V95/03681 [1995] RRTA 2720 (5 December 1995)

REFUGEE REVIEW TRIBUNAL

DECISION AND REASONS FOR DECISION

RRT Reference : BV95/3681

Tribunal : John A. Gibson

Date : 5 December 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.

DECISION UNDER REVIEW AND APPLICATION

This is an application for review of decisions] made on 11 March 1993 which, by virtue of s 39 of the *Migration Reform Act* 1992, have effect as a refusal 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 an "RRT-reviewable decision" to include, subject to certain exceptions which are irrelevant for present purposes, decisions made before 1 September 1994 respectively -
that a non-citizen is not a refugee under the Convention relating to the Status of Refugees (the Convention) as amended by the 1967 Protocol relating to the Status of Refugees (the Protocol) (para (a)); and
that an application for a visa or entry permit, a criterion for which is that the applicant for it be a non-citizen who has been determined to be a refugee under the Convention as amended by the Protocol, be refused (para (b))**;**
(iii) s 412, which prescribes the criteria for a valid application; and
(iv) s 413 which validates an application for the purposes of s 412 if it complies with certain criteria.

I am satisfied that the jurisdictional requirements listed under paras. (i) to (iv) *supra* exist in this matter. Note that, by virtue of s 39 of the *Migration Reform Act* 1992, the primary decisions in this matter have effect as a refusal to grant a protection visa

BACKGROUND

The applicant is an ethnic Serb in his mid-thirties. He is from xxxxxxxx in the Vojvodina region of the Federal Republic of Yugoslavia. He is a welder by occupation. He arrived in Australia in September 1990. He made an application for Refugee Status in May 1992.

On the grounds of his birth in the former constituent republic of Serbia within the Federal Socialist Republic of Yugoslavia he is a citizen of the successor state, the Federal Republic of Yugoslavia (Serbia and Montenegro).

THE LAW

On 1 September 1994 the *Migration Reform Act* 1992 (MRA), by amendment to the Migration 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 *MIEA v Che Guang Xiang*, unreported, 12 August 1994, No. WAG61 of 1994, (Che), 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 *MIEA and Paterson v Mok*, (Mok) 127 ALR 223, Sheppard J, with whom the other members of the Court agreed, said at 248:

"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 *Che*, 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).

Refugee *sur place*

A refugee sur place is a person who was not a refugee when he or she left his or her country of nationality or habitual residence , but who becomes one at a later date. This may be due to circumstances arising in the country of origin in his or her absence, or as a result of his or her actions subsequent to departure.(see UNHCR Handbook on Procedures and Criteria for Determining Refugee Status (1992) para 94-96.)

CLAIMS & EVIDENCE

Application-May 1992

I cannot safely return to Yugoslavia while the civil war between Serbia and other independence-seeking republics, particularly at this time Bosnia, continues. As a Serb male who has already completed one year national military service from xxx 1981 until xx xxx 1982 I remain on the army reserve list, and would be expected to serve the Serb-dominated Yugoslav army upon my return.

I conscientiously object to being forced to serve in a civil war and refuse to take any part in the senseless carnage currently occurring in my country. I am a pacifist and entirely disagree with killing, particularly killing one's fellow countrymen. I firmly believe that all citizens in Yugoslavia should be able to live together in peace. Furthermore, two of my brother-in-laws are Croatian and Bosnian. To expect me to fight my relatives and friends is intolerable. There is no way I can shoot a gun against many of my friends. I would rather kill myself than do that to anyone.

While the war and violence continues I cannot return to Yugoslavia. I left Yugoslavia on xx September 1990 because I had a terrible premonition of the violence that has since occurred. At that time conflict between Serbia and the other republics was occurring in isolated areas only and the mass call up of citizens to the Yugoslav Army had not commenced.

I fear, if I am forced to return to Yugoslavia, I will be sent before a military court and forced to fight in the Yugoslav army. I remember from my year of compulsory military service from xxxxxx, that if you refuse to serve the government can put you before a firing squad. I had to memorise this law during my period of national service.

The Yugoslav Army currently have every major airport, railway and bus station manned for deserters and people required to serve in the army. I am on the army reserve list, hence the army authorities would have my name on their list to serve. Ethnic problems emerged in Yugoslavia as early as 1981 when Kosovo (an Albanian stronghold in Macedonia) declared its intention to gain independence from

Yugoslavia. Since that time ethnic tensions have erupted first between Serbia and Croatia, and with Bosnia-Herzegovina. Despite peace negotiations overseen, initially by the European community, and later by the United Nations' and over one dozen ceasefire agreements (all of which have been broken) fighting continues and the situation remains volatile. Late in April Serbia and Montenegro announced the formation of a new Yugoslavia and ignored United Nations ceasefire agreements in Bosnia-Herzegovina shelling Sarajevo (News Report, The Age, 29 April 1992)...

Interview-February 1993

The applicant filled out the application form with the assistance of an interpreter.

When asked what did he think would happen to him if he went back, he replied that he would be called to go into the army as the people from the military services have already visited his father to find out when he report to them. He was sure that they would call him up. That was the reason they came to get some information. This occurred about 1 month after the war started; he could not remember the exact date. He thought it was in 1992.

The applicant does not want to serve in the army because he served the army in Sarajevo where everything is happening at the moment; his friends were Muslims, Croats, everything and some of his relatives are Croatian and Muslim. He just doesn't want to go.

He was asked if there are provisions for conscientious objectors. He replied that 'you can object, but they can imprison you, that's first'. He went to say that he was a soldier and he is familiar with that law. Secondly, the law is such that if you don't fulfil the military obligation they can kill you.

The fact that the 1989 new legislation makes provision for conscientious objectors enabling national servicemen who object to serve without bearing arms was put to the applicant. He responded that he performed military service for 15 months, and he did it before xxxx.

He was asked how he thought this new law would affect him. He said that he would still have to go to the army and fight. He was asked why this was so. He replied that a few of his friends have had to go into the army and a few of them from his school had died because they had to fight.

He was asked whether when he did military service in xxxx if he objected then to doing military service.

His answer was 'To be honest with you, all the time I was in the army I was just thinking about when I would be finished with it, I had a chance to get a rank there but I didn't wish to do so'.

His duties were as a xxxxxxxxx operator. He said that this was not necessarily what he would do if he were called up.

He did go to do military exercises in the period since xxxx.He said " In our country you are called from time to time to do those and you had to have your uniform ready. Now I would have to do it non-stop. [Before the war] every 6 months I was called for a few days because we had to do those exercises there".

The applicant said that the Serbian army is fighting in Bosnia, Sarajevo, and in Croatia as well. His friends were killed in Croatia.

RSRC Application-April 1993

...By focussing on Serbia's lack of enforcement of penalties for draft-evasion, under Article 214 of the Yugoslav Criminal Code, the department is neglectfully overlooking the lawless nature of the civil war in former Yugoslavia. In a period of violent civil war, as presently exists, in the Balkan region of former Yugoslavia, the military forces of Serbia, and its enforcement agents, are no longer concerned with punishing draft-evaders. The compelling aim of the Serbian Army is to secure as many frontline fighters in the quest for a "Greater Serbia", even if this means forcing draft evaders to the frontline against their conscientious objections and with a callous disregard for human life...

While [a] report indicates that in many instances prison sentences handed down for draft-evasion or desertion are not as harsh as can be prescribed under Articles 201, 202 and 214 of the Yugoslav Criminal Code, the threat of reinstatement to the frontline is frequently a harsher deterrent. As the department poignantly states, in their own reasons for decision, "Serbs and Montenegrins who have been charged with desertion are currently receiving minor punitive measures (compared to that allowed by law) and are then being sent back to the front to fight". Being sent to the front to fight is a death sentence in the bloody conflict between Serbs,Muslims and Croats in Bosnia-Hercegovlna.

The Department has accepted that there is "a possibility that the applicant will be drafted should he return to Yugoslavia". We submit that this is not a possibility, but a certainty, as the applicant's father was visited in 1992 by military personnel inquiring his son's whereabouts. Furthermore, the report Croatia and the Federal Republic of Yugoslavia (FRY): Military Service quotes a 1991 Amnesty International report "In October 1991, however, Yugoslav military legal experts indicated that only professional soldiers who refuse to take up arms during a state of war and those who flee abroad to avoid military service face a possible death penalty" (pl4). If the RSRC upholds DORS' decision to refuse [the applicant's] refugee status in Australia, and send him back to Serbia, he will certainly be viewed by military authorities as falling into the later category...

[His] reason for not wanting to return to Yugoslavia is a paralysing fear for his life. There could be no more deserving reason...

[The applicant] clearly states...that he has a strong moral basis to his opposition to performing military service in the Yugoslav Army. [His] brother-in-law is Croatian and he has many Muslim and Croatian friends. For this reason he is absolutely committed to avoid serving the Yugoslav Army, where he would be compelled to

inflict pain and suffering on people he believes have an equal right to live peaceably in Yugoslavia.

Furthermore, paragraph 171 of the UNHCR Handbook states: "Where, however, the type of military action, with which the individual does not wish to be associated, is condemned by the international community as contrary to basic rules of human conduct, punishment for desertion or draft-evasion could, in the light of all other requirements of the definition, in itself be regarded as persecution." The war in Yugoslavia certainly falls within the meaning of this paragraph of the UN Handbook. The international community, including the Australian Government and the United Nations, has universally condemned the actions and policies of the Yugoslav Army. Amnesty International reports and newspaper articles, previously submitted in support of [his] application, clearly identify the Yugoslav Army as the main aggressor in the current civil conflict in the Balkans. Diplomatic efforts lead by EC negotiator, Mr Cyrus Vance, are primarily attempting to exact compromises from the Serb side, so far without success...

RRT submission-November 1993

..We acknowledge that [the applicant] - an ethnic Serb - departed his homeland prior to the disintegration of the former Socialist Federal Republic of Yugoslavia (SFRY); however, we submit that this does not reflect upon the issue of the applicant's fear of refoulement owing to the subsequent conflict in that country. With regard to this we direct the Tribunal to those principles of the United Nations High Commissioner for Refugees (UNHCR) Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees (hereinafter UN Handbook) concerning refugees sur place:

"The requirement that a person must be outside his country to be a refugee does not mean that he must necessarily have left that country illegally, or even that he must have left it on account of well-founded fear. He may have decided to ask for recognition of his refugee status after having already been abroad for some time. A person who was not a refugee when he left his country, but who becomes a refugee at a later date, is called a refugee sur place'." [94] (UN Handbook, Re-edited, Geneva, 1992, p.22)

Accordingly, we submit that the applicant has a genuine and well-founded fear of persecution should he be forced to return to FRY We note that this fear relates primarily to the applicant's conscientious objection to the performance of any military service obligations that may await him in his homeland; however, we submit also that the applicant's specific concerns cannot be divorced from the on-going ethno-political conflict in the former Yugoslavia.

We note that the applicant is from the troubled province of Vojvodina in FRY, an ethnically heterogeneous region inclusive of many Serbs, ethnic Hungarians, Slovaks, Croatians, and others. We submit that non-Serbs in Vojvodina have suffered profoundly from Serb efforts to sustain a nation-state identified by race, culture and religion. Subsequent to the disintegration of SFRY this has resulted in the creation of a hybrid federation, wherein nominal political boundaries envelop a predominantly Serbian population However, these artificial borders still confine a variety of ethnic,

religious and cultural minorities, many with their own nationalist agendas. The resultant tension between the oppressive Serbian regime and the various minorities within FRY has led directly to the phenomenon known as ethnic cleansing.

We note that ethnic cleansing involves many forms of action: the expulsion of families from their homes; forced dislocations; the appropriation of property; racial and/or religious vilification; economic discrimination; physical brutality; systematic rape; and genocidal murder Throughout the Balkan conflict, the FRY government has shown itself to be incapable of, or unwilling to protect ethnic minorities within its boundaries against such actions; indeed, the Serbian state has often instigated or colluded with such activities.

Further to this, we note that although the Balkan conflict has been relatively contained in the Vojvodina region, the tension between Serb authorities and the various ethnic minorities of the province has been substantial and potentially explosive. We submit that the political situation in Vojvodina resembles an intifada-style conflict wherein the occupying, Serb forces maintain civil and political authority over a hostile population. As noted below, this tense situation is exacerbated further by the influx of Serb refugees from the disputed Krajina region and other territories of the former Yugoslavia. We note the assessment of Human Rights Watch:

"Serbian para-militaries, with the apparent blessing of local, provincial and republican governments, have been terrorising and forcibly displacing non-Serbs from areas within Serbia. This campaign has been particularly intense in the province of Vojvodina...

"For the most part, Serbs who are resident [in these areas] do not support the expulsion of their non-Serbian neighbours. Rather, it is the Serbian refugees from Croatia and Bosnia-Herzegovina who are joining the efforts of Serbian paramilitary groups and political extremists to coerce the non-Serbs to leave. Serb refugees from Croatia and Bosnia-Herzegovina are quick to occupy the homes abandoned by those fleeing for more hospitable territory. Local police and civilian authorities in some of these towns appear to condone and, in some cases, even encourage the expulsion of non-Serbs from Vojvodina. And Serbian and Yugoslav authorities in Belgrade have done little to prevent or bring to an end such practices." (Abuses continue in the former Yugoslavia: Serbia Montenegro and BosniaHerzegovina, Human Rights Watch/Helsinki, July 1993, Vol.5, Issue 1, p.5)

"... Serbian refugees, with the active assistance of the regime and extreme nationalist paramilitary groups, terrorised non-Serbs and children of mixed marriage in a systematic campaign to drive them from their homes. The refugees then occupied the abandoned dwellings. Human Rights Watch/Helsinki Watch has documented cases in which armed civilians and paramilitary forces expelled Croats, Hungarians, Slovaks and others from many villages and towns in Vojvodina ..." (Human Rights Abuses of Non-Serbs in Kosovo. Sandzak and Vojvodina, Human Rights Watch/Helsinki, May 1994, Vol.6, Issue 6, p.5)

We submit that even in those circumstances where the persecution of non-Serbs in Vojvodina is not actively and physically perpetrated by the Serb-dominated FRY government itself, the authorities take no substantive action to protect minorities, nor

does it seek to prosecute the Serb protagonists. Indeed, we note that such actions notably the expulsion of minorities from their lands and homes - serves well the political purposes of the FRY government. We submit therefore that the Milosevic regime covertly supports such ethnic cleansing, utilising the brutal services of Serb paramilitary groups and individuals to do it.

We submit that such matters go to the foundation of the applicant's conscientious objection to the performance of military service in FRY, in that he does not wish to play any part in the ethnic cleansing process, particularly where such military action would be directed against relatives and friends of non-Serb heritage and/or mixed race. As noted in his original application for refugee status, [the applicant] has stated his feelings on these matters in a clear and heartfelt manner: [see application]

Were [the applicant] to return to FRY and refuse his military service obligations, we submit that he would be persecuted and prosecuted for draft-evasion and/or desertion. We submit that [he] would most definitely refuse to fight against his fellow Yugoslavs, be they Serb or non-Serb. We note particularly the applicant's unwillingness to take any military or other role in the on-going police action in Vojvodina. As noted in his original application, this refusal is on account of his sincere moral objections to armed conflict and to his personal, familial and political objections to the specific nature of the Balkan war and the objectives of the Serb/FRY government. Further to this, we request that when assessing [the applicant's] fear of persecution should he refuse to perform his military service, the remarks of Hathaway be considered:

"there is a range of military service which is simply never permissible, in that it violates basic international standards. This includes military action intended to violate basic human rights, ventures in breach of the Geneva Convention standards for the conduct of war, and non-defensive incursions into foreign territory. Where an individual refuses to perform military service which offends fundamental standards of this sort, punishment of desertion or draft evasion could, in the light of all other requirements of the definition, in its self be regarded as persecution'." (James C. Hathaway, The Law of Refugee Status, Butterworths, Torontol 1991, pp 180-181)

By refusing to fulfil his military service obligations, [the applicant] believes that he will be subject to severe punishment from the FRY authorities. With regard to this, we again direct the Tribunal to the UN Handbook:

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

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

"Not every conviction, genuine though it may be, will constitute a sufficient reason for claiming refugee status after desertion or draft-evasion. It is not enough for a person to be in disagreement with his government regarding the political justification for a particular military action. Where, however, the type of military action, with which an individual does not wish to be associated, is condemned by the international community as contrary to basic rules of human conduct, punishment for desertion or draft-evasion could, in the light of all other requirements of the definition, in itself be regarded as persecution." [171] (UN Handbook, op cit, p.40)

We reiterate that [the applicant] will be prosecuted as a draft-evader and/or a deserter should he be forced to return to FRY. With regard to this, we note above that the UN Handbook states that a person is not recognised as a refugee merely because of a fear of punishment for draft evasion However, we contend that [his] fear of persecution is clearly "concomitant with other relevant motives for... remaining outside his country." (Ibid., [168], p.40), in that the applicant is morally opposed to the nature of the Balkan war and to the very ethno-political policies underpinning the conflict.

We note that the Tribunal has consistently recognised that military deserters from FRY may well hold a genuine fear of persecution for such reasons and, accordingly, may be approved as refugees We cite at length the following remarks of Refugee Review Tribunal (RRT) Member, Dr Rory Hudson:

"The question of objection to military service has been thoroughly canvassed by K.J. Kuzas in "Asylum for Unrecognized Conscientious Objectors to Military Service: Is There a Right Not to Fight?" Virginia Journal of International Law, vol. 31,1991. Kuzas States:

Under international law, every sovereign nation has the right to maintain armed forces and draft its citizens at its own discretion. There is considerable international support....for the recognition of absolute conscientious objectors as an exception to the basic rule. However, there is much less support for recognising those conscientious objectors who claim the right to pick and choose in which military actions to participate.'

"If the present applicant is to make out a case, he must make it out as a selective objector to the war which was in progress in Yugoslavia at the time he deserted. As to such selective objection, Kuzas, after making a useful survey of the international jurisprudence, reaches the following conclusion:

An applicant who cannot qualify as an absolute pacifist, but expresses a conscientious objection to a particular military action which is unrecognized by his country or origin, he established a well-founded fear of persecution if the requirements of either section (1) or (2) below are met: [see below]

"I am in agreement with this analysis, which I do not think differs from the view of Professor Hathaway or of the (UNHCR) Handbook, though it is more thoroughly reasoned and more precisely formulated...

"The applicant has therefore discharged the onus of showing that the rule stated by Kuzas, which I have accepted, is applicable in this case. That is to say, there is a real chance that he will face persecution in Yugoslavia at the present time by reason of his desertion from military service in the cause of an internationally condemned conflict to which he holds a conscientious objection. This brings his case within the Convention." (RRT File No: V94/02609, Decision and Reasons for Decision, 07/02/1995, pp.9-1 6)

We note also the decision in [RRT File No: V95/03378) wherein Dr Hudson remarks:

"... the applicant articulated strong anti-war views which appeared to me to be genuine. It is not clear whether he is a total pacifist, but at least he considers that the present Yugoslav wars involve the killing of innocent people with whom he has no quarrel. He states that he would rather go to prison than fight in the war again. He says that if the authorities gave him a gun and told him to shoot people with it, he would shoot himself instead. His view appear to have a genuine moral basis rather than merely reflecting fear or dislike of combat.

"The delegate accepted that the applicant had a genuine conscientious objection to the war, but referred to information to the effect that (1) provision for conscientious objection exists in the law of Yugoslavia; (2) the Yugoslav Army is not at present involved in any conflict; and (3) penalties for draft evasion/desertion in Yugoslavia are mild.

"... a number of Tribunal decisions have pointed out contrary information and held that, consequently, persons from Yugoslavia with a genuine conscientious objection to military service will normally qualify for refugee status. Indeed, so far as I am aware there is no Tribunal decision to the contrary..." [emphasis added] (RRT File No: V95/03378, Decision and Reasons for Decision, 27/10/1995, p.11)

We note that the Tribunal has previously had access to a variety of different and sometimes conflicting sources of information regarding the likelihood of a deserter or draft-evader being persecuted in FRY. We note the further remarks of Dr Hudson:

"It is disturbing to have to deal with such conflicting information. However, I think that where this occurs, I should take the view that there must be at least a real chance that the applicant will be punished for desertion upon return. I am not, after all, weighing the information to decide which is more likely to be true, but rather assessing whether persecution is a real chance. Further, I take the view that in the case of a conflict between information coming from an informed source with no particular interest at stake, the latter is more likely to be accurate...

"The information suggests that the right to conscientious objection, while it may exist in theory, is not respected in practice. The information regarding the punishment for deserters or draft evaders is relevant in the same sense that, while the applicant would not in my view face punishment as a deserter or draft evader upon return now, nevertheless he would face such punishment if he refused to do military service after his return...

"It is clear, from this information, that whether or not Yugoslavia [FRY] is officially at war there is forced conscription of men to fight in wars in other countries, that those who have a conscientious objection to such wars do not have their objections adequately taken into account, and that they are liable to suffer punishment amounting to persecution if they attempt to avoid military service.

"It is true, of course, that a cease-fire has just been declared in the Bosnian conflict; however, it is far to early to sat that this will hold; furthermore, it appears that there is an imminent threat of war between Yugoslavia [FRY] and Croatia over Eastern Slavonia...

"Therefore, the information is sufficient to show that the applicant, as a person with a conscientious objection to a war into which he could well be forcibly conscripted, faces a real chance of persecution in Yugoslavia [FRY] at the present time by reason of his objection." (Ibid, pp 14-17)

With regard to the above principles, we contend that what is at issue in this application for review is not so much the well-foundedness' of [the applicant's], nor even the real chance' of persecution occurring What is at issue in this case is [his] personal sincerity and genuine moral and conscientious objection to the on-going Balkans war.

Further to this, we submit that the military and political situation in the former Yugoslavia remains extremely volatile With regard to this, we cite the recent escalation of conflict between Croatia and ethnic Serbs in the disputed territories of Krajina and Eastern Slavonia. Consequently, the applicant continues to fear that he will be called to service in the FRY army, and that such service and/or the refusal of such service will lead to persecution and hardship.

We submit that even a brief appraisal of the current situation in the former SFRY demonstrates that the ethno-political conflict is on-going. While we acknowledge that there have been some successful peace initiatives in certain regions of BosniaHerzegovina (BH) over the past month, these fragile agreements have always deteriorated and open conflict again ensued. The Bosnian Serb militia (with the tacit support of FRY) still pursue a policy of ethnic cleansing within BH; furthermore, neither FRY nor Croatia has renounced their designs on each other's territory.

Hearing

The applicant appeared and gave evidence through an interpreter in the Serbian language. He was represented by Mr. Lucas from the firm of Barlows.

The applicant is from a town in central Vojvodina comprising the various national minorities (mostly Hungarian, but also Bosnians, Montenegrins, Slovaks, Russians) and ethnic Serbs. The minorities made up 80% of the population of the town. when he was growing up in Yugoslavia, the applicant had relationships with all the other children. They were obliged to learn Hungarian as well. He always thought of himself as a Yugoslav. He never distinguished between Serbs and other nationalities. One of his brother-in-laws is a Serb, the other is a Bosnian from north-eastern Bosnia whose mother is a Muslim. What he had said in the interview was put to him. He replied that

while he was doing national service in Sarajevo he had many friends and acquaintances who were Muslims. He does not have any relatives who are Croats but he does have friends who are Croatians.

Whilst serving in the army he became friendly with his captain who was of Muslim nationality. The applicant remained in close contact with him before he came here. He spent holidays in Sarajevo with him. He also had other friends in Sarajevo who were Muslims.

He last spoke to his parents three months ago. His parents have not mentioned any thing about difficulties with the nationalities but his father had mentioned that many Serbian refugees had come and settled in Vojvodina two years ago. He also knew of Serbian friends who went to fight in Bosnia and died in the war, as well as Hungarians.

If he went back he would be forced to go to war since he is a reservist. He would be against that because he does not pay much weight to a person's nationality, whether they are Serbs, Croats or Muslims. He said that 'all people are the same for me'.

The military authorities from the bureau where he was registered in the town which was the municipal centre called on his father. They asked him when the applicant was to come back from Australia. His father asked why they were interested. They said it was because the applicant was supposed to go into the army. The visit had probably occurred a few months before his father told him about it. The authorities were aware he had left as he reported to the military bureau. That is why they went to speak to his father and were asking him when the applicant was supposed to come back. That was their only visit and he had never received any documentation from the military authorities. The reason for this, he said, was that they knew he was in Australia and therefore did not send him a written draft notice.

The applicant spent the whole of his national service in Sarajevo and his intake comprised all nationalities. He was in a specialist unit; his job was xxxxxx xxxxxxxxxxxx. When he was discharged after fifteen months, his passport was taken away from him for four years and he was not allowed to travel outside of the country. This was because of the sensitive nature of his job. The xxx xxxxx of the JNA were only changed every four years. When he was given his passport back, he had stopped working with xxxxx. In his reserve training he was working as an ordinary soldier in which capacity he was registered at the military bureau.

The positions of xxxxxxxxxxx operators in the reserve unit were already taken by experienced soldiers. He could have stayed in the army and maintained his duties but he did not want to do so. He had not objected to military service at the time because it was a peaceful time. He would definitely fight for Yugoslavia and defend it against external enemies, but he does not want to fight fellow Yugoslavs.

When asked about his attitude to the manner in which the war was being fought, the applicant stated that he was against the war the Serbs were fighting in Bosnia, but he said that he did not know about Srebrenica. Regarding Slavonia, he said that he knew that a war had broken out there but he was not very familiar with the details.

He was asked about his attitude towards the wave of Serbian nationalist feeling which begun in the late 1980's. He said that he remembered the demonstrations.

He did not take an interest in politics but he saw what Milosevic was trying to do. He was completely against it.

The applicant was asked what his reasons were for coming to Australia. He said the first reason was economic. He had been working long hours in Yugoslavia, and the pay was poor; his father had a very small pension and his mother was not working. They did not have a farm to fall back upon. They were suffering hardship. He also thought that probably a war would break out because of all the demonstrations and the notions which Milosevic was spreading around. He had a premonition that a war would start.

He was asked if the source of what he called his premonition about what was going to happen in Yugoslavia was the rise in nationalism or were there more tangible reasons for his feelings. He replied that the Serbs were becoming more and more aware of their nationality, and the ' fall of the Berlin wall was another event' which he saw as leading to a resurgent Germany. As a reservist he saw a 'bit of conflict among themselves' (meaning the nationalities). He said that at the time he was not quite sure when and where it would break out but he was sure it would.

He spoke of a Slovak friend who had shown him a video of the funeral of a Slovak soldier who had been killed at the front.

The applicant's girlfriend is a pure Muslim and he has known her since he arrived in Australia. They now live together. He said knowing her parents ' how could I take a gun and shoot them' (Muslims). He said that he did not have anything against going back as he missed his family but he did not want to go back to bloodshed and conflict.

The signing of the peace agreement does not mean the end of the conflict as agreements have been reached before and then broken.

DISCUSSION OF CLAIMS AND FINDINGS OF FACT.

The applicant asserts a claim on the grounds of persecution for reasons of political opinion. In essence he claims that he will be persecuted for reasons of imputed political opinion were he to return to the Federal Republic of Yugoslavia (Serbia and Montenegro) (FRY), be called-up for military service and required to serve in a war contrary to his conscience and that by reason of his failure to return to Yugoslavia he will be treated as a deserter or draft evader and be punished for Convention related reasons. He says he has an objection of conscience to the war in Bosnia and to killing, particularly his fellow countrymen of whatever nationality.

His claim is that he is a refugee *sur place*, since the events giving rise to his fear of persecution occurred after he had left what was then the Federal Socialist Republic of Yugoslavia.

I found the applicant to be a sincere, honest and credible witness who expressed himself with a quiet conviction about matters which were central to his claim. I have

little doubt that he does have strong reasons of conscience for not wanting to be involved in fighting or killing members of other nationalities of the former Yugoslavia. I accept that he never has made distinctions based on ethnicity. His girlfriend since his arrival in Australia and now de facto wife is a Muslim woman from Bosnia. This, as they both said, presents its own set of problems if they were to return to Yugoslavia in the present climate. The applicant himself grew up in a multi-ethnic community in Vojvodina and numbered all nationalities among his friends. One of his sisters is married to a Bosnian whose mother is a Muslim. During his national service in Sarajevo more than a decade ago he made a good friend of his commanding office who was a Muslim and whom he visited afterwards. He also made many friends and acquaintances among the different nationalities during this time. He spoke in the hearing of a Slovak who was a friend of his here. All these matters bear on the assessment which I made of the applicant that he was entirely genuine in his feelings about non-Serbs and his refusal to contemplate fighting or killing people of the same race or ethnicity as his friends and relatives.

I draw no inference adverse to the applicant by reason of his initially undertaking his military service at a time of peace and now claiming to be opposed to taking part in the war in Yugoslavia. I accept that a person may genuinely reject the notion of taking up arms against 'fellow Yugoslavs' yet have in the past served in the army because practically speaking there had at the time been no realistic possibility of a war breaking out between the various parts of Yugoslavia which could have produced a moral doubt or uncertainty about involvement in fighting.

In the light of the applicant's frank admission that his objection was limited to fighting fellow Yugoslavs, but he would be prepared to defend his country against external aggression, there is no basis for a proposition that the applicant is a total pacifist. The material before me gives rise to a claim of partial objection to military service.

I can see no relevance to the actual claims which the applicant makes of the material relied on by his advisers concerning the treatment of minorities in Vojvodina. There is no nexus established between the applicant's likelihood of call-up into the Yugoslav army and the evictions and harassment of minorities carried out by Serbian irregulars and citizens in that region.

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 that here under consideration.

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)
If the applicant were to be called up to serve on his return to the Federal Republic of Yugoslavia (Serbia and Montenegro), as a reservist this action would be a legal requirement in that country. The obligation to perform military service is universal upon all males in the applicant's country, and hence it does not in itself amount to discrimination against him. Failure to respond to a call-up may expose the applicant to a penalty ranging from a fine to imprisonment for up to the period of national service or for several years (depending on the circumstances) and potentially longer if a person escapes the country with the intention of avoiding call-up (with some more severe penalties for related offences in time of war) (see DFAT cable BG 60031 of 23.03.93). These penalties which were applicable in the former Yugoslavia (see Amnesty International doc, 'Conscientious Objection to Military Service', Jan. 1991 Index POL 31/01/91) still appear to apply in the re-constituted Yugoslavia.

The Handbook states in this regard:

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, 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.

Partial objection

If the present applicant is to make out a case, he must establish that he is a selective objector to the war which has been in progress in Yugoslavia and that he faces the prospect of punishment on account of this objection should he return there.

In a particular case 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, will found an entitlement to refugee status. The situation where this principle will apply is where the government in question is unwilling or unable to control those individuals or groups engaged in the offending conduct or the conduct is a matter of government policy or military strategy, 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 (Dr. Hudson) 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 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.

In order for an applicant for refugee status to bring himself within these grounds it must be shown that the conflict to which the applicant is said to have objected was of the kind described, and there is a real chance that the applicant will be punished for desertion or draft evasion. This punishment may involve the failure to recognise a claimants conscientious objection by the imposition of penalties for past desertion or non-recognition per se by a failure to provide alternatives to military service which are consistent with the nature of the conscientious belief held.

Nature of military action

The military action in which the applicant has not been prepared to participate was almost from the start condemned internationally. The fact that atrocities and war crimes against civilians were being perpetrated by and/or facilitated by the Yugoslav National Army at that time was well-known. The international community has repeatedly expressed its disapproval of the warfare in the former Yugoslavia in a series of Resolutions of the Security Council. The first of these was Resolution 713 of 25 September 1991 in which it was stated that "The Council fully supports the collective efforts for peace and dialogue in Yugoslavia, and decides that all States immediately implement a general and complete embargo on all deliveries of weapons and military equipment to Yugoslavia". International condemnation continued by the passing of Resolutions 721, 724, 727,740,743,749 and at least 48 further Resolutions until the end of 1994. Further, United Nations Peace-keeping Forces have been established in various parts of the country, (Resolution 724, 15 December 1991) and there has been a resolution demanding the withdrawal of the Yugoslav National Army from hostilities in Croatia and Bosnia (see The United Nations and the situation in the former Yugoslavia, United Nations Department of Public Information Reference Paper 15 March 1994).

The war atrocities and deadly "ethnic cleansing" activities which were perpetrated (inter alia) by Yugoslav National Army forces, collaborating with Serbian irregulars on the territory of Croatia in 1991/2 have been clearly documented. They were becoming known at the time the applicant was forcibly called-up. They are, among other crimes perpetrated by other parties to the conflict in former Yugoslavia, the subject of investigation by the first International War Crimes Tribunal to be set up since the Second World War. For example the Yugoslav National Army's "ethnic cleansing" of the area around Vukovar and their concerted bombing and utter destruction of the city of Vukovar itself over the period August -November 1991,

complete with war atrocities, was internationally known at the time. (See US Committee for Refugees, Yugoslavia torn asunder, February 1992 pp 3-9 which documents some of the early civilian ethnic cleansing experiences in the Vukovar region; see also Human Rights Watch: Helsinki, vol 6 issue 3, February 1994, report on "Former Yugoslavia: The War Crimes Tribunal : One Year Later"). (see RRT Decision N94/02519)

The most recent example of atrocities committed by proxies associated with the Yugoslav army is the reported massacre of Muslim men in northern Bosnia carried out by Serbian paramilitaries led by Arkan, a Belgrade-based ex-bank robber and warlord suspected of atrocities in Croatia and Bosnia (Guardian Weekly, October 15, 1995)

The above information places his refusal to return to Yugoslavia for further military service in its proper context.

Examination of applicant's reasons for objection

In view of the position which he took at the hearing that he would be prepared to defend his own country and fight for it in a normal war it can not be concluded that he holds an absolute objection to military service. He has, however, consistently claimed that he does not want to become involved in killing those who are members of the other ethnic groups which used to make up former Yugoslavia.

In relation to this I find that the applicant is genuine in his views and what he said to me in the hearing was on all fours with what he said in the interview and in his personal statement.

I consider that the applicant's refusal to fight in the Yugoslav Army reflects a partial conscientious objection to being involved in a war against people who given the nature of the former Yugoslavia he had considered to be his fellow countrymen.

I am satisfied that he is of that generation to whom the concept of a Yugoslav has some meaning.

It has been submitted on behalf of the applicant that he would refuse to fight if returned to Serbia. I find that such refusal would be on the grounds of a genuinely held objection to military service.

The applicant has therefore discharged the onus of showing that the rule stated by Kuzas is applicable in this case.

Consequences of draft avoidance

It has been put that the fact that the applicant remained outside Yugoslavia after the military authorities paid a visit to his home exposes him to a risk of punishment for draft avoidance. The applicant himself said that the reason he was not served with any documentation was that they knew he was out of the country. The inference which I am asked to draw is that staying away from the country with presumed knowledge of

a probable call-up to active service in 1991/2 would result in punishment now nearly four years later.

The avoidance or refusal to perform military service and desertion is punishable under articles 201, 202 and 214 of the 1992 Yugoslav Criminal Code.

The Sixth Periodic Report on the situation of human rights in the territory of the former Yugoslavia of the Special Rapporteur states (at para. 132) , that:

Article 214, para. 1 of the 1992 Federal Criminal Code of Yugoslavia provides, inter alia, a sentence ranging from a fine to a term of one year of imprisonment for refusing to serve in the military forces. Furthermore, article 214, paragraph 3 of the Code provides that those who avoid military service by going abroad or staying abroad may be sentenced to a term of one to ten years imprisonment. *According to the jurisprudence of the Supreme Military Court, the elements of [this article] are satisfied simply if there is an established legal obligation for military service and an intention to avoid this service through escaping abroad or through the extension of an existing stay abroad* (my italics).
A DFAT report confirmed the fact that the penalty for not responding to call-up is one year. However, to enable prosecution, call-up papers have to be received personally by the individual. If a person is caught in hiding with the intention of avoiding call-up, the penalty is 3 months to 5 years. If a person escapes from the country with the intention to avoid military service, the penalty is from one to ten years. However, DFAT maintained that there have been only few prosecutions and with only minor prison sentences *(cable no BG 60031 of 23/3/1993).*

The sources available to the Tribunal comprise some contradictory reports about the severity of punishment for those who have avoided military service. These contradictions appear to rest on the interpretation of whether the offence was committed in wartime or peacetime.

For example, Fabian Schmidt, Radio Free Europe/ Radio Liberty's Eastern European specialist, indicated that, although the legality of the Yugoslav presidency's decree of an "imminent danger of war" of 18 October 1991 has been disputed by some Yugoslav lawyers (because only four of eight presidency members actually voted for the declaration), the decree has not been challenged in the courts which, when dealing with those who avoided military service during the period between 18 October 1991 and 22 May 1992 assume the existence of an "immediate danger of war" *(RFE/RL, Vol.3, No. 25 of 24/6/1994).*

Amnesty International claimed that all offences committed under the relevant Articles of the Yugoslav Criminal Code relating to the avoidance of military service and desertion during wartime carry a possible death sentence. However, Yugoslav military experts indicated that only professional soldiers who refuse to take up arms during the state of war and those who flee abroad to avoid military service face a possible death penalty *(IRBDC, Q&A Series, September 1992:14).*

However, other sources maintain that, in practice, the penalties were more lenient than those set out by law. *United Nations Economic and Social Council's report of*

21/2/1994 stated that refusal to perform military service during the armed conflict has been usually punished with a sentence ranging from 3 to 4 months *(p.22).*

UNHCR Australia stated that, although the penalty for draft evaders and deserters may be substantially increased in wartime, in practice, these offences have been considered by courts as committed in peacetime and sentences are mild and in most cases suspended *(facsimile of 2/12/1993).* This earlier advice has been repeated in identical terms recently without apparently taking into account the present situation arising from the Croatian recapture of former Serb occupied territory and the threat of further conflict directly involving Yugoslavia (see UNHCR'S position regarding draft evaders and deserters from former Yugoslavia, UNHCR, 31 August 1995, CX 10085) .

This information has been corroborated by a Belgrade lawyer, who stated that:

Usually they [eg.those who refused to serve in the Yugoslav Army during the 1991 fighting against the Croats] get three months, whether they have a sick wife, a sick kid, or money. Any possible excuse they come up with, it's all the same - three months. If they say they won't go again, they got four months *(Nelson, Suzanne, " Yugoslavia: Draft Evaders Face Prison as Call-up Continues", Inter Press Service, 14/2/1994).*

In correspondence DFAT has stated that currently there is no comprehensive program of pursuing offenders who avoided draft prior to 1992. However, it also noted that:

humanitarian lawyers claimed that within the last few months [ie at the beginning of 1994] a decision was taken to prosecute people from the 1992 draft intake who refused call-up. Most of those against whom prosecution has been instigated belong to minority communities such as Hungarian or Slovak minorities. Sentences generally have been for 3-4 months *(DFAT facsimile message, 11/5/1994).*

The *UN Economic and Social Council* indicated in its February 1994 report that under Article 214, those who remain abroad are still liable to prosecution upon their return to Yugoslavia. *(p.22).* This view is shared by DFAT which stated that a Serb from Serbia returning after having fled abroad to avoid a draft notice already served on him, could be called-up on return or even prosecuted *(DFAT facsimile message, 11/5/1994).*

Recent information, which is a relevant consideration, is in an article by Fabian Schmidt : "The Former Yugoslavia: Refugees and War Resisters" (RFE/RL Research Report vol 3 no 25, 24 June 1994, pp 47-54) It deals specifically with the chance of prosecution facing deserters or draft evaders:

Under the Yugoslav Constitution, which is still in force in Serbia and Montenegro, there has never been a right to conscientious objector status, except on religious grounds; and even then, as in Croatia, conscientious objectors must perform service within the army itself. The only other alternative to serving in the army is desertion, the penalty for which is a maximum of twenty years' imprisonment if the country has been declared to be in "immediate danger of war".

A formal declaration of an immediate danger of war was made by the Belgrade government on 18 October 1991 and was in effect until 22 May 1992....and the courts assume the existence of a state of "immediate danger of war" when dealing with those who avoided military service during that period.
In peacetime the maximum penalty for desertion, disobeying orders, or draft evasion is ten years' imprisonment. The minimum penalty is between one and five years, depending on whether a state of immediate danger of war has been declared.
According to data published under Milan Panic's short-lived government between 1 January 1991 and 1 July 1992 3,748 people stood trial for crimes involving evasion of military service; criminal proceedings were initiated against an additional 5,497 individuals, but these people against whom criminal charges have been brought are incomplete.
Estimates do exist, however. According to the Humanitarian Law Fund... the total number of criminal proceedings related to military service that have been conducted in the FRY is between 15,000 and 20,000 and there will probably be more.
Yugoslavia's former minister of justice, Tibor Varady, and the former minister for human rights, Momcilo Grubac, said in a joint statement that "those who took refuge in foreign countries in order to avoid participation in armed conflicts remain in serious [legal]danger...Thousands have been prosecuted and further thousands will in all probability be prosecuted in the future. .."
The Belgrade Center for Antiwar Actions estimates that in that city alone some 10,000 deserters or draft dodgers are in hiding in the homes of relatives and friends; the total in the rest of the FRY is thought to be about 200,000. There are reports that some people have been charged with desertion or draft evasion after being conscripted for a second time (p.52)

Later in the article, the author refers to the opinion of the UNHCR cited by the *Frankfurter Allgemeine Zeitung* on 9 March 1994 to the effect that deserters who are sent back to Yugoslavia are "not exceptionally endangered" and that the maximum prison sentence is rare - but also asking Western governments to be "especially careful" in decisions to expel deserters and conscientious objectors to Yugoslavia. I agree with what is said in decisions V94/02609 and V94/ 02243 that

It is hard to know what to make of this apparently contradictory attitude of the UNHCR, but it does appear to represent a qualification to the UNHCR's position as stated on 2 December 1993...

The Sixth Periodic Report on the situation of human rights in the territory of the former Yugoslavia of the Special Rapporteur notes (at para. 133) that:

During the armed conflict in the former Yugoslavia, refusing service in the military has usually been punished with a sentence ranging from three to four months. Under article 214, para 3, those who remain abroad are still liable to prosecution upon their return to Yugoslavia.

I am unable to find based solely on the applicant's departure in 1990 with the permission of the army authorities, the visit to his home to inquire about his whereabouts during a period of call-up and his continued absence abroad that he faces a real chance of persecution for draft evasion should he return to Yugoslavia.

I reach a different conclusion in relation to the consequences of his conscientious objection to participation in the military conflict in the former Yugoslavia.

An authoritative article this year pointed to the possibly severe consequences facing draft evaders or deserters returning to Yugoslavia and the negative attitudes of the authorities towards them.

Tens of thousands of young men from rump Yugoslavia consisting of Serbia and Montenegro are waiting in vain in Germany, the Netherlands and in the Czech Republic for an amnesty to return home. These conscientious objectors and deserters fled abroad as they were unwilling to participate in the Balkan war which broke out in the summer of 1991. Some 400,000 people have left rump Yugoslavia since then. Many of them are pacifists and conscientious objectors, opposition circles in Belgrade say. They risk prison terms up to 20 years and even the death sentence on return under the Yugoslav penal code, Belgrade lawyer Rajko Danilovic told German Press Agency dpa.
An opposition appeal for amnesty for the deserters in 1992 was rejected. "The deserters cannot expect anything from a society from where they fled," said rump Yugoslav President Zoran Lilic.
The negative attitude of the Yugoslav authorities to the objectors is also borne out by the bill which proposes to deprive the deserters of their right of inheritance.
The draconian punishments apply during times of war or impending war, according to law. Such a situation exists since the then rump Yugoslav leadership declared a state of war "illegally and unconstitutionally," in the summer of 1991, says Danilovic. Civil and military courts then accepted the direction to mete out strict punishment to deserters, which was never countermanded.
The exact number of the condemned deserters and objectors is officially not known, but human rights activists claim that most of them are non-Serb minorities, mainly Hungarians and Slovaks.
No one has been condemned to death so far. "But this does not mean that a death sentence could not be imposed in a future case," says Danilovic. (Deutsche Presse-Agentur, March 28, 1995, Deserters face jail on return, says Belgrade, by Dubravko Kolendic)

There is information from the Yugoslav authorities that:

All citizens of Yugoslavia are under military obligation in times of peace and war alike. ..
Conscription (entering in the military records) is done in the calendar year in which the person subject to military service will reach the age of 18 years...
Military service lasts 12 months.
In the case of recruits who for religious or for other reasons do not want to do their military service under arms or want to do so in the civilian sector, the military service lasts 24 months. Military service on civilian duties takes place in the military economic establishments, hospitals, and other organisations and institutions engaging in the matters of general public concern. (Consulate-General of FR Yugoslavia dated 05.04.94)

It requires those not wishing to do their military service under arms to immediately apply to the proper authority on receipt of their call-up papers. (see DFAT cable BG 61225 of 31.12.93)

I refer again to the first part of the quotation from Schmidt, supra, in which he noted that there has never been a right to conscientious objector status, except on religious grounds, and even then, as in Croatia, conscientious objectors must perform service within the army itself.

The provisions dealing with this aspect of the applicant's claim are referred to in the Sixth Periodic Report on the situation of human rights in the territory of the former Yugoslavia of the Special Rapporteur states (at para. 132) :

Although the Constitution and the relevant legislation of the Federal Republic of Yugoslavia provide for conscientious objection, the corresponding regulations and procedures for its implementation remain to be adopted.

In the same vein UNHCR advised the Department on 10 August 1994 that:

although the Yugoslav constitution provides for conscientious objection to military service, the implementing regulations have not been adopted.

The article by S. Nelson, " Yugoslavia: Draft Evaders Face Prison as Call-up Continues", in *Inter Press Service* of 14 February 1994, notes the prosecution of "thousands of Yugoslavs" for draft evasion, with sentences of three and four months' imprisonment being imposed, and apparently scant regard being paid to any claims of conscientious objection.

Amnesty International recently stated (ref: AI Index EUR70/07/95 of 22 June 1995), with reference to recent mobilisations in Yugoslavia:

The manner in which these mobilisations had been carried out made it highly unlikely that any of those conscripted were given the opportunity to exercise their right to refuse to do military service on conscientious grounds.

Where there is conflict between sources, as here, I tend to the view expressed most recently in decision V95/03378 that:

in the case of a conflict between information coming from a diplomatic source and information coming from an informed source with no particular interests at stake, the latter is more likely to be accurate:cf Hathaway, The Law of Refugee Status, at p. 81, and the authorities cited in footnote 115 on that page...

In any event it would seem that where a person has already served in the Yugoslav army as a national serviceman, without making a claim to conscientious objection, he does not have the option of alternative service.

The information thus suggests that the right to conscientious objection may exist in theory in certain cases and not in others, and is anyway not respected in practice. The information regarding the punishment for deserters or draft evaders is relevant in the

sense that, while the applicant would not in my view face punishment as a deserter or draft evader upon return now, nevertheless he would face such punishment if he refused to do military service after his return.

In an earlier case V94/01589 I accepted as plausible the evidence given by a witness that information from contacts in Yugoslavia was to the effect that once outside the age bracket one's liability to call-up depends on what category of duties one carried out in the regular army before. In this case it was urged by the applicant's representative that his specialist training as a xxxxxxxxxxxx operator increases the risk that he would be called-up as a reservist. I am prepared to draw an inference that his previous army experience places the applicant in a necessary category. He could on any view be drafted as an ordinary soldier.

Having regard to all the information available to me I find that there is a real chance of punishment awaiting the applicant if he returns to Yugoslavia and refuses to do military service. The Yugoslav army has been engaged in an internationally condemned conflict to which he holds a conscientious objection. There is in my view a real chance of the applicant being called-up and being then required to act contrary to his conscience on pain of imprisonment. I am satisfied that in the circumstances prevailing in Yugoslavia at the present time there would be no means by which the applicant could exercise such an objection.

Forced mobilisation

I find also that the applicant faces a risk that he may be faced with the choice of punishment or forced mobilisation in the army (with more severe consequences if he refuses). I accept the possibility continues to exist for the foreseeable future that the applicant would be required to participate in an internationally condemned military action (which would inevitably involve him in collaborating with and/or actively undertaking atrocities and war crimes himself), and/or to be prosecuted for refusal to serve. The risk that the applicant would be faced with forced participation in a war against his conscience has recently been increased by the prospect of a renewed conflict in Slavonia . The dispute over this territory became a major element in the search for a solution to the Balkan conflict.

Those fears had begun to materialise in recent months with the Croatian offensive into occupied Krajina, the ongoing conflict in Bosnia between the Bosnian Serbs and the prospect of a widening of the conflict to include the Yugoslav army which now can only conscript Serbs, Montenegrins and members of the national minorities within Serbia.

The prospect of conflict breaking out involving the VJ (Yugoslav Army) has been a genuine possibility. There have been a number of reports of the extremely tense situation which prevails between Yugoslav and Croatian forces in the region of eastern Slavonia. It was reported in The Australian of 9 August 1995, for example, that:

United Nations officials in Zagreb say that the situation in eastern Slavonia is tense with Yugoslav army tanks massing in the east and heavy Croatian artillery in the west

near Osijek. "Militarily it would be stupid for Tudjman to strike on eastern Slavonia now, but we cannot rule it out", a UN official...commented.

On any view one could not expect a reduction in the level of mobilisation of forces by the Yugoslav army in the foreseeable future.

There is also evidence of the participation of regular Yugoslav Army officers in the Bosnian conflict assisting the Bosnian Serb army in the Bihac area. (Time, December 19, 1994)

The European Correspondent, Askold Krushelnycky, wrote in the edition of 5-11 October 1995 that:

...although the Serbs occupying eastern Slavonia and Baranja have agreed to drop previous demands to live in a separate Serb state, a huge gulf remains between them and Zagreb on how and when the region should be re-incorporated into Slavonia. The Serbs want the area, which as well as being agriculturally rich also contains oil reserves, to be placed under international supervision for a "transition" period of up to five years before reverting to Croat control. The Croats have agreed to give the region a measure of autonomy but want it to come under Zagreb's control within a year...President Tudjman warned his country would use force to retake the region if a peaceful formula were not found before early November.
Western diplomats fear that any Croat attempt to recapture the area, which adjoins Serbia proper, would trigger retaliation from the powerful Yugoslav army controlled by Serbia's President Slobodan Milosevic. Were that to happen, they warn, the situation could quickly degenerate into a wider Balkan war.
Buoyed by his forces' victories of recent weeks, when the Croats retook first western Slavonia then the huge Krajina Serb-held territories, Tudjman was confident they could do the same in eastern Slavonia.
In case V94/02908, evidence was recently given by a journalist that the Yugoslav army had been engaged in a large scale-mobilisation surrounding Slavonia and would intervene to protect this region in the event of a Croat attack. She also gave anecdotal evidence that members of her family in Serbia had been mobilised and were currently serving in the vicinity of eastern Slavonia. I accepted her evidence.

On November 13, it was reported that rebel Serbs in the region had gone on a war footing while the Croatian army continued its own military build-up (The Australian). The following day, a breakthrough was announced whereby the parties at the Dayton peace conference had agreed to the hand-back of the disputed territory to Croatia over the next two years (The Age, 14 November 1995). Finally the three leaders of Bosnia, Serbia and Croatia reached an agreement to end the conflict with Bosnia to be a single state within its present borders, comprising a Bosnian-Croat Federation and a Bosnian Serb Republic.

A commentator made the following points at the time:

...there were ominous signs across Bosnia that signing the agreement would prove easier than implementing it. Even before the ink had dried, rebel Bosnian Serb leaders denounced it, raising questions as to whether the Serbian President...can deliver their cooperation. Army warlords on both sides grumbled about the territorial divisions the

deal would cement...One of the greatest obstacles to implementing the Dayton deal is that the plan to a large extent has been imposed by the West on warring parties who believe they could have won- had they only had the means to continue fighting...
In the end...what Bosnian and rebel Serb leaders will find hard to do is to convince their followers to renounce the political beliefs that kept them fighting on. Rebel Serb leaders, who have preached Serbian independence, face the nearly impossible task of persuading their followers that they should submit to a national Government that has Muslims in it.
And Bosnian government leaders must shatter the hopes of those who believed that this war would reunite Bosnia ethnically-not divide it..(Elizabeth Neuffer, Boston Globe, in The Age 23 November 1995).

The Bosnian Serb leader, Karadzic, has been quoted as saying that:

" Until a ...better solution than that provided by the Dayton peace accords is found for the Serb portion of Sarajevo, the Serb army will maintain its position,..."(The Age 28 November 1995).

The various communities in Bosnia and their leaders have continued to reject those parts of the agreement which involve the ceding of further territory to their enemies. (see Sarajevo Serbs Reject Agreement, The Australian, 27 November 1995; Balkan Peace Force Faces Risk at every Turn, The Age 29 November 1995).

The completely interlinked nature of the Bosnian and Croatian territorial disputes mean the outcome in Slavonia will inevitably depend on the successful implementation of the peace plan for Bosnia.

I am unable to conclude that the possibility that a conflict involving the Yugoslav Army (VJ) might break out, which was reasonably foreseeable a few weeks ago, has ceased to be so by reason of recent events. In the light of the history of conflict in the region and failed peace agreements and ceasefires, it would require change of an evidently substantial, effective and durable kind before it could be said that the situation has materially altered.

I find that the risk that the applicant would be called-up as a reservist and thus be faced with forced participation in a war against his conscience still exists despite the agreement on the return of eastern Slavonia to Croatia and the Dayton peace accords on the future of Bosnia-Herzegovina.

I find therefore that there is a real chance that the applicant will face persecution if he were to return to Yugoslavia. It follows that the applicant's fear of persecution for reasons of political opinion is well founded. As a consequence, the applicant 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.

JOHN A. GIBSON

TRIBUNAL MEMBER

[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.**