidence to the contrary, facts that call into question the existence of basic protection against return must be carefully assessed.

These words must be kept well in mind in any consideration of the respective claims in this case.

In terms of the relevance of the applicant having a Croatian passport, to the question of nationality, paragraph 93 of the ***Handbook*** is a helpful stating point:

Nationality may be proved by the possession of a national passport. Possession of such a passport creates a prima facie presumption that the holder is a national of the country of issue, unless the passport itself states otherwise. A person holding a passport showing him to be a national of the issuing country, but who claims he does not possess that country's nationality, must substantiate his claim, for example, by showing that the passport is a so-called "passport of convenience"... However, a mere assertion by the holder that the passport was issued to him as a matter of convenience for travel purposes only is not sufficient to rebut the presumption of nationality.

This view is supported by R.S.Lancy in an article ***The Evolution of Australian Passport Law***, Volume 13, Melbourne University Law Review, June 1982, where the learned author states at page 432-433:

International usage seems to suggest that passports issued by various governments are not conclusive evidence that the holder is entitled to the national status entered upon a passport document. However, as a matter of day-to-day practice, a passport is treated by consular offices of the issuing state, and by officials of the state which is being visited by the holder, as prima facie evidence that the holder is entitled to the national status endorsed on the passport. Being only prima facie evidence it is subject to displacement by other compelling evidence.
...Arguably,..., in the ordinary current sense of the term, passports in themselves confer no right recognised in international law. Whilst they may be evidence of national status, the rights to protection evidenced in international law flow from actual national status, not the evidence by which that status is conclusively established.

It is the evidence of both applicants that they obtained their Croatian passports so they could travel overseas because it was not possible to obtain travel documents from the Bosnian authorities at that time. They clearly do not consider themselves citizens of Croatia and although the obtaining of a Croatian citizenship certificate was a necessary step in the process of securing a Croatian passport I can infer that the husband did not intend thereby to obtain Croatian citizenship. In the case of the wife it may be that she was already a Croatian citizen by birth. I accept that they regarded themselves as citizens of the Republic of Bosnia-Herzegovina.

The description which each of the applicants gave of the stages of the process and the requirements to obtain their Croatian passports involving as it did the grant of a domovnica (a Croatian citizenship certificate) is consistent with all available information. It is their credit that they made no attempt to obfuscate the issue.

However, the presumption referred to in the Handbook is in fact precisely that: a presumption only. This conclusion is subject to rebuttal in any particular instance. In *Zidarevic v. Canada (Minister of Citizenship & Immigration)* [1995] 27 Imm. L.R. (2d) 190, the Federal Court of Canada (Dube J) considered a case of a Bosnian Croat holding a Croatian passport which had been issued to him for travel purposes - a case very like the present situation of both applicants. The Court held that the Immigration and Refugee Board had erred in law in regarding this passport as being decisive evidence of Croatian citizenship. His Honour stated:

A passport of convenience does not a citizen make.

I accept for the same reasons as were enunciated in decision V94/02696 that the primary and secondary applicant having established their antecedents to the satisfaction of the Croatian authorities acquired citizenship under the relevant Croatian law; the primary applicant formalised her citizenship by proof of birth in Croatia and baptism, the secondary applicant obtained it by proof of ethnicity and baptism.

There is a weight of information which allows the conclusion to be drawn that Croatian citizens holding a domovnica with an address in BiH are not considered full citizens and do not have legal domicile in Croatia. They are ineligible for the Croatian ID card unless they have obtained a permanent lodging (domicile). It is only possession or renting of real estate in Croatia which qualifies a person for the benefits of full citizenship, including voting rights in local and presidential elections, access to

the social welfare system and employment assistance.(UNHCR advice 27 October 1994)

That advice in dealing with the question how the *Domovnica* (Croatian citizenship Certificate) is acquired stated:

Croatian citizenship may be acquired by ethnic Croats (art 3). Bosnian Croats living outside of Croatia may obtain Croatian Citizenship if they meet certain requirements (art 16), such as familiarity with the Croatian language and culture (art 8). Bosnian Croats applying for *domovnica* must support their application with at least one of the following documents: 1. a birth certificate; 2. baptism certificate; 3. any other public document in which it is clearly stated that he or she is Croat by origin. Certain names are clearly Croatian names...
Although the *domovnica* is proof of Croatian citizenship, a Bosnian Croat is treated differently depending on the legal domicile listed on it. Hence, Bosnian Croats with legal domicile in Bosnia and Herzegovina (BiH) do not receive equal treatment to those domiciled in Croatia proper.

The implications of this are dealt with in the following sources.

I note, first, the following information from the UNHCR on 2 December 1993:

Normally, draft age male citizens of the Republic of Croatia do not risk being sent to Herzegovina although reports have been received suggesting that Croatian males from the Dalmatian coast may be subject to pressure to cooperate with HVO (Bosnian Croats) in Herzegovina. An evaluation of the circumstances of the individual case would therefore be required.

The article, "Croatian draftees bound for Bosnia", *Peacenet World News*, 8 January 1994 noted that hundreds of Croat males of Bosnian descent have been pressured, and indeed forced, to fight for the Bosnian Croat Army in Bosnia. This is of direct relevance to the secondary applicant.

In "The Former Yugoslavia: Refugees and War Resisters", *RFE/RL Research Report*, 24 June 1994, Fabian Schmidt confirms the reports of forced recruitment of Bosnian Croats within Croatia to fight with Bosnian Croat forces in Bosnia.

The following passage from a report on a field trip to Zagreb by the Senior Migration Officer with the Australian Embassy in Vienna, dated 28 April 1995, is instructive:

An agreement has been entered into between the Croatian and Bosnian governments for the return from Croatia of 50,000 Bosnian citizens of Muslim and Croatian-origin. This was claimed to include Bosnian Croatians who have taken up Croatian citizenship and who have Croatian passports. These persons do not have Croatian ID cards. While there will not be any forced returns, those who fail to return voluntarily lose their refugee status, privileges, emergency assistance etc. Also Croatian citizens are eligible for military call up. These measures effectively force many such persons to return to BIH.

This paragraph reflects information from the UNHCR; the reference to Croatian citizenship and passports should be noted. The report continues:

Ethnic Croatians from BIH who take up Croatian citizenship have the same rights and entitlements as persons born in Croatia ie the issue of a Croatian passport; work and study rights and access to State health care. The level of health care depends on whether the individual is employed or not.
Evidence required for the granting of Croatian citizenship is the standard documentation such as birth and baptismal certificates. In cases where documentation is not available because of loss or destruction, declarations from relatives in Croatia and from persons who know the applicant are accepted.
Ethnic Croatians from BIH who have taken up Croatian citizenship can be returned to federation areas as they have the care and protection of the state of the Federation of Bosnia and Herzegovina (constituted in March and established in May 1994), unless they can establish that their residence was destroyed and they are unable to resume normal life. Each case is determined in consultation with the local authority in BIH.
There is no difference in the passport issued to Croatian born citizens and BIH born citizens. Residence is included in passports and persons from BIH who do not have residence in Croatia are required to record their BIH residence. To qualify for Croatian permanent residence a non Croatian must have legally resided in Croatia for a specified period and possess/occupy an approved dwelling. Refugees who take up Croatian citizenship do not lose their refugee status until they obtain resident status.
Croatia will accept the return of any Croatian passport holder irrespective of country of origin.

Further on, the report states:

In effect most Bosnian Croatians, with Croatian passports are not able to meet the residential requirements and therefore do not have ID cards.
While there may be no legal requirement that an individual must have an ID card for employment our advice is that few employers will engage someone without an ID card except in the "black economy" where such persons are exploited.

DFAT cable GE104557 of 1 May 1995 from the Australian Embassy in Geneva reported advice from UNHCR as follows:

Bosnian Croatians returned from Europe, and carrying Croatian passports, were said to be refused protection by the Croatian authorities and returned to Croatian areas of Bosnia. There they were immediately forced to carry out war work. UNHCR asked that states not return such people even if they were carrying valid Croatian travel documents. UNHCR said that the Bosnian and Bosnian Croatian authorities had reached an agreement on voluntary return with dignity of the refugees and displaced persons. UNHCR was not a party to the agreement and was concerned that key safeguards, involving amnesties and military service requirements, were missing. When questioned, UNHCR acknowledged that the Bosnian government and the Croatian government wanted their citizens to return from abroad. Their motives were seen to be purely military.

In the earlier case to reference has been made the applicant's solicitors submitted an opinion from Mrs E.C. Hawkesworth, Senior Lecturer in Serbian and Croatian Studies

at the University of London, which included the advice that "A Croatian passport does not guarantee the right to residency or work".

The UNHCR, issued on 27 October 1994, which I referred to at the inception of this discussion notes that Bosnian Croats not domiciled in Croatia proper do not receive equal treatment with other Croatian citizens. The UNHCR said that "in practice the Croatian passport is not proof of Croatian citizenship". Regrettably, this comment was not elaborated on, but the UNHCR went on to say:

Mr Rebic, Head of ODPR [it is not stated what this acronym stands for], told UNHCR that Bosnian Croats having a Croatian passport would not be forcibly returned to [Bosnia], but that they would not be considered Croatian citizens. Bosnian Croatian returnees reported to UNHCR, however, that upon arrival in Croatia the authorities have turned down their registration request (which in practical terms means no admission to collective centers and no assistance). Their situation could raise protection concerns in some cases, such as forcible return and illegal status.

In conflict with this appraisal is advice received from the Croatian Ministry of Internal Affairs that 'there is no difference in the passport issued to Croatian born citizens and BiH born citizens ...Croatia will accept the return of any passport holder irrespective of country of origin' (Report on Field Trip to Zagreb by Senior Migration, Vienna, 28 April 1995). I should say that in relation to this matter and other areas of contention I prefer the evidence from independent and more reliable sources like UNHCR than that emanating from the government of Croatia.

I note that in referring to ethnic Croatians from Bosnia the UNHCR material seems to be making a distinction between people in that category who take up Croatian citizenship and persons born in Croatia. If that was the only inference open to me on the information available then it might well be that the country of reference for the wife would be Croatia and that of the husband Bosnia. In light, however, of the significance of Bosnian residence to the question of class of citizenship acquired or possessed by a person, I consider that the inference is also open from the existing material that the terms ethnic Croatians from Bosnia or Bosnian Croat do not exclude Croatian born Bosnian permanent residents like the primary applicant.

Since the point is reached at which the grant of the *domovnica* means that there is no difference between the passport issued to Croatian born and Bosnian born citizens it is the fact of BiH residence appearing on that passport (and on the *domovnica*) which is critical to the acquisition of full citizenship. I am unable to draw the conclusion on all the material that the primary applicant will be treated any differently from the secondary applicant given their common BiH residence.

In the light of all the above passages I consider that in the case of ethnic Croats like the applicants whose Croatian passports show their place of residence as being in Bosnia, notwithstanding that they are Croatian citizens, they do not have the right to reside in Croatia, are liable to be deported back to Bosnia and do not have the protection of the Croatian Government. Their ability to work in Croatia is also restricted in practice, if not in law.

I accept as correct the excellent exegesis in decision V94/02696 on the subject of the legal relationship between Croatian citizenship law and international law in the context of the appropriate country of reference for ethnic Croats from Bosnia.

It was stated in that decision by the member (Dr. R. Hudson) that:

This Tribunal, in deciding the question whether the applicant is a citizen of Croatia, is in the position of a municipal court rather than an international court and must therefore, in the normal course of events, settle the question by an examination of the domestic law of Croatia rather than by a direct application of principles of international law. However, given the principles of statutory interpretation referred to above and the nature of the Convention as an international human rights instrument, as well as the principles referred to by members of the High Court in *Sykes v. Cleary*, and having regard to Article 1 of the Convention on Convention on Certain Questions Relating to the Conflict of Nationality Laws with its qualifications to the recognition of foreign nationality laws, I find that it is appropriate to apply Croatian citizenship law only to the extent that it is consistent with relevant principles of international law.

In the earlier decision V94/02162 I concluded on analogous but less expansive grounds that the applicant was not a Croatian citizen for Convention purposes. I adopted the reasoning on this subject in the decision V93/1087 (W.G.Gilbert-Member).

One of the principles of international law, as expounded in **The Nottebohm Case (Second Phase)** [1955] ICJ 4, which was dealt with in all the RRT decisions to which I have referred, is that nationality should reflect a real connection between the individual and the State, "a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties". That principle was violated in the present case as regards the secondary applicant who was not even born in Croatia. He can not be said to have that connection with Croatia.

As stated by Weis (Nationality and Statelessness in International Law, 1956, at p. 49):

One of the elements inherent in the concept of nationality is the right to settle and to reside in the territory of the State of nationality or, conversely, the duty of the State to grant and permit such residence to its nationals.

The right to reside in the country of which one is a national is similarly infringed in the case of both applicants.

For these reasons, as elaborated upon in the decision V94/02696 I find that the applicants are not nationals of Croatia for Convention purposes notwithstanding the Croatian citizenship law which makes them Croatian citizens for domestic purposes within Croatia. Hence Croatia is not an appropriate country of reference for the purposes of the Convention.

In terms of the identical manner in which their respective passports were acquired which first necessitated the grant of a so-called citizenship certificate (*Domovni*ca) I can see no material difference between the position of both applicants. Equally they are each not recognised as having the full incidents of citizenship by reason of their

prior permanent residence outside Croatia in Bosnia, and the Republic of Croatia considers it has the right to expel persons in each of these categories to the territory of another sovereign State of which they are also putative nationals.

One essential point needs to be stressed. There is on any view of the matter a logical contradiction between the assertion made by Croatia that an ethnic Croat, Bosnian born/permanent resident of Bosnia or Croatian born/permanent resident of Bosnia holds its citizenship, which on any view of the principles of nationality law connotes a right to remain within the country of citizenship, the conferring of full citizenship rights and the affording of protection by the State, and the position that Croatia takes that it can return such persons to those areas of Bosnia-Herzegovina under Muslim-Croat control i.e to a foreign country notwithstanding their claimed possession of Croatian citizenship.

The secondary applicant, having been born in Bosnia, presumably has Bosnian citizenship, as the Bosnian citizenship legislation provides for citizenship by birth on Bosnian territory. Bosnia also allows dual citizenship, so that he would not be excluded by virtue of being a Croatian citizen under Croatian law. In any case, if by chance he is not a Bosnian citizen, then Bosnia is clearly the country of his former habitual residence. It is clearly the country of former habitual residence of the primary applicant, if not of nationality. Therefore, Bosnia is the appropriate country of reference for the purposes of both applications.

Military Service

The secondary applicant raises a claim to refugee status based on his conscientious objection to military service.

Liability to military service in the BiH army or Croat/Serb militia for person of military age

The UNHCR advice in cable BG61886 of 15.07.94 indicates that persons of military age are liable for enforced armed service. UNHCR reiterated this advice in its *Response to DIEA Australia* (10/08/94).

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 Herzegovina 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.

More specifically, Fabian Schmidt, a specialist in Slavic and Balkan studies, has written for *Radio Free Europe/Radio Liberty* ("The Former Yugoslavia: Refugees and War Resisters". *Radio Free Europe/Radio Liberty*, 24/06/94, 47-54) that there is evidence that Bosnian Croats are liable for conscription into the Bosnian Croat militia.

Croatian men of Bosnian origin have also faced the possibility of being conscripted to serve in the Bosnian Croat militia, the HVO. As recently as December 1993 such individuals received HVO draft notices. Croatian officials maintain that Croatians serve only as volunteers in Bosnia, but the Croatian peace movement believes a number of Bosnian Croats have been drafted in this way... (Schmidt, 24/06/94: p.51)
...there were... press reports early this year that young men were being rounded up and shipped out to Bosnia [from Croatia].
These forced recruitments are reported to have taken place in December, at a time when the self-proclaimed Croatian Republic of Herceg-Bosna had introduced harsh measures aimed at punishing deserters and draft evaders. These measures included the withholding of social benefits from the families of these men, even in Croatia, and publishing the names of deserters.

Objection to military service

The starting point is that it is an internationally recognised right of a government to require military service by its citizens and to impose penalties for non-compliance or military desertion. (see ***Handbook on Procedures and Criteria for Determining Refugee Status***, Geneva, January 1992 at para. 167 (***the Handbook***)). I note the comment in Stoilkovic v Minister of Immigration (Federal Court, Olney J, 33 ALD 379, but referred to in Unreported, 7 September 1993 at p. 5), on the relevance of the paragraphs concerning Deserters and persons avoiding military service in the ***Handbook*** to matters in issue before the Court similar to what I am considering here.

A person will not be a refugee if his only reason for refusing military service is his dislike of such service or fear of combat (see ***Handbook*** at para. 168).

The ***Handbook*** states, correctly in my opinion, that :

Fear of prosecution and punishment for desertion or draft-evasion does not in itself constitute well-founded fear of persecution under the definition. " (at para. 167)

However, where the objectives of the military activity in question are contrary to international law and additionally in such a case where there is a failure to recognise the legitimacy of conscientious objection and to provide for an appropriate and proportionate non-combatant alternative, then refusal to perform military service may ground a claim to refugee status. This can be described as a partial conscientious objection to military service.

The Handbook states concerning the issue of conscientious objection:

170. There are, however, also cases where the necessity to perform military service may be the sole ground for a claim to refugee status, i.e. when a person can show that the performance of military service would have required his participation in military

action contrary to his genuine political, religious or moral convictions, or to valid reasons of conscience.
Goodwin-Gill puts the matter in this way:
Objectors may be motivated by reasons of conscience or convictions of a religious, ethical, moral, humanitarian, philosophical, or other nature...Military service and objection thereto, seen from the point of view of the state, are issues which go to the heart of the body politic. Refusal to bear arms, however motivated, reflects an essentially political opinion regarding the permissible limits of state authority:it is a political act. The "law of universal application" can thus be seen as singling out or discriminating against those who hold certain political views. (The Refugee in International Law, pp. 33-4)

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

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

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

[n]ot every conviction, genuine though it may be, will constitute a sufficient reason for claiming refugee status after desertion or draft-evasion. Specifically, [i]t is not enough for a person to be in disagreement with his government regarding the political justification for a particular military action.

Not all the claims of selective objectors should be excluded. UNHCR notes:

Where, however, the type of military action, with which an individual does not wish to be associated, is condemned by the international community as contrary to basic rules of human conduct, punishment for desertion or draft-evasion could, in the light of all other requirements of the definition, in itself be regarded as persecution. (para 171)

But as the UN Report states:

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

In a particular case then an entitlement to refugee status will be founded by a reason of conscience for not being associated with military action by armed forces whose conduct is condemned by the international community as contrary to the basic rules of

human conduct. A circumstance such as this will arise where the government in question is perpetrating the acts in question or is unwilling or unable to control those individuals or groups engaged in the offending conduct, and the applicant can show a reasonable possibility that he will be personally forced to participate in such conduct (see K.J.Kuzas,"Asylum for Unrecognised Conscientious Objectors to Military Service: Is There a right not to fight?", Virginia Journal of International Law, vol 31, 1991), directly or indirectly, (see Zolfagharkhani 20 Imm.L.R.1), or that he will be punished for refusing or avoiding military service.

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

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

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

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

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

Ethnic Affairs (1991) 102 ALR 339 and *Jagpal Singh Benipal v. Minister of Foreign Affairs and Immigration and others* (High Court of New Zealand, 1985). The *Ciric* case is of persuasive value in the present situation, and, while I share the views of my fellow Tribunal member that one could wish that the court had devoted more time to explaining its reasoning, the decision in that case provides strong support for the conclusion I have reached in this application.

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

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

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

Nature of military action

War between Muslims and Croats in Bosnia Herzegovina broke out in May 1993 and lasted the better part of a year. The war was described as "often grisly" by Radio Free Europe/Radio Liberty (RFE/RL, 01/04/94) and serious abuses of human rights by both sides have been documented both by Helsinki Watch in *Bosnia-Hercegovina: Abuses by Bosnian Croat and Muslim Forces in Central and Southwestern Bosnia-Hercegovina* (September 1993) and by Amnesty International in *Central and Southwest Bosnia-Herzegovina: Civilian Population Trapped in a Cycle of Violence* (January, 1994). Helsinki Watch reported that paramilitary forces were active alongside both the Bosnian Croat HVO and the predominantly Muslim Bosnian Army (p.2). There are also reports that draftees from Croatia were compelled to fight in central Bosnia Herzegovina in mid 1994 (Peacenet World News Service, 17/06/94).

Amnesty International in its Annual Report for 1994 (dealing with the events of 1993) stated that:

The war became three-sided in the Spring with the almost complete breakdown of the fragile alliance against the Bosnian Serbs between the Bosnian Croat forces-the Hrvatsko Vijece Obrane (HVO) - and the largely Muslim Armija Bosna i Herzegovine... Bosnia's State President,...Izetbegovic,..., was left still more closely associated with the Muslim nationality alone, as were the Bosnian government and the armed forces.
Fierce fighting continued throughout the year on various fronts. The siege of Sarajevo by the Vojske "Republike Srpske" (VRS), the army of the " Serbian Republic ", persisted throughout the year...
Deliberate and arbitrary killings were widespread and committed by all sides...In April Muslim soldiers, apparently paramilitaries, reportedly shot dead nine Croatian men, including civilians and disarmed HVO soldiers, after taking control of the village of Trusina near Konjic. Earlier in the attack two Croatian children were injured as a Muslim soldier fired indiscriminately into a room... [See also Helsinki Watch, September 1993] More than 35 Croats, mostly civilians, were killed by Armija BiH forces in the village of Uzdol near Vitez in September; most of them were burned in their homes.
(It should be noted that the Report catalogues a whole series of atrocities carried out by the armies and the paramilitaries of each of the warring sides; references here are specifically relevant to the situation of Bosnian Croats).
...There were allegations of ill-treatment and appalling conditions in Bosnian government-controlled camps. Many of the detainees taken by all sides were apparently held as hostages for exchange with another side. People were also reportedly imprisoned for desertion or for attempting to avoid mobilisation onto the contending armed forces. Large numbers of men were known to have sought asylum abroad because of their objections to service in one or other of the armies; many have refused on conscientious grounds. Conscientious objectors may have been among 1000 deserters reported to have been sentenced to suspended prison sentences, or up to five years imprisonment, by the Bosnian Serb military court in Banja Luka...As well as prosecuting men from their own national group, on occasion all sides also reportedly either forcibly mobilised men who were under their control, or made detainees undertake work close to front lines...
Many thousands of people were forcibly expelled from their homes during the year...

The US State Department Country Reports on Human Rights Practices for 1993 deals in some depth both with the general situation in Bosnia and human rights violations, but also on numerous occasions refers to the treatment of ethnic Croats and the egregious actions of the military forces of the Bosnian government and the Bosnian Croat army (HVO) in addition to those of the Bosnian Serb Army (BSA).

Human rights abuses in Bosnia occurred in an environment of war, occupation, a struggle for territory and power, the breakdown of a multiethnic system, and efforts to force the duly elected Bosnian Government to accept an ethnic division of the State. The Bosnian Government is Muslim-dominated but continues to support a multiethnic society, and elected officials are drawn proportionally from all national groups...
As BSA units swept through northern and eastern Bosnia in 1992, Karadzic declared the establishment of the "Republika Srpska" or "Serb Republic." Techniques

employed by the BSA, which Serbs themselves referred to as " ethnic cleansing," included: laying siege to cities and indiscriminately shelling civilian inhabitants; "strangling" cities (i.e., withholding food deliveries and utilities so as to starve and freeze residents); executing noncombatants; establishing concentration camps where thousands of prisoners were summarily executed and tens of thousands subjected to torture and inhumane treatment; using prisoners as human shields; employing rape as a tool of war to terrorise and uproot populations; forcing large numbers of civilians to flee to other regions; razing villages to prevent the return of displaced persons; and interfering with international relief efforts, including attacks on relief personnel...

In April periodic skirmishing between the Bosnian government army and the militia of Mate Boban's Croatian Defense Council (HVO), the main representative of the Bosnian Croat minority, escalated into outright war. Regular Croatian army units, originally in Bosnia under a bilateral military cooperation pact, fought on the side of Boban's forces; Croatian authorities also offered materiel to the HVO but significantly less than that which Serbian authorities provided to the BSA.

The trigger for the surge in government-HVO fighting was Boban's insistence on the creation of a separate Bosnian Croat "Republic of Herceg-Bosna" within Bosnia and Herzegovina. Mostar was to be its capital, and government troops in the region were told to submit to HVO command. When the Government refused, the HVO blockaded Mostar, attacked it, and brutalized, confined, and raped its Muslim residents in an assault containing some of the most extreme human rights abuses in Bosnia and Herzegovina in 1993.

The HVO also engaged in vicious acts in central Bosnia. In April the HVO killed up to 100 noncombatants in the central Bosnian hamlet of Ahmici and then razed the village. In October it massacred at least a score of Muslim civilians at Stupni Dol. The HVO and BSA engaged in localized collaboration on the battlefield in the central Bosnian enclave of Maglaj, creating conditions of extreme deprivation there.

Bosnian government forces perpetrated a number of abuses and atrocities in 1993, for the most part against the Bosnian Croats. In September government troops killed dozens of Croat civilians at Uzdol; the HVO charged that many more government massacres not yet investigated occurred in central Bosnia. As the tide in the fighting turned in favour of the Government in the fall, tens of thousands of Bosnian Croats fled or were driven from their homes, most going either to Croatia or to parts of Bosnia under HVO control. In November government forces killed two Franciscan friars in Fojnica and openly looted Bosnian Croat-owned shops in Vares..

c Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

In spite of intense international pressure to close the prison camps discovered under BSA control in mid-1992, there were probably still scores of detention facilities for civilians, including women, children, and the elderly, in operation throughout Bosnia at the end of 1993. As many as 260 camps have been known to exist at one time or another during the conflict. In January 1993, the U.S. Government estimated that there were 135 Serb-run detention centers in Bosnia. Many of these formed part of the penal system established in BSA-held areas in mid-1992; a significant number in this network were closed by the end of 1993. Many HVO and Muslim camps, numerous in the summer and fall of 1993, were also closed by the end of the year. Because camps closed down and reopened depending in part on the status of negotiations and the presence of international observers, it was difficult to estimate the numbers of persons detained...

Camps with poor living conditions in 1993 included those in Batkovici, Kamenica, Trnopolje, and Doboj (operated by the BSA); Rodoc, Otok, and Dretelj (operated by

the HVO); and Zenica and Konjic (operated by the Government). At Dretelj, perhaps the most notorious camp of 1993, the UNHCR found prisoners in conditions of "appalling brutality and degradation," with broken ribs and fingers, bruises, and heart irregularities. Amnesty International said prisoners at Dretelj were so cramped that they could not lie down. Beatings and torture were reported at BSA camps in Manjaca, Batkovici, and Prijedor in the spring, at HVO camps in Rodoc and Jablanica in the summer, and at government camps in Visoko and Konjic, also in summer. Summary executions and deaths due to torture or neglect were attested to in 1993 and almost certainly continued through December. Individuals detained in 1993 told of meager and sometimes poisoned or spoiled rations, malnutrition, poor or nonexistent sanitation, withholding of medical care, forced labor (performed by women as well as men) including trench-digging on the front lines and removal of corpses and the wounded, forced blood donations, overcrowding, and lack of amenities such as bedding. There were scattered reports of groups of prisoners being conscripted into enemy armies and of prisoners of one nationality being sold as conscripts from the second to the third nationality. The three sides were accused of using prisoners as human shields...
Bosnian Muslim women in the spring and summer accused HVO and BSA soldiers of perpetrating mass rape. The UNHCR noted that HVO soldiers may have raped 100 or more women, some in gang-rape situations; many of the rapes occurred in connection with evictions from Mostar in mid-1993 and fighting near Vitez earlier in the year. Reports of rapes by Bosnian Serb civil and military police and soldiers continued, but the number of such charges was lower for 1993 than for 1992, when the BSA first practiced mass rape as a tool of war. Reports from Brcko, Nerici, Stolina, Skijana, and Grcica described the continuing confinement and sexual abuse of a total of at least 130 young Muslim women by the BSA. UNPROFOR troops were accused of frequenting some locations where Muslim women were held. Bosnian Croat women charged government troops with raping them in Mostar and Bugojno; the Bosnian Serbs also said government soldiers had raped Bosnian Serb women. International observers were not able to corroborate most accusations because access to victims was very limited.

The nature of the military actions waged by the various protagonists but particularly for the purposes of this application the Bosnian government and Bosnian Croat forces in which the secondary applicant may be required to fight is further described under the heading:

g. Use of Excessive Force and Violations of Humanitarian Law in Internal Conflicts
Violations of humanitarian law and international conventions on the treatment of civilians in time of war were widespread and egregious. Many human rights violations committed by the BSA occurred as part of specific policies to expel Muslims and Croats from areas the Serbs desired for themselves. The HVO engaged in localized efforts to drive Muslims away from territories they sought to occupy. Other abuses took place on a more haphazard basis. Paramilitaries, vigilantes, "weekend warriors," criminal gangs reporting to local warlords, and civilian mobs were responsible for numerous instances of crimes against civilians. Atrocities detailed in this section include indiscriminate attacks against civilians; forced population movements; interference with the delivery of humanitarian relief, including attacks on international relief workers; interference with utilities and infrastructure; and forced conscriptions...

HVO attacks, particularly on Muslims, increased dramatically in 1993. The HVO slaughtered approximately 100 Muslims in the central Bosnian village of Ahmici in April. Masked Croats killed Muslim civilians in Vitez in house-to-house fighting later that month. In September, the United Nations said HVO shelling killed 10 to 15 Muslims a day in Mostar. The HVO in the spring also reportedly shot two Serb women who were part of a small contingent of Serb inhabitants of Mostar forced out of the city and told to walk to BSA-held positions. In October between 25 and 50 Muslim villagers, including women and children, were killed by the HVO at Stupni Dol, near Vares; the remainder of the town's population was taken captive and the village entirely destroyed. The HVO shelled UNHCR officials attempting to gain access to Stupni Dol for 3 days before finally letting medical examiners through. Later in the month, the Bosnian Government claimed the discovery of a mass grave in Tasovcici containing the bodies of alleged victims of HVO attacks in Stolac and Capljina.

Government troops also targeted civilians in 1993, particularly Bosnian Croats. Thirty Bosnian Croat civilians were massacred at Uzdol in September. Survivors of the attack said they were used as human shields. Government soldiers murdered two Franciscan friars in Fojnica in November. The HVO charged the Government with killing more than 100 other Bosnian Croat civilians between April and October in a variety of central Bosnian locations including Trusina, Doljani, Bugojno, Jakovice, Kiseljak, and Kopijari. Witnesses described torture preceding the killings and mutilation afterward. The United Nations is investigating the charges. Government soldiers killed a score of Bosnian Serb civilians in the village of Skelani, in the Srebrenica pocket, in January, and shot several Bosnian Serbs in Sarajevo, including two elderly people being evacuated...
The three sides practised forced conscription to a limited degree in 1993. In some BSA-held areas, those who refused were dismissed from work and detained. Some families of men who refused conscription were also dismissed. In April the BSA forced evacuation flights from Srebrenica to divert to BSA-held Zvornik, where evacuees were taken prisoner and threatened with conscription...

The Report continues:

Freedom of Movement Within the Country, Foreign Travel, Emigration, and Repatriation
The wartime situation, coupled with mass detention and expulsion,...interfered with the free movement of millions of Bosnians. The changing front lines made many others virtual hostages within broad geographic areas. Sarajevo was the most heavily populated island of "hostages" in Bosnia...
In some cases citizens of whole villages were given orders to remain within specified confines or be shot or fined in order that a pool of people to perform labour and take part in prisoner exchanges could be maintained...

Information notes on former Yugoslavia from the office of the UNHCR Special Envoy for former Yugoslavia, (No. 1/95, January 1995) stated that the practice of forced labour at the front continues.

[In] December...Hundreds of Croats and Muslims are forcefully detained, beaten and taken to Glamoc and Grahovo for frontline forced labour for the Bosnian Serb

military. Several men reportedly die from beatings and wounds suffered while serving forced labour.

This last piece of information bears upon the risk which the secondary applicant faces as a military age male returning to a country where the fortunes of the various sides to the conflict remain unpredictable.

Risk of persecution

In the circumstances of this case I am prepared to draw the inference that the secondary applicant would be dealt with as a person who had evinced an intention to escape abroad to avoid military service and has continued to remain abroad for that purpose. I conclude he would be so regarded by the Bosnian Government military authorities.

Having regard to all the available information to me I find that there is a real chance of serious punishment awaiting the secondary applicant if he returns to Bosnia-Herzegovina, on the basis of his failure to respond to his call-up notice in 1994. I am satisfied that there is such a chance of persecution by reason of the failure to report for military service in the Bosnian government army. I have no doubt that having been called up by the Bosnian government army and having left to avoid participation in the war that the secondary applicant will be treated as a deserter. He also faces the possibility of recruitment into the Bosnian Croat army of which he had in the past been a member. Indeed there is a strong probability that they would have a record of his previous service and he would be subject to a call-up into the HVO for that reason alone. I am satisfied on the basis of the country information from which I have freely quoted that both the Bosnian government army and the HVO have been engaged in an internationally condemned conflict to which the secondary applicant holds a conscientious objection. Both these armies and para-military forces associated with them have been engaged in action where the rules of war have been violated, and where other human rights violations have been widespread. As suggested by Kuzas this establishes a prima facie case that the actions in which these armies have been engaged are condemned by the international community and there is no material before me upon which I could conclude that any such presumption has been rebutted.

I accept that the applicant faces the risk of forced conscription into the BiH army or the Bosnian Croat forces without any consideration being given to any reason of conscience that the applicant may have for objecting to such service. It is clear on the information which I have that there is no provision for alternative service in either of these forces. In the circumstances prevailing in Bosnia there would be no means by which he could reasonably exercise his objection to military service in either of these military bodies. As I have said I have no doubts about the sincerity of the applicant's convictions regarding participation in the conflict on whichever side he may be forced to fight when he expresses an attitude that he does not want to be a party to fighting fellow-Bosnians.

In conclusion, I accept that there is the possibility of punishment by means of imprisonment for desertion or attempting to avoid mobilisation, or the risk of being forcibly enlisted, and I accept that the requisite subjective factors are present to bring

the applicant into the category of some one who possesses a partial objection to military service.

In the context of the ethnic hatred which has riven Bosnia-Herzegovina, a refugee claim may be founded upon forced mobilisation by armies or militias of persons of opposing national groups who are under their control, or making detainees from such groups work close to front lines in aid of the war effort. These acts may constitute persecution, provided sufficient reasons of conscience exist in any particular case, because they involve such persons in military actions against one's own people (or in appropriate cases against other ethnic groupings). Further, independently of the first ground, in the circumstances that have prevailed and continue to prevail in Bosnia, ill-treatment or death in the event of a reluctance or an initial refusal to be mobilised or forcibly conscripted is persecutory per se if such a possibility exists on the facts of a case because such refusal would be taken as a political act. In this case I consider there is a real chance of the applicant being persecuted in either of these two ways since any return to Bosnia could bring him under the control of any one of the three substantial warring parties in that country.

I make the observation that the fact that such ill-treatment may have occurred in a situation where an individual has been conscripted to serve in an army which is not the recognised military force of a nation-State but rather akin to a militia formed to serve the interests of a putative political entity does not make acts which are contrary to humanitarian law and constitute blatant and fundamental human rights violations any less acts of persecution in Convention terms.

The present intense military action against the Bosnian Serbs by the Croatian army assisted by the HVO in co-ordination with the Bosnian army has led to the capture of large areas of western Bosnia and has put pressure on the Serb stronghold of Banja Luka (The Australian 15 September 1995) The siege of Sarajevo continues although there are indications that a deal has been brokered which could see the withdrawal of Serb heavy artillery and missiles from the exclusion zone around the city (The Age 16 September 1995) this enabling relief supplies to be taken to the beleaguered city.

As a result of the creation of the Confederation between Croats and Muslims, which is still at an inchoate stage, and their joint military actions against the Serbs in relieving Bihac last month and the current sweep through western Bosnia the chance of the applicant's facing persecution at the hands of the predominantly Muslim Bosnian Army may well have diminished. However, the applicants were forced to flee their home which was destroyed and their town is occupied by the Serbs. Until the recent NATO airstrikes there were continuing heavy bombardments of Sarajevo by the Bosnian Serbs. (The Australian of 24 August 1995)

The position confronting the applicants is identical to that of the tens of thousands of ethnic Croats who have been expelled from areas of Bosnia Herzegovina under Serb control. The UNHCR has advised in this respect that:

In addition to 280,000 Bosnian refugees, about 344,000 Croatian citizens, mostly of ethnic Croatian origin were expelled or have fled from regions under local Serb control (The United Nations Protected Areas - UNPAs - and the adjacent so-called pink zones) to other areas in Croatia. UNHCR, the international community, NGOs

and the Government of Croatia provide care and maintenance programs, including special programs for trauma victims. In view of great needs and limited resources, however, Croatia advocates burden sharing, which for the time being includes non-return of refugees originating from UNPA's to Croatia. UNHCR has supported the Croatian Government in this context.

(UNHCR, 15/04/94)

The widespread abuse of human rights which has been part of the ethnic cleansing operations has been documented in detail by both Amnesty International, notably in *Bosnia-Herzegovina: "You Have No Place Here - Abuses in Bosnian Serb-controlled Areas"* (June 1994) and Helsinki Watch in *Bosnia-Hercegovina: "Ethnic Cleansing" in Northern Bosnia* (November 1994).

I have referred previously to the litany of human rights abuses carried out by all parties to the conflict illustrated by the various sections of the US State Department Reports on Bosnia.

The situation for ethnic Croats is better in areas not under Serb control. According to the Helsinki Watch report *Bosnia-Hercegovina: Sarajevo* (October 1994) non-Muslims in government controlled sectors of Sarajevo are not the subject of systematic persecution from the government, although they can be the targets of criminal actions such as thuggery and robbery.

Non-Muslim civilians in government-controlled parts of Sarajevo are not generally persecuted by government forces. The most violent crimes against Serbs, Croats and other non-Muslims have been perpetrated by local gangs, some of which were disbanded in early 1993 and their members killed or imprisoned by the government, and some of which still do operate, albeit on a smaller and less savage scale.

(p.26)

However the report goes on:

Serbs and Croats who continue to live in areas of Sarajevo that remain under the control of the government of Bosnia-Herzegovina report that they are frequently the first to be robbed and evicted from their homes. In the case of robbery, some Serbs and Croats complained that the government was tolerating crime against non-Muslims. Only when the victims of local gangs were Muslims, they attest, has the government intervened to stop the crime. According to a Catholic priest in Sarajevo, " Individual extremists are working on behalf of muslim 'interests'. We can not say that the government is behind this but ...all that is not Muslim is less stable and secure..." ...housing is allotted arbitrarily and often in a discriminatory manner. Some non-Muslims are denied housing or evicted from their homes. Although illegal evictions do not appear to be a widespread problem as yet, non-Muslims fear that such evictions will continue and increase in scope and frequency as more and more displaced persons and Bosnian army soldiers returning from the battlefields seek housing in Sarajevo.

A recent article in the Economist of August 26 1995 said of the current situation that:

After 41 months of war, many of the liberal intellectuals who championed a multi-ethnic society have left Bosnia. An influx of refugees from rural areas, many of them religious, has helped to marginalise the Croats and Serbs who live on Bosnian-government territory...To be fair to the Bosnian government, it does maintain at least a rhetorical commitment to a "sovereign, democratic and multi-ethnic Bosnia-Herzegovina", which is a great deal better than anything offered by the ethnic purists who run the Serb and Croat bites of Bosnia.

There is still the prospect of continuing conflict between the Bosnian-Serb army and the army of BiH throughout eastern Bosnia and in and around Sarajevo with the even more sharply drawn ethnic focus as between Serb and Croat which I am entitled to assume is the case since the recapture of Krajina and the continuation of the Croat and Muslim military campaign in the west of the country. There is no basis upon which I can find that the applicant's are able to return to their home in

xxxxx or to Sarajevo without a risk of persecution from the Serb militias or even Muslim forces in the event of a change in the current military situation. In the light of past experience such a change could occur within the immediately foreseeable future after their return. I find that the applicants face a real chance of persecution in the form of gross maltreatment or death on the grounds of their race or nationality at the hands of Serb military groups who by definition are beyond the control of the Sarajevo government and against whom they are unable to be protected. I also find that as ethnic Croats there is more than a remote chance that within the time-frame posited they face a risk of persecution from the government itself, its official military forces and their para-military supporters. Past persecution of ethnic Croats by Muslim forces is corroborated by available country information.

During the height of the fighting in 1993, for example, soldiers of the Bosnian Herzegovinan government rounded up 1,000 Bosnian Croat refugees trying to flee the town of Konjic in central Bosnia, robbed them, beat them, and fired shots at them, according to the *Country Reports on Human Rights Practices in 1993*. The village of Donje Selo became the main refuge of most non-Muslims, according to Helsinki Watch (September 1993: p.12).

The US State Department Reports for 1993 had this to say:

Government troops also targeted civilians in 1993, particularly Bosnian Croats. Thirty Bosnian Croat civilians were massacred at Uzdol in September. Survivors of the attack said they were used as human shields. Government soldiers murdered two Franciscan friars in Fojnica in November. The HVO charged the Government with killing more than 100 other Bosnian Croat civilians between April and October in a variety of central Bosnian locations including Trusina, Doljani, Bugojno, Jakovice, Kiseljak, and Kopijari. Witnesses described torture preceding the killings and mutilation afterward. The United Nations is investigating the charges...

Tens of thousands of Bosnian Croat refugees fled Konjic, Travnik, Novi Travnik, and Vitez in fear of advancing government troops in the spring. In September government forces used death threats and extortion to pressure Bosnian Croats to leave Zenica; a month later government soldiers rounded up 1,000 Bosnian Croat refugees trying to flee Konjic, robbed them, beat them, and fired shots at them...

I also specifically refer to the Helsinki Watch Report, *Bosnia-Hercegovina: Abuses by Bosnian Croat and Muslim Forces in Central and Southwestern Bosnia-Hercegovina* at p. 15 concerning the existence and mistreatment inflicted upon detainees at a place of detention in Konjic and to the US State Department Reports from which I have quoted. I consider that the Muslim-Croat alliance is an uneasy one and the current relationship does not preclude potential future conflict. I am not prepared to find that the political arrangement between Croats and Muslims will hold firm and thus exclude all but a remote possibility of the applicants facing persecution at the Convention standard.

I share the views espoused in RRT decision V94/02696 to which I have previously referred in another context that the situation in Bosnia has been and continues to be extremely fluid and unstable.

My colleague made the following observations :

While certain areas of Bosnia have been classified as United Nations-protected "safe zones", recent experience has shown that those zones are far from being safe and that their inhabitants are extremely vulnerable to "ethnic cleansing" and other persecutory practices by Bosnian Serb forces.
In the light of these recent events I would not feel comfortable with saying that any part of Bosnia is at present an area where there is no real chance that another armed force might take over from the existing controlling power and subject the inhabitants to some form of race-based persecution.
In this case, although Travnik is not at present under immediate threat from Serb forces, I do not think it would be safe to say that there is no real chance that the Serb forces could at some time in the foreseeable future attack it and take it over. If that happened, then it is highly probable that ethnic Croats would experience persecution at the hands of occupying Serb forces on the basis of their race, as has happened when Serbs have taken over other Croat- or Muslim-controlled parts of Bosnia and Croatia.
In the future, the situation may stabilise so that one would be able to say that the danger of Serb conquest is no longer a real one. In the opinion of the Tribunal, however, that is not the present situation, but rather the situation is extremely volatile and unpredictable. The UNHCR has recommended that nobody should be returned to any part of Bosnia at present.

While the situation in Bosnia has some features of so called ' generalised group - defined oppression ', it is an error to conclude from this that these applicants are thereby disqualified from refugee status. I reject the view as inconsistent with the reasoning in Chan's case, that an applicant must be able to show that he has been "personally singled out" for persecution i.e. that he fears something more than a generalised denial of human rights. That approach according to J.C. Hathaway, The Law of Refugee Status at p 91-92.

"confuses the requirement to assess risk on the basis of the claimants particular circumstances with some erroneous notion that refugee status must be based on a completely personalised set of facts ... the issue is.. whether the applicant faces a[real chance] (my insertion) of being persecuted because of who she is ..... not whether that chance is identifiable to her alone.."

The ministerial guidelines for the Refugee Status Review Committee [in Canada] noted:

A person is a refugee whether persecuted alone or with others. A person need not be singled out for persecution in order to be a refugee (quoted in Hathaway at p92).

While persons who fear harm as the result of non-selective phenomena such as civil unrest or war are not entitled to Refugee Status on that basis alone, protection will be offered where there is some element of differential intent or impact based on one of the Convention grounds. Hathaway restates the central proposition that like all other harms , broadly based harm is a function of two basic issues.

"First, is the anticipated state tolerated harm of sufficient gravity to constitute persecution? If so, is there is a connection between the risk faced and the claimants race .....[or]..... social group..... If the harm is both sufficiently serious and has a differential impact based on civil or political status, then a claim to Convention refugee status is made out, however many people are similarly affected "(my emphasis) (at p93-4)

I have no difficulty in making a finding that the situation in Bosnia is one where there is differential impact based on civil or political status or racial origin such that the Convention definition is satisfied. It is abundantly clear that the civil war in Bosnia-Hercegovina is so clearly and overtly defined in terms of ethnicity/race, that the nexus to a Convention ground is in place. It is not simply a case of individuals fleeing conflict or civil disorder of a generalised nature. The details of 'ethnic cleansing', the practice of hostage taking of members of opposing ethnic groups contrary to the Geneva Conventions and Protocols, forced conscription of other national groups and massacres, detentions and gross violations of human rights based solely on the race of the victims in BosniaHercegovina have been cited previously by me in this decision.

I accept that the facts of this case bring it within paragraph 70 of the United Nations Handbook on Procedures and Criteria for Determining Refugee Status ('the Handbook') which states that:

The mere fact of belonging to a certain racial group will normally not be enough to substantiate a claim to refugee status. There may, however, be situations where, due to particular circumstances affecting the group, such membership will in itself be sufficient ground to fear persecution'

Although I have found above that Croatia is not the appropriate country of reference in this case, nevertheless I recognise like my colleague that the issue is not free from doubt. For this reason it is proper that I mention what I believe the position would be if it were the case that one or both of the applicants had to be assessed against Croatia as well as, or instead of, Bosnia. In that case, however, I should say that the evidence to which I have referred above in the context of the treatment by the Croatian authorities of ethnic Croatians from Bosnia indicates that there is a real chance that both a Bosnian born-Croat in Croatia as well as a Croatian born Bosnian-permanent resident, each lacking full citizenship rights, could be deported by the Croatian authorities back to Bosnia. In that case, of course, the applicants would be in exactly the same position so far as their fear of persecution is concerned and the result would

have to be the same. Hathaway's statement that nationality must be effective if international protection is to defer to protection from a state of citizenship is apposite in this regard.

I find therefore that there is a real chance that the applicants will face persecution if they were to return to Bosnia-Herzegovina for the reasons I have expressed. It follows that the applicants fear of persecution for reasons of race, nationality or political opinion, as the case may be, is well founded. As a consequence, each of them is a refugee and a person to whom Australia has protection obligations. .

DECISION

Application for a protection visa remitted pursuant to paragraph 415(2)(c) of the *Migration Act* 1958 ("the Act") for reconsideration with a direction that the criterion requiring the applicant to be a non-citizen in Australia to whom Australia has protection obligations under the Convention relating to the Status of Refugees done at Geneva on 28 July 1951 as amended by the Protocol relating to the Status of Refugees done at New York on 31 January 1967, is satisfied in relation to both applicants.

[1] **In accordance with s431 of the *Migration Act* 1958 (C'th), (as amended), the published version of this decision does not contain any statement which may identify the applicant or any relative or other dependent of the applicant.**