Immigration and Refugee Board of Canada
Refugee Protection Division

Commission de l'immigration et du statut de réfugié du Canada
Section de la protection des réfugiés

RPD File No. / N° de dossier de SPR : VA7-00522

Public Proceeding / Audience Publique

Reasons and Decision – Motifs et décision

Respondent	Josip BUDIMCIC	**Intimé**
Date(s) of Hearing	December 3,4,5,6,7,10 and 11, 2007	**Date(s) de l'audience**
Place of Hearing	Vancouver, BC	**Lieu de l'audience**
Date of Decision	19 November 2008	**Date de la décision**
Panel	Ross Pattee	**Tribunal**
Counsel for the Claimant(s)	Dennis G. McCrea Barrister and Solicitor	**Conseil(s) du / de la / des demandeur(e)(s) d'asile**
Tribunal Officer	Mumtaz Rana	**Agent(e) des tribunaux**
Designated Representative(s)	N/A	**Représentant(e)(s) Désigné(e)(s)**
Counsel for the Minister (the Applicant)	Jesse Davidson & Ron Yamauchi	**Conseil du ministre**

Canada

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SUMMARY OF DECISION

INTRODUCTION

[1] This is the decision of the Immigration and Refugee Board (the "Board") with respect to the application of the Minister of Public Safety and Emergency Preparedness (the "Applicant") to vacate the determination of Convention refugee status that was granted on November 9, 1994 to Josip BUDIMCIC, the "Respondent" in this matter.

[2] This was a public hearing – a rather unusual event for hearings before the Refugee Protection Division (RPD). The National Post made an application on August 20, 2007 to have these proceedings opened to the public. The Respondent had no objection to having the proceedings open to the public and the Minister took no position with respect to this application.

[3] The panel carefully reviewed this application, and assessed the factors set out in section 166 of the *Immigration and Refugee Protection Act*("*IRPA*").[1] The application to have a public hearing was granted, and a copy of that decision can be found at appendix A. Accordingly, this decision is a matter of public record.

[4] An oral hearing was held in relation to this matter over the course of seven days, from December 3 to December 11, 2007. A series of pre-hearing conferences were held on July 19, September 6, October 18, November 1, and November 13 2007 to help prepare the case. 66 exhibits were entered, with in excess of 2,500 pages of documentary evidence.

ISSUES

[5] The hearing, and consequently this decision, dealt with three distinctive questions:

1. The first part of the hearing dealt with the allegations by the Minister's Representative that the Respondent directly or indirectly misrepresented or withheld

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1 *Immigration and Refugee Protection Act*, S.C. 2001, c. 27.

material facts relating to a relevant matter, which, if known to the visa officer who considered the application for refugee status in 1994, could have resulted in a different determination.

2. The second part of the hearing dealt with the further request of the Minister's Representative that the Refugee Protection Division find the Respondent excluded pursuant to Section 1 F(a) and 1 F(b) of the United Nations Convention Relating to the Status of Refugees.

3. Finally, the third part of the hearing dealt with the issue of whether, as set out in s. 109(2) of *IRPA*, there is other "untainted" evidence to support the original visa officer's decision to grant refugee status to the Respondent.

DETERMINATION

[6] With respect to issue 1, has the Respondent made a misrepresentation and/or withheld material facts? The answer to this question is yes. The panel finds the Minister has made out this aspect of the case.

[7] With respect to issue 2 regarding 1F (a) and (b) Exclusion – has the claimant committed a war crime or crime against humanity? The answer to this question is no. The panel finds the Minister's Representative has not met the test for exclusion.

[8] With respect to issue 3 as it pertains to s. 109(2) - was there other sufficient untainted evidence (at the time of application) to justify a determination for refugee protection? The answer to this question is yes. The panel finds there was sufficient untainted evidence to support the visa officer's determination that the Respondent was a Convention refugee.

[9] The application by the Minister of Public Safety and Emergency Preparedness to vacate the determination of Convention refugee status that was granted on November 9, 1994 to Josip BUDIMCIC, the Respondent, is hereby dismissed. Accordingly, the prior determination of Convention refugee status stands.

WITNESSES

FOR THE APPLICANT:

[10] The applicant called the following witnesses:

- Stephan Stebelsky – the visa officer who processed the Respondent's application in Belgrade in 1994.
- Brian Casey – the immigration program manager, also at the Canadian embassy in Belgrade during the period in question.

FOR THE RESPONDENT:

[11] The Respondent called the following witnesses:

- The Respondent.
- Tatjana Budimcic – the Respondent's wife.
- Dr. Jan Malherbe – a witness for the Respondent from Saltspring Island.
- Dr. Ivan Avakunovic – expert witness, testified regarding Eastern European politics and history.
- Nedjeljko Bosanac – was present with the Respondent in 1991 near Tenja, Croatia.
- Richard McColl – retired RCMP officer testified as an expert regarding the methodology of taking the witness statements and police line-ups.
- Protected witness #1 (see Appendix A, paragraphs 8 &9).
- Protected witness #2 (see Appendix A, paragraphs 8 & 9).

QUALITY OF THE INTERPRETATION

[12] A final comment needs to be made regarding the interpretation of the hearing. To ensure as much accuracy as possible and given the complexity of this case, two interpreters were

used. One live in Vancouver at the hearing, and a second one via teleconference from Toronto sitting in as back up.

[13] During the evidence of Witness #1 on December 7, 2007, there was some confusion, and some disagreement between the two interpreters. Accordingly the Presiding Member ordered an audit, the results of which were received on December 27, 2007. The overall assessment was that the translation was very good, and this result was shared with all the parties.

[14] Finally, it should be noted the Respondent provided, with a few minor exceptions, his testimony in English.

APPLICABLE LEGISLATION

[15] A Convention refugee was defined by subsection 2(1) of the *Immigration Act*:

> 2. (1) . . .
>
> "Convention refugee" means any person who
>
> (*a*) by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,
>
> (i) is outside the country of the person's nationality and is unable or, by reason of that fear, is unwilling to avail himself of the protection of that country, or
>
> (ii) not having a country of nationality, is outside the country of the person's former habitual residence and is unable or, by reason of that fear, is unwilling to return to that country, and
>
> (*b*) has not ceased to be a Convention refugee by virtue of subsection (2), section E or F of Article 1 thereof, which sections are set out in the schedule to this Act;

The "*Convention*" referred to is the United Nations Convention Relating to the Status of Refugees, signed in Geneva on July 28, 1951, and includes the protocol thereto.

The definition of a Convention refugee under section 96 of *IRPA* is very similar:

> 96. A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,

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

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

The Respondent and his dependants are currently deemed to be Convention Refugees by operation of section 338 of the current *Immigration and Refugee Protection Regulations*[2], which states:

338. Refugee protection is conferred under the *Immigration and Refugee Protection Act* on a person who

(*a*) has been determined in Canada before the coming into force of this section to be a Convention refugee and

(i) no determination was made to vacate that determination, or

(ii) no determination was made that the person ceased to be a Convention refugee;

(*b*) as an applicant or an accompanying dependant was granted landing before the coming into force of this section after being issued a visa under

(i) section 7 of the former Regulations, or

(ii) section 4 of the Humanitarian Designated Classes Regulations; or

(c) was determined to be a member of the post-determination refugee claimants in Canada class before the coming into force of this section and was granted landing under section 11.4 of the former Regulations or who becomes a permanent resident under subsection 21(2) of the *Immigration and Refugee Protection Act*.

Section 109 of *IRPA* reads:

109. (1) Vacation of refugee protection – The Refugee Protection Division may, on application by the Minister, vacate a decision to allow a claim for refugee protection, if it finds that the decision was obtained as a result of directly or indirectly misrepresenting or withholding material facts relating to a relevant matter.

(2) Rejection of application – The Refugee Protection Division may reject the application if it is satisfied that other sufficient evidence was considered at the time of the first determination to justify refugee protection.

(3) Allowance of application – If the application is allowed, the claim of the person is deemed to be rejected and the decision that led to the conferral of refugee protection is nullified.

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2 *Immigration and Refugee Protection Regulations*, SOR/2002-227.

BACKGROUND

[16] The Respondent Josip Budimcic, his wife Tatjana, daughter Nikolina and son Vedran left their home in Osijek in the Croatian region of Yugoslavia in July 1991, ostensibly due to threats and ethnic turmoil.

[17] They made application to the Canadian Embassy in Belgrade for determination that they were Convention Refugees as defined under the former *Immigration Act*. The Respondent applied to immigrate to Canada with his spouse and children as dependants under the "Refugee and Humanitarian Classes Abroad" class.

[18] Under the *Immigration Act*, 1976 S.C. 1976-77, c 52, which was in existence at the time relevant to these proceedings, a person outside of Canada could be determined to be a Convention Refugee. That determination was made outside Canada and was a decision independent of the permanent resident application.

[19] As part of his application process, immigration officials working at the Canadian Embassy were required to determine whether the Respondent and his dependants met the requirements of immigrating to Canada. These processes included an eligibility determination to determine whether the Respondent met the definition of Convention Refugee, and an admissibility determination to ensure that the Respondent was not inadmissible to enter Canada, as described under the former *Immigration Act*.

[20] A determination was made by the Visa Officer and concurred in by his Manager on November 9, 1994 that they were refugees. Furthermore, the Respondent and his dependants were issued Landed Immigrant Visas (Form IMM1000) on January 10, 1995.

[21] Having been granted Landed Immigrant Visas, the Respondent and his dependants boarded a flight and sought entry to Canada as Landed Immigrants. The Respondent and his dependants arrived in Canada at the Toronto Pearson International Airport on January 19, 1995 and were granted landing as Landed Immigrants. The Respondent and his dependants were conferred "CR-1" class for permanent resident status, based on their status as Convention refugees.

[22] The Respondent and his family have lived continuously in Canada since their arrival in 1995.

HISTORY OF CROATIAN PROCEEDINGS AGAINST THE RESPONDENT

[23] The Respondent was charged and convicted of war crimes *in absentia* in Croatia. The basis of the charge and conviction is the evidence of four witnesses to the alleged war crime. The four witnesses alleged that on or about October 11, 1991 they were part of a twelve-man unit of the Croatian National Guard holding a position in a fruit orchard near Tenja. Their unit was captured by the Yugoslav National Army (JNA). The witnesses alleged that their commanding officer was executed at the scene of their capture, and the remaining eleven members of the unit were taken to a JNA frontline position located between Tenja and Sarvas. The four witnesses alleged that at this frontline position, they were subjected to various forms of abuse, which included mock executions, tear gassing and beatings. The four witnesses alleged that the Respondent, in addition to two other identified individuals, was present at this frontline position and participated in the abuse they suffered. The four witnesses say that after being abused at the frontline position, the eleven members of the unit were separated into two groups. The group of six to which the four witnesses belonged was taken to a house in Bijelo Brdo, where they alleged that they were interrogated further and suffered additional abuses.

[24] The four witnesses stated that in the evening of the same day of their capture, they were taken from Bijelo Brdo to Bogojevo by lorry. The four witnesses alleged that during the transport, one of the six was removed from the lorry and executed. While at Bogojevo the four witnesses alleged that they were interrogated further and suffered additional abuse. The following day the four witnesses were taken from Bogojevo to Begejci, where they were kept until their release on December 10, 1991.

[25] On August 23 and 27, 1993, almost two years after the alleged incident in question, two of the witnesses to the alleged offence gave statements at the Osijek - Baranjsko Police Department. The witnesses, Miroslav HEGOL[3] and Stjepan CENAN[4] respectively, both stated

[3] Exhibit 42, Vol 1, pages 173-175.
[4] *Ibid*, at pages 170 -172.

that they were members of a unit of the Croatian Army which consisted of HEGOL, CENAN, Franjo CALUSIC, Zdenko BASURIC, Stjepan JANOSIC, Marijan DED, Ivan RADIC, Zeljko HERTARIC, Darko POPIC, Vjekoslav STETKA and Ivica DINJAR. HEGOL also includes Zdenko STEPIC in his description of the unit. Both HEGOL and CENAN stated that the unit was positioned at Point 93 in an orchard between Tenja and Sarvas on October 11, 1991 when they were surrounded by the JNA. They both state that the unit was taken prisoner by the JNA, and that immediately upon their capture their unit commander, Vjekoslav STETKA, was executed.

[26] Both HEGOL and CENAN stated that the remaining eleven of the unit were taken to the JNA frontline position between Tenja and Sarvas. They both state that they were abused at this front line position. HEGOL identifies the Respondent as being at this frontline position, and one of the authors of the abuse he suffered. Both HEGOL and CENAN stated that they were taken to Bijelo Brdo where they suffered additional abuse. CENAN also identifies the Respondent as being at Bijelo Brdo and one of the authors of the abuse he suffered while there. Both HEGOL and CENAN stated that they were taken from Bijelo Brdo to Bogojevo, and that during the transit to Bogojevo JANOSIC was taken out of the vehicle and executed. Both HEGOL and CENAN stated that they were then taken from Bogojevo to Begejce, were they were kept until December 11, 1991.

[27] The above-noted statements of HEGOL and CENAN were included as evidence in a document issued by the Osijek - Baranjsko District Police Department, Criminal Investigation Section dated September 1, 1993.[5] The document is addressed to the District Attorney General of Osijek, and a stamp notation on the document indicates that it was received by the District Attorney General on September 9, 1993. The document notes that criminal charges are brought against Josip BUDIMCIC, born March 29, 1963 in Bizovac, Croatia, arising from a criminal act under Article 122 of the *General Penal Code of the Republic of Croatia*, alleging a war crime was committed against prisoners of war[6].

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5 *Ibid* at pages 165 - 169.
6 *Ibid* at page 165.

[28] On September 30, 1993 the Osijek Attorney General issued a "Request to Commence an Investigation" to the Investigating Judge of the District Court in Osijek.[7] The Request identifies the Respondent and his co-accused (Branko STOISAVLJEVIC and Stevo STOISAVLJEVIC), and alleges that the Respondent and his co-accused broke the rules of international law by committing murder, torture and inhumane treatment of prisoners of war. The Request suggested to the investigating court that: the "excerpt from the Offence and Penal Evidence for the informants be obtained"; that HEGOL, CENAN, RADIC and DINJAR be called and examined as witnesses; and that after the investigation process a resolution be made to arrest the accused.

[29] On October 8, 1993 the Investigating Judge Dragan SIMENIC of the District Court of Osijek Investigation Centre issued to the Police Department, the Magistrate for Offences, and the National Revenue Department in Osijek - Nasice - Valpovo a request for information from the penal evidence, information regarding offences and infractions, and information regarding the personal property of the Respondent and the two co-accused.[8] The document notes that an investigation is "presently under way" in the Osijek Court, and that there is ongoing legal action arising from the criminal acts under Article 122 of the General Penal Code of the Republic of Croatia.

[30] On October 15, 1993 the District Court in Osijek received confirmation from the Osijek-Baranjsko Police Department, 7th Police Station Valpovo that the Respondent's name is not mentioned in the Register of Criminal Evidence.[9]

[31] On October 28, 1993 the District Court at Osijek received notification from the Valpovo Community Magistrate Court that the Respondent had not been convicted in that court.[10]

[32] On November 8, 1993, Judge SIMENIC signed an order that an investigation take place at the proposal of the Osijek District Attorney. The order is based on the suspicion that the

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7 *Ibid* at pages 176 - 178.
8 *Ibid* at page p. 179.
9 *Ibid* at page 180.
10 *Ibid* at page 184.

Respondent and his co-accused committed the acts noted in the charges brought by the Osijek-Baranjsko Police Department.[11]

[33] As part of the Investigation conducted by Judge SIMENIC, examinations of the four witnesses (CENAN,[12] HEGOL,[13] DINJAR[14] and RADIC[15]) of the alleged war crimes were conducted. The examination of each witness is recorded in a narrative format and signed by each witness. The examinations occurred on November 8 and 30, 1993.

[34] On November 30, 1993 the Respondent's detention was ordered and an arrest warrant was issued by Investigating Judge SIMENIC of the Osijek District Court.[16] The arrest warrant stated that the Police Department of Osijek are instructed to arrest the Respondent and his co-accused.

[35] On December 10, 1993 an Indictment against the Respondent and his co-accused was issued by the Osijek Public Attorney to the District Court. The Indictment requests that the case be heard in the District Court of Osijek, that HEGOL, CENAN, RADIC, and DINJAR be called as witnesses, and that the accused be judged *in absentia*. The Indictment provides that the grounds for the charges are based upon the statements of the four witnesses.

[36] On January 7, 1994 the Extraordinary Criminal Council of the Osijek District Court ruled that the trial of the Respondent and his co-accused would be conducted *in absentia*.[17]

[37] On January 12, 1994 the Respondent was assigned Vladimir DOMAC as Defence Counsel.[18]

[38] On April 27, 1994 a hearing was conducted. At the hearing, the Respondent's Defence Counsel argued that due to the fact that the accused were "probably" members of the territorial defence or the reserve units of the JNA, the jurisdiction of the Osijek Municipal Court

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11 *Ibid* pages 186 – 188.
12 *Ibid* pages 152 – 164.
13 *Ibid* pages 129 – 140.
14 *Ibid* pages 121 – 128.
15 *Ibid* pages 141 – 151.
16 Exhibit 41, Volume 2, pages 217 – 219.
17 *Ibid* at pages 223 – 224.
18 *Ibid* at pages 225.

was in question, and that a Military Court would be more appropriate.[19] On May 6, 1994 the Osijek Municipal Court ruled in favour of the Defence motion, and directed that the case will be submitted to the Osijek Military Court as the proper authority.[20] The Osijeck Military Court disputed the decision of the Osijek Municipal court, and the matter was sent to the Supreme Court of the Republic of Croatia in Zagreb for decision. On August 11, 1994 the Supreme Court ruled that the case would be tried in the Osijek Municipal Court.[21]

[39] The Main Hearing for the case commenced on January 11, 1995, and was held over three days: January 11, January 18, and January 27 1995. The Hearing was open to the public.[22]

[40] The Record of the Main Hearing contained in Exhibit 41, Volume 2 of the Minister's disclosure indicates that the four witnesses who were interviewed as part of the judicial examination provided testimony at the hearing. However, a full transcript of the testimony is not present in the Record of the Main Hearing, only a narrative summary. Prior to each witness's testimony, a notation is made that a declaration is made in accordance with the investigation, followed by a page number. The trial, conducted over the span of three days, was a total of approximately three hours in duration.

[41] A verdict was rendered at the conclusion of the hearing on January 27, 1995,[23] where the Court ruled the Respondent has committed a crime against humanity and international law – a war crime against prisoners of war as per Article 122. The Court found that on October 11 and 12, 1991 in Bijelo Brdo, Bogojevo and in as yet undetermined places in Eastern Slavonia, the unit consisting of STETKA, CENAN, HEGOL, DINJAR, RADIC, JANUSIC, DED, CALUSIC, BASURIC, HERTARIC, POPIC and STEPIC laid down their arms and gave themselves up to "the First Accused Budimcic Josip" and the other two accused. The Court found that the "accused" handcuffed them, beat them on the heads and other parts of the body with their hands, feet, guns, and electric truncheons, stubbed out cigarettes on their bodies, fired shots over their heads, denied them water and threatened them with death. The Court found that JANUSIC was

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19 *Ibid* at pages 228 – 229.
20 *Ibid* at pages 230 – 231.
21 *Ibid* at pages 249 – 255.
22 *Ibid* at pages 263 – 284.
23 *Ibid* at page 278.

killed on the orders of the Respondent. The Court sentenced the Respondent to fourteen years in prison, and his co-accused to twelve and ten years in prison respectively.

[42] The Record of the Main Hearing notes that the verdict was announced publicly in the presence of all parties, and that "the president of the Council explained briefly the reasons for the verdict." The verdict also notes that at the public hearing, "the court cross-examined the witnesses - victims Stjepan Cenan, Ivan Radic, Miroslav Hegol and Ivica Dinjar, and verified the written documentation."[24]

[43] A Detention Order was issued against the Respondent.[25] This order was posted on the Court bulletin board.

[44] The Osijek District Public Attorney filed an appeal of the decision of the Osijek Municipal Court to the Supreme Court of the Republic of Croatia on February 22, 1995. The basis of the appeal was that the sentence against the Respondent was insufficient given the "seriousness of the criminal responsibility of the accused."[26] The Supreme Court reviewed the appeal, and overturned the verdict due to the fact that not only were the reasons for discrepancies in the sentences unclear in the verdict, but also due to the fact that the Osijeck Municipal Court had failed to justify in its verdict the rationale in finding one the Respondent's co-accused guilty of a particular element of the offence. The Supreme Court directed that a retrial occur; this ruling was made on November 15, 1995.

[45] The retrial occurred on February 20, 1996 at the Osijek Municipal Court. The statements of the four witnesses were read into the record, and the documentary evidence was examined. The Municipal Court rendered a verdict that the Respondent and his co-accused were guilty of the offences, on what were essentially the same grounds as the previous ruling. All three of the accused were sentenced to fifteen years in prison.[27] The new verdict was placed on the Court bulletin board.[28]

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24 *Ibid* at page 290.
25 *Ibid* at pages 285 – 286.
26 *Ibid* at pages 294 – 295.
27 *Ibid* at pages 210 – 314.
28 *Ibid* at page 325.

[46] On April 18, 1996 the Osijek - Baranjsko Police Department, Police Station in Valpovo was served with the penal documents for the Respondent, directing that Department to implement the prison sentence.[29]

MINISTER'S ALLEGATIONS

[47] The Minister submits that the Respondent misrepresented and withheld material facts relating to a relevant matter during the application process that led to the decision to determine him to be a Convention refugee. Specifically, the Minister submits that the Respondent misrepresented and withheld material facts relating to his military history, his employment history, his residential address history, and his record of criminal charges. These material facts were relevant to the decisions to find the Respondent both eligible and admissible to qualify as a Convention Refugee in Canada and thus obtain permanent residence in Canada.

[48] The Minister submits that the decision to determine the Respondent to be a Convention refugee should be nullified and replaced by a finding that he is excluded from refugee protection by operation of Articles 1F(a) and 1F(b) of the *United Nations Convention Relating to the Status of Refugees* (the "*Convention*").

[49] The Minister submits that there are serious reasons to consider that the Respondent committed and was complicit in the commission of war crimes and serious, non-political crimes outside the country of his refuge. The Minister alleges that in October 1991, the Respondent participated in the abuse and torture of captured Croatian soldiers while he was a member of the Yugoslav People's Army ("JNA") during the war of separation between Croatia and Yugoslavia. More specifically, the Minister alleges on or around 11 October 1991, the Respondent, then a member of the Yugoslav military, was present when twelve members of a Croatian military unit were captured in a forest between Sarvas and Tenja. Two of the prisoners were executed. The Minister says that four of the survivors identify the Respondent as having participated in their mistreatment, which included physical and psychological abuse.

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[29] *Ibid* at pages 341 – 342.

[50] The Minister's Representative submits the actions by the Respondent constitute "war crimes" as defined by various international instruments, or alternatively, that they amount to serious, non-political crimes.

[51] The Minister further submits that even if the Board determines that the Respondent is not excluded from the definition of Convention Refugee, the Minister's application should still be allowed. The Minister submits that even without the non-disclosure of the aforementioned material facts, there would not have been other sufficient evidence before the visa officer at the time to justify refugee protection, as per s. 109(2) of *IRPA*.

[52] There were at least six pre-hearing conferences over the course of six months to prepare for this case. The process, procedure and strategy for this case was discussed and agreed to by all the parties at the September 5, 2007 pre-hearing conference.[30] It was agreed that section 109 (1) would be addressed first. Then the Minister would address the allegations the Respondent should be excluded for war crimes, crimes against humanity, or serious non-political crimes. Finally, the panel would hear whether there was sufficient untainted evidence that would have enabled a positive decision for refugee protection.

VACATION APPLICATION - BURDEN OF PROOF AND EVIDENTIARY STANDARD

[53] The test is whether the Minister's Representative can establish that the Respondent, on a balance or probabilities, directly or indirectly misrepresented or withheld material facts relating to his application for Convention refugee status, and/or on his application for permanent residency to Canada.

[54] The parties agree that the general principles as described in case of *Wahab*[31] govern the application of section 109 (1) and (2).

1. S. 109(1) – Did the Respondent misrepresent and/or withhold material facts?

[55] The Respondent in his written submissions made a number of admissions[32] which go to the root of the analysis under s. 109.

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30 September 5, 2007 Transcript.
31 *Wahab v MCI* 2006 FC 1554.
32 Respondent's submissions, p. 8.

[56] In particular, the Respondent admits that his full military history was not disclosed on his application form IMM 8. He admits he should have disclosed on the application form his military history between November 1991 and April 1992.[33]

[57] The Respondent admits that he did not disclose his complete military history to the visa officer during his immigration interview. The visa officer did not ask about his service between November 1991 and April 1992. If asked, the Respondent submits he would have disclosed it.[34]

[58] If his military service between November 1991 and April 1992 would be properly considered work, the Respondent admits that facts relating to his work history while doing that military service were not disclosed on his form IMM 8.[35]

[59] The Respondent admits that he did not disclose his work history in Vukovar for the period 17 April 1992 to 10 July 1993 on his application form IMM8. The Respondent goes on to state that the work as a policeman at this time would not have been material despite the comments of Mr. Stebelsky referred to at the Minister's Representative's submissions in paragraph 60. The Respondent submits the evidence is that the conflict in Vukovar was over as of 18 November 1991.

[60] The Respondent admits that, unbeknownst to him, he was charged by the Croatian courts with criminal offences from 10 December 1993 until his date of landing on 19 January 1995.

[61] The Respondent admits that he did not disclose the fact that he had been charged in Croatia because he had no knowledge of it.[36]

[62] The Respondent submits that, if the facts admitted to had been disclosed on the application for permanent residence, or at the interview, the visa officer's questions at the interview might have been different and therefore those matters omitted were material.

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33 Applicant's submissions, paragraph 85.
34 *Ibid*, paragraph 89.
35 *Ibid* paragraph 85.
36 *Ibid* paragraphs 85 and 94.

[63] As a result of the admissions made, the Respondent submits that it is open for the RPD to decide that the claim for refugee status was obtained as a result of indirectly misrepresenting or withholding material facts relating to a relevant matter.

[64] Given these admissions by the Respondent, the panel's decision with respect to s. 109(1) will be relatively brief.

[65] The panel finds the Minister's Representative has established their case under s. 109(1). Clearly the facts of this case demonstrate the Respondent, and for that matter, his wife, left out pertinent information. The evidence also clearly establishes the Respondent was well aware that in filling out the form truthfully, it may have jeopardized his ability to even get an interview.[37]

[66] The Respondent says he answered all the questions *asked of him* during the interview… and the panel believes him in this regard. What the Respondent does not understand or even seem to comprehend, is that it is what is on the IMM8 form that *drives* and *generates* the questions being asked by the visa officer. By omitting key, relevant information pertaining to his work history, military history, and residency during critical time periods, he has effectively foreclosed an avenue of investigation by the interviewing officers, and precluded them from undertaking a meaningful inquiry into material and relevant information pertaining to the application.

[67] The panel places particular emphasis on the omissions regarding the Respondent's failure to provide details pertaining to his military service.

[68] At Box 25 of the IMM008 form[38] the Respondent is asked, "Since my 18th birthday, I have been (or still am) a member of, or associated with the following political, social, youth, student or vocational organizations (including trade unions and professional associations). Include any military service (show rank, unit and location of service in last column)." The only entry the Respondent makes in this box dates from October 1982 until November 1983, the name and address of the organization is noted only as "Army", the type of organization is noted

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37 Transcript of proceedings, December 6, 2007 at page 52.

38 *Ibid.*

only as "Policmen" (sic) and the position held is noted only as "Kraljevo". None of his later military service is noted.

[69] Mr. Stebelsky, who was the front line visa officer in Belgrade that processed the Respondent's application, testified that he conducted an interview with the Respondent for the purpose of determining whether the Respondent met the selection criteria as a refugee and to determine if he was admissible to Canada.[39] The panel finds Mr. Stebelsky was a highly credible witness.

[70] Mr. Stebelsky testified that his notes from the interview were found on pages 130 to 134 of Volume 3 of the Minister's Disclosure Documents.[40] He stated that during the interview he reviewed the Respondent's answers on the IMM008 that the Respondent had completed, and that he clarified questions with the Respondent as evidenced by his (Mr. Stebelsky's) handwriting on the IMM008.[41]

[71] Mr. Stebelsky stated that given the period in time, the issue of war crimes was a concern in processing these applications. He stated that they (the visa officers) made a determination as to whether a person may be involved in war crimes by conducting a probing interview. They also considered documentary information collected from various organizations responsible for monitoring the situation in the former Yugoslavia, and the information obtained from past interviews of previous applicants. He stated that a person's military service was highly relevant to the assessment of whether a person had committed war crimes, and he stated that a person's military service was assessed in conjunction with his (Mr. Stebelsky) personal knowledge of what was happening in the area.[42]

[72] Mr. Stebelsky testified that the Respondent was questioned about his military service. He stated that his questioning of the Respondent's military service was based on what the Respondent had declared on the IMM008 form; specifically that he had been conscripted into his mandatory military service from 1982 to 1983.[43] Mr. Stebelsky further testified that during his

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39 Transcript of Proceedings, December 03, 2007at p. 25.
40 *Ibid*., at p. 26.
41 *Ibid*., at p. 31.
42 *Ibid*., at p. 34 – 35.
43 *Ibid*., p. 35.

interview of the Respondent, the Respondent stated that he had been mobilized three times by the police in unarmed guard duty in Vukovar after 1993 while he was employed by the United Nations Protection Force (UNPROFOR).

[73] Mr. Stebelsky stated that from his review of the documents in front of him, he had not been aware of any other military service completed by the Respondent.[44]

[74] Mr. Stebelsky stated that the military service performed by the Respondent from 1982 to 1983 was not of concern with respect to war crimes because there was no war going on at the time of that service. He stated that the mobilizations that occurred while the Respondent was working for UNPROFOR would not have been considered military service because it was mobilization by the police in Vukovar.[45] Mr. Stebelsky stated that the mobilizations in Vukovar would not have been of concern with respect to involvement in war crimes because the Respondent was mobilized in an unarmed capacity, the mobilizations involved police duties in the area where the Respondent was residing, and the declared mobilizations occurred within the norms of what was occurring in the area.[46]

[75] Mr. Stebelsky testified that it was his standard procedure at that time to ask all males for their military booklets. He stated that he did not receive a military booklet from the Respondent. He stated that many applicants would not be able to provide their military booklets for various reasons, and failure to provide the military booklet would not necessarily impede processing of the application if an explanation was provided as to why it was not available. Mr. Stebeslsky stated that during his time processing visa applications in Belgrade, he would have seen "thousands" of Yugoslav military booklets, and that he had an understanding of the information contained within the booklets.[47]

[76] Mr. Stebelsky was provided with a copy of the Respondent's Military Booklet.[48] He testified that he did not have this document in front of him when he processed the Respondent's application for permanent residence, and that he was not aware of the information contained in

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44 *Ibid*., at pp. 38, 47.
45 *Ibid*., at pp. 38.
46 *Ibid*., at p. 47.
47 *Ibid*., at pp. 47 – 48.
48 Respondent's Book of Documents, Volume 1, pages 60 – 90.

the document when he processed the application. He stated that he was not aware that the Respondent had "Participated in War" from September 18th, 1991 until March 17th, 1992 and he had not been aware that the Respondent had been at the front line in Tenja or Sarvas.[49]

[77] Mr. Stebelsky testified that the information noted in paragraph 47 above would have been relevant to the processing of the application for permanent residence because it was

> more than simply the obligatory military service that I had described earlier and what Mr. Budimcic had mentioned at his selection interview.

[78] Mr. Stebelsky went on to explain that:

> The mobilization in the war would mean that the applicant would have been conscripted into the army to do whatever the army had told him to do. In our normal way of processing an application, the military booklet is important to both show where a person -- I mean -- how can I put it? It's both exculpatory and it's both the reverse of that. It can implicate someone or it can not implicate someone. What I mean by that is if it shows that the person has been conscripted in a certain place at a certain time, then you need to probe further into what that person was doing at that place and at that time and you will question the applicant to make sure that they are admissible to Canada, that they're not complicit in any kind of a human rights violation or war crime.[50]

[79] Mr. Stebelsky stated that the locations of Tenja and Sarvas with respect to the Respondent's participation in the war would have been significant, because

> in that area in Eastern Croatia at that time, there were serious human rights violations taking place that have been well documented by both international tribunals and by independent journalists, by human rights organizations.[51]

[80] Mr. Stebelsky testified that without this information, he would not have been able to make a correct admissibility determination of the applicant.

[81] Mr. Stebelsky testified that from his review of his notes of the interview and the IMM008 application for landing submitted by the Respondent, he had not been aware that the Respondent had worked for the police department in Vukovar and had a role in establishing the

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49 Transcript of Proceedings, December 03, 2007; page 52 – 53.
50 *Ibid*., at p. 53.
51 *Ibid.*

police department from April 13, 1992 until October 1993. He stated that this information would have affected the processing of the application because

> Vukovar is a place that witnessed one of the largest war crimes after World War II in Europe, if not the largest," and because "anything to do with the security service or the military service in that area at that time of that incident would have been worthy of further exploration to make sure that the person was not complicit in any war crimes.[52]

[82] Finally, the panel does not accept the submissions of counsel for the Respondent that his failure to provide his military booklet does not amount to a misrepresentation. Rather, the panel finds it is a continuation of the pattern of withholding of information. Yet again, a proper disclosure of his military history and residency would have prompted the visa officer to inquire about his military past, including requesting a copy of the military booklet.

[83] Given the facts as found above, the panel does not need to deal with whether the Respondent knew at the time of his application that he had outstanding charges for war crimes against him in the context of the decision under s. 109(1), although this matter may be relevant under the exclusion issue.

[84] The panel accordingly finds the initial decision granting refugee status upon the Respondent was obtained as a result of withholding material facts relating to a relevant matter.

2. 1F (a) and (b) Exclusion – are there serious reasons for considering that the Respondent has committed a war crime or a crime against humanity, and/or a serious non-political crime?

[85] The legal test under Article 1 F(a) and (b) requires the panel to find there are ***serious reasons*** to consider the Respondent has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes, or a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee.

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[52] *Ibid*., at pp. 57 – 58.

[86] The Federal Court of Canada has defined "serious reasons to consider" as less than the civil standard of balance of probabilities, but more than mere conjecture or speculation. [53]

[87] The panel finds the Minister's Representative has not met the legal test.

[88] Given this conclusion, the panel does not need to consider the arguments raised by the Respondent's counsel regarding the timing of the Respondent's involvement, namely on or about October 8, 1991, and whether on that date the incident was considered an "internal conflict" or an "international conflict". Furthermore, the panel does not need to consider the very recent Federal court case of *Ventocilla*,[54] which found that prior to 2000, customary and conventional international law did not extend the concept of "war crimes" to conflicts other than international conflicts.

[89] While the panel does not need to decide this issue in the context of this case, the panel does find the Minister's Representative's argument on this point in their written submissions dated March 28, 2008 to be extremely persuasive.

[90] Leading up to and during the hearing, the Minister's Representative placed a heavy emphasis on the relevance and the legitimacy of the conviction *in absentia* of the Croatian court in arguing that the Respondent should be excluded under Article 1 F (a) or (b). This position was clarified, and indeed changed, by the Minister's Representative in his written submissions:

> The Minister is not relying on the conviction of the Respondent by the Croatian Court to support a finding that there are serious reasons to consider that the Respondent has committed or has been complicit in war crimes.[55]

[91] Nevertheless, the issue is worth commenting on by the panel, and has an impact on the outcome of this proceeding. The Croatian court process in dealing with alleged war criminals has been the subject of much review and analysis. In particular, the allegation has been raised that the Croatian courts did not treat these alleged war criminals fairly, and they were not given fair trials.

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53 *Ramirez v. Canada (MCI) [1992] F.C.J. No. 109.*
54 *Ventocilla v. Canada (Citizenship and Immigration)*, 2007 FC 575.
55 Minister's Reprsentative's written submissions, March 28, 2008, paragraph 142.

[92] Perhaps most notably is the evidence which indicates that the International Criminal Tribunal for the former Yugoslavia (ICTY) was at times reluctant to transfer cases back to be heard in Croatia given the concerns raised about the impartiality of the trial process, preferring instead that the cases be heard by the Tribunal.[56] Several documents filed in exhibits 7 and 42, Volume II outline the areas of concern which include witness intimidation, political influence, lack of judicial impartiality, high degrees of factual errors, and lack of due process. These reports arise from a number of international observer organizations including the Organization for Security and Co-operation in Europe (OSCE), Amnesty International and the ICTY, which say the Croatian courts were biased, unfair and were incapable of providing fair trials.

[93] For example, OSCE stated that "since its accession in 1997, Croatia has been repeatedly sanctioned by the European Court of Human Rights (ECHR) for a variety of fair trial violations that are widespread throughout its judicial system, including denial of access to court, lack of execution of final court decisions, and unreasonable delays in the rendering of decisions."[57]

[94] It is also interesting to note the statistics concerning the *in absentia* cases and decisions. As reported by Human Right Watch:

> According to the UN Commission for Human Rights, in 554 verdicts for war crimes and genocide reached by Croatian courts between 1991 and 1999, 470 individuals were sentenced *in absentia*. Some Serbs who had been convicted *in absentia* returned to Croatia and were arrested and retried. In most cases, the defendants have been acquitted after the retrial.
>
> As of July, 2001, there had been only three cases in which returnees were found guilty in a retrial following previous conviction *in absentia.* [58]

[95] The Organization for Security and Co-operation in Europe's (OSCE) Mission to Croatia reported:

> The outcomes in some of these cases suggest that at least some of the *in absentia* convictions may not be sufficiently substantiated. Particularly in light of the continuing arrests in third countries of citizens of Serbia and Montenegro wanted by Croatia, the Governments of Croatia and Serbia and Montenegro should

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56 Exhibit 42, Vol II, page 110.
57 Exhibit 42, Vol II, page 108.
58 Exhibit 42, Vol II, pages 103,104.

> develop a mechanism for systematic review of war crime cases, in particular *in absentia* convictions.[59]

[96] The OSCE in a 2004 Report states that the "Chief State Prosecutor has acknowledged that a significant number of past investigations and indictments were based on insufficient evidence. As a result, he has ordered a review of approximately 1800 pending cases that are not currently on trial."[60]

[97] The same report comments on the inconsistency of witness statements, noting that several witnesses changed their testimony compared to that given before the investigating judge or in previous *in absentia* proceedings. Many explanations were given for the changes, including past trauma, coercion by local officials, and threats.[61]

[98] Amnesty International in its 1995 Report has also weighed in on this issue, noting that "Croatian courts continued to hold trials of people (mainly Serbs) accused of participating in fighting against Croatia during the war in 1991. Most defendants were tried *in absentia* and the proceedings may have fallen short of fair trial standards."[62] Again in 2005, Amnesty International continued to raise concerns about the trial process:

> Many Croatian Serbs have been convicted and sentenced, often *in absentia*, in trials which Amnesty International considers may have violated international fair trial standards. The latest OSCE report on domestic war crimes trials in Croatia states that "the national origin of defendants remained a critical factor in war crimes prosecution in Croatia in 2004, raising systemic concerns as well as concerns about some individual trials.[63]

[99] The panel finds these statistics most troublesome, and this information clearly provides a backdrop within which this case must be analysed.

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59 *Ibid*, page 116.
60 Exhibit 7, page 138.
61 Exhibit 7, page 146.
62 Exhibit 7, page 19.
63 Exhibit 7, page 118.

[100] The Minister's Representative said at one point in a pre-hearing conference they were trying to find an expert to provide evidence pertaining to the Croatian courts and judicial system, but the expert that they were considering might be reluctant to give evidence in public.[64]

[101] At the hearing, The Minister's Representative did not tender evidence to say the investigation and the prosecution of war crimes were fair and unbiased, or that they were not motivated by the political conflict that was ongoing. Again, the issue of tendering evidence on this point was raised during the pre-hearing conferences.

[102] Even in the case of the Respondent's *in absentia* hearing, anomalies were noted. The judgment was appealed, and the verdict of the lower court was rescinded and the case was returned to the same court for a new trial.[65] Certain aspects of the appellate court judgement are worth noting:

> Examining the contested sentencing regarding the appeal of the Public Attorney under Article 366, Paragraph 1, of the ZKP, the supreme Court as the court of second instance confirms that an absolutely fundamental violation has been committed against the regulations of the criminal case under Article 354, paragraph 1, Item 11, of the ZKP, because the verdict does not deal with the key facts at all and its reasons are not given, and verdict pronounced in one part of the factual document is unclear.[66]

The appellate court went on to note there were problems with the lower courts analysis of witness Cenan's statements. The court concluded the retrial was to correct the shortcomings, including re-examining the witness, and that the new hearing would establish the legally relevant factual position on which it will base the new decision.[67]

[103] As indicated, the Minister's Representative in his written submissions at paragraphs 142 and 143 took a different tact:

> The Minister is not relying on the conviction of the Respondent by the Croatian Court to support a finding that there are serious reasons to consider that the Respondent has committed or has been complicit in war crimes. The Minister has tendered the statements of the victims as evidence to support our application that

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64 Transcript, pre-hearing conference, November 1, 2007, page 39, lines 27,28.
65 Exhibit 41, Vol II, page 304.
66 Exhibit 41, Vol II, page 305.
67 Exhibit 41, Vol II, page 306.

> the Respondent ought to be excluded from refugee protection. That the Croatian authorities conducted an investigation of the Respondent, laid charges against the Respondent, and proceeded with a criminal trial with the Respondent as one of three accused, does support the Minister's position that the Respondent misrepresented himself to the Visa Officer with regard to his criminal status in the former Yugoslavia.
>
> Organizational problems and inefficiency in the criminal justice process, and bias on the part of judges and prosecutors are not relevant considerations for the Board because the Minister is not submitting that the Board adopt or rely on the decision of the Croatian Court as the basis for an exclusion finding.

[104] The panel finds there were problems with the court process in Croatia, and specifically, there were significant problems with respect to *in absentia* trials. Furthermore, there is evidence that in the context of the Respondent's *in absentia* case there were anomalies, which included a re-trial, using the original complainants' testimonies and statements.

[105] It is within this context that the panel must weigh the evidence it has before it to determine whether there are serious reasons for considering that the Respondent committed a war crime, a crime against humanity, or a serious non-political crime.

[106] The Minister's Representative's case relies on the following factors, which include the motivation of the Respondent to have committed the acts alleged,[68] written statements and interviews from four witnesses Ivan RADIC, Miroslav HEGOL, Ivica DINJAR and Stjepan CENAN, and the lack of credibility of the Respondent and the other witnesses during the hearing,

[107] The basis for this decision regarding the allegations of war crimes, crimes against humanity and serious non-political crimes lies in the evidence (the various witness statements and interviews) and in person witness testimony that was heard at the hearing. The challenge for the Minister's Representative is that he has relied exclusively on the written statements of the four witnesses. Not one of the alleged victims was brought to Canada to give evidence, nor were any of them called to give testimony by videoconference or telephone, nor were they tendered for cross examination. Beyond the transcripts of the statements, no one provided an affidavit in these proceedings.

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[68] Minister's submissions, paragraph 147.

[108] The Minister's Representative elected not to call any of them. Clearly this was being contemplated as an option at some point in the many years preparing for this hearing. One can point to the fact that the witnesses, who are all located in the former Yugoslavia, were all canvassed at the end of their interviews with the RCMP as to whether they would be willing to come and testify, either in Canada or in Croatia.[69] All four of the witnesses signed documents indicating they would be willing to testify in Canada should that ever be necessary.[70]

[109] The question as to whether any of the four witnesses would testify was also raised during at least one pre-hearing conference.[71]

[110] Furthermore, this case has been active and has been worked on for many years. The Respondent and his family have been living in Canada for thirteen years. The first indication the Respondent was being investigated appears to have been many years ago. Indeed, the Minister's witness, Mr. Stebelsky, indicated that Ottawa CIC headquarters had flagged the Respondent as a possible war criminal as early as 1998 or 1999.[72] The history of this file includes numerous interviews of the Respondent by the RCMP, the first of which took place on May 28, 2003.[73] Furthermore, the RCMP on at least two occasions travelled to Serbia and Croatia to conduct interviews.

[111] There has been ample opportunity and time to adequately prepare this case. Although not required to do so, the Minister's Representatives chose not to call any of the four witnesses who produced the statements even though the Respondent gave notice he would be flying in Mr. Bosanac, a witness who was with the Respondent on the relevant day in question, October 12, 1991. The Respondent also arranged for protected witness #1 to be flown in from Croatia to testify on his behalf.

[112] Section 170 of *IRPA* states the Board is not bound by any legal or technical rules of evidence. Having said that, at the end of the day the panel must make its decision, weighing and assessing what is sufficient trustworthy and credible evidence presented by the parties.

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69 Exhibit 41, Vol 1, multiple interviews
70 Exhibit 42, Vol II pages 179- 186.
71 Transcript pre-hearing conference, July 19, 2007, page 9, line 1.
72 Transcript December 3, 2007 page 45, lines 1-18.
73 Exhibit 41, Vol II, Tab 5.

[113] The panel was left weighing the evidence found in four witness statements, witnesses who were not present at the hearing and unavailable for direct and cross examination, against the viva voce evidence of the Respondent, his travel companion Bosanac, and protected witness #1.

[114] There are significant problems with the four written witness statements. There are numerous inconsistencies, on what the panel would consider key elements. The most critical and relevant inconsistencies are noted below.

[115] Perhaps most noteworthy, are that portions of the statements have been blacked out. The Respondent requested full copies on several occasions, and this was raised in front of the Presiding Member at the pre-hearing conferences on September 5, 2007[74], and again on November 13, 2007.

[116] The Minister's Representative states it was the RCMP who chose what to edit out, and that those decisions were made pursuant to access to information and privacy acts. On September 5, 2007 the Minister's Representative stated the blacked out portions were omitted for witness safety. Again on November 13, 2007 the Minister stated their hands were tied in respect to having the portions blacked out.[75] Options were given to both counsel by the Presiding Member as to how these blacked out portions might be produced.[76]

[117] The Minister was warned that this may affect the weight given to these statements, and may raise questions about what the significance of the blacked out portions mean to this case[77]. Unfortunately the panel is left in the dark as to what was edited, and in some cases it would appear to be observations about the reliability and credibility of the witness. Although there are many examples of deleted portions, as an example the panel points to the RCMP officer's observations concerning Radic's interview,[78] wherein three lines at the end are blacked out, and the final comments made about Radic regarding his credibility (good) and potential (good) also have a blacked out line. In the absence of a full record, it places the panel in a most

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74 Transcript page 10.
75 Transcript page 57.
76 Transcript page 59.
77 Transcript page 60.
78 Exhibit 42, Vol II, page 149.

awkward position. What is missing? Is it irrelevant to the case? Or is it relevant? Who gets to make the decision that these portions should be excluded from the hearing?

[118] In court proceedings, such evidence would be turned over, in entirety, to presiding judge, where a determination would be made as to admissibility and relevance. Again, this was raised on several occasions with both counsel, and it was never addressed to the satisfaction of the panel. Frankly, it leaves more questions unanswered. At the end of the day, it is the Minister's case to make, and these omitted portions are most troubling. These blacked out portions, in conjunction with the numerous inconsistencies found between them, when linked with the fact that none of those witnesses testified in person or were made available for cross examination, significantly undermines the weight the panel places on the written witness statements.

[119] There is also, however, information that is file specific to the case at hand which indicates there were problems. For example, the investigating Judge was Dragan Simenic. His name appears on the witness statements as early as November 1993 in the prosecution of the Respondent.[79]

[120] His role in the process continued for many years, and Judge Simenic even participated when the RCMP went to Croatia to conduct the interviews of the witnesses. This, in and of itself, of course does not necessarily mean the process was tainted, or that these statements were not trustworthy or credible.

[121] What is troubling, however, are the references where the objectivity of Judge Simenic is placed in doubt. For example, even the RCMP documented the interference of the Judge and his admonishment of the witnesses when they attempted to give a different version of what took place, in some instances arguing with the witness. This took place in the interview with Radic, where the officer's notes state:

> The Judge continued to read from the previous statement and appeared to complain/question when Radic changed his recollection of the events. Ie: previous statement when Stetica had been killed, Radic had been 2 m. away and witnessed same, but now stated that he had been 20 m away and not seen

[79] Exhibit 41, Vol I page 141.

> anything…. At this point in the interview, there appeared to be some type of argument between Radic and the Judge.[80]

[122] From this passage it is evident the argument referred to was not translated, and the RCMP were only able to glean that some type of argument was taking place without knowing the content.

[123] There were similar problems with respect to the interview of Hegol, where the RCMP officers note:

> The Judge proceeded directly into Hegol's pre-conflict activities without waiting for the preamble, appearing to be impatient. An interruption was made to obtain the biodata….Throughout the interview, the Judge basically read from a previous statement and had Hegol confirm the details…. The Judge momentarily left the courtroom to locate the court reporter.

[124] The panel finds it odd that some of this exchange takes pace without the presence of the court reporter.

[125] Yet again, the integrity of the process can be questioned with respect to the interview of Dinjar:

> The Judge controlled the interview, basically reading from a previous statement and having Dinjar acknowledge same. No translations were obtained until a signal was given by the Judge. This made for a long time passing between translations – will have to rely on transcripts.[81]

[126] Independent observers have also noted the propensity for a considerable lack of impartiality amongst parts of the Croatian judiciary.[82]

[127] Against this back drop, there were also a number of concerns regarding the manner the witness statements were obtained, in addition to inconsistencies between those witness statements.

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80 Exhibit Exhibit 42, Vol II, page 144.
81 Exhibit 42, Vol II, page 155.
82 Exhibit 7, page 149.

[128] For example, the witnesses were asked to identify *Josip Budimcic*, rather than the person the witness claims to have seen do certain things. This is not entirely reliable evidence that Josip Budimcic did those things. The instructions to the witnesses were as follows:

> A recognition of the accused, Josip Budimcic, by the witness, Ivan Radic, has been ordered on the basis of the provisions of Art.240, Criminal Procedure. The witness, Ivan Radic, was called upon to describe the appearance of Josip Budimcic, and memories and observations, so the witness described that he has been acquainted with Josip Budimcic, who comes from the same town, since early childhood.[83]

[129] Given that Witness Radic knew the Budimcic family, and that they came from the same town, it is not surprising at all he would correctly identify Josip Budimcic.

[130] Similar instructions were given to the other witnesses.[84]

[131] Other inconsistencies are worth noting. Witness Dinjar in his 2001 statement pointed to photograph #6 and said: "I think that the one I am indicating with my finger is Josip Budimcic but I am not 100% certain.**"**[85] The same witness on page 31 then states of Budimcic that he "knew him well."

[132] There were also problems with witness Cenan who in 1993 gave very strong allegations of identity. At one point he calls Budimcic his "acquaintance"[86]. He later states: "I know Budimcic and Stoisavlijevic Branko well so there is no possibility that I could not identify either".[87]

[133] Even the RCMP and the Department of Justice (DOJ) in 2003 realized witness Cenan had given seriously inconsistent statements:

> Wolpert: Today, and also, when you spoke to the RCMP 2001, you mentioned, in a lot of detail, that when you were brought to the front line, that you recognized Josip BUDIMCI (sic), and that Mr. BUDIMCI (sic) took an active part in the interviewing you, and the other prisoners, and that he was acting like he was in charge. I was just want to ask you, in the two statements you gave in 1993 to the

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83 Exhibit 41, Vol I, page 97.
84 Exhibit 41, Vol I, pages 5, 33, 67.
85 Exhibit 41, Vol I, page 34
86 Exhibit 41, Vol I, page 157.
87 Exhibit 41, Vol II, page 265.

> Criminal Investigation Section and the Investigating Judge, at no time in either of those statements do you mention Mr. BUDIMCI (sic)as being present at the front line or taking part in the abuse at the front line, although, you mentioned him later at Bijelo Brdo. Could you explain this?
>
> Cenan: At the moment that he was there, I did not, right away, recognize him but my fellow soldiers, that were also taken prisoners from Sretnia, later told me that this is him. They were neighbours and they knew each other better. …
>
> Wolpert: When was it, approximately, that you learned his name?
>
> Cenan: While we were still prisoners, I learned from Radic and the others that this is Josip BUDIMCI (sic) by name.
>
> Wolpert: While you were still a prisoner?
>
> Cenan: Yes.
>
> Wolpert: That would mean that in August '93 and November '93 you already knew his name. Right?
>
> Cenan: Yes.
>
> Wolpert Why wouldn't you have mentioned according to the record of those two statements?
>
> Cenan: I don't recall.[88]

[134] Witness Cenan was again questioned by the DOJ regarding the discrepancies in his evidence and was not able to explain why his story changed so dramatically or why he became so definite so many years later.[89]

[135] There are also inconsistencies where the witnesses claim to have seen the Respondent.

[136] Witness Cenan in his statement of 8 November 8, 1993 says the Respondent was at Bogojevo and describes him doing specific things.[90] Later in his statements made in 2001 and 2003 Cenan says the Respondent was not at Bogojevo.[91] None of the other witnesses say the Respondent was ever at Bogojevo.

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88 Exhibit 41, Vol I, page 25.
89 Exhibit 41, Vol I, page 26.
90 Exhibit 41, Vol I, page 157.
91 Exhibit 41, Vol II, page 166, Vol I, page 23.

[137] Witness Cenan also says the Respondent was at Bijelo Brdo,[92] whereas none of the others say he was at Bijelo Brdo.

[138] Witnesses Hegol[93], Radic[94], Dinjar[95] say they never saw Budimcic after the front lines.

[139] Much was made at the hearing regarding the type of clothing the Respondent was wearing. It provides yet another example where there are inconsistencies between the various witnesses, and even inconsistencies by the various witnesses themselves.

a) JNA uniform drab green (Cenan 1993)[96]

b) camouflage uniform (Cenan 1995)[97]

c) some kind of blue jacket and something of the same color on the lower part of his body, but I can't be more precise (Cenan 2001)[98]

d) Blue spitfire jacket not military police. "I now recall him definitely in a blue spitfire jacket" (Cenan 2003)[99]

e) blue uniform-a jacket and the kind of uniform ordinary police wore uniform (Dinjar)[100]

f) that uniform –officer's belt (Dinjar)[101]

g) blue uniform with vest (Hegol 2003)[102]

h) blue uniform something like the old police used to wear (Hegol 2001)[103]

i) militia blue uniform, not police (Radic 2003)[104]

[140] Finally, it is worth noting that some of the witnesses have indicated they had been sprayed with pepper spray[105], which may have affected their ability to properly see.

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92 Exhibit 41, Vol I pages 17,157.171,192.
93 Exhibit 41, Vol I pages 66, 78.
94 Exhibit 41, Vol I pages 98,112.
95 Exhibit 41, Vol I pages 48, 123.
96 Exhibit 41, Vol I, page 157.
97 Exhibit 41, Vol I, page 265.
98 Exhibit 41, Vol I, page 3.
99 Exhibit 41, Vol I, page 11.
100 Exhibit 41, Vol I, page 32.
101 Exhibit 41, Vol I, page 33.
102 Exhibit 41, Vol I, page 73.
103 Exhibit 41, Vol I, page 65.
104 Exhibit 41, Vol I, page 105.
105 Exhibit 42, Vol II, page 177, hearing transcripts December 11, 2007 pages 63 – 68.

[141] At the end of the day, the panel is left with typed statements from four witnesses, with multiple inconsistencies, and portions that are blacked out. When the layer of a potentially biased court process is placed over this, the panel was left to weigh the in person witnesses before it, namely the Respondent, Mr. Bosanac and protected witness #1, against the written untested statements.

EVIDENCE OF NEDELJKO BOSANAC

[142] After these proceedings were commenced, Mr. Bosanac was located by the Respondent living in Australia. He was disclosed as a witness to the Applicant and the RPD in accordance with the Rules. His contact information was provided. The Applicant had the opportunity to contact Mr. Bosanac prior to giving evidence but did not do so.

[143] He attended the hearing and gave sworn evidence about the events on or about 11 October 1991 and what took place on the road between Tenja and Sarvas. Mr. Bosanac was with the Respondent on the day in question, and used his car to drive the Respondent. He was with the Respondent when they pulled over. Mr. Bosanac's viva voce testimony contradicts the evidence found in the various written witness statements, and corroborates the Respondent's version of events.

[144] Mr. Bosanac's recollection of the events of that day are very similar to those given by the Respondent to the RCMP in 2003, 2005 and under oath at the hearing. Mr. Bosanac confirmed the Respondent did not harm the alleged victims in any way. He confirmed the Respondent was unarmed, and did not wear any type of a uniform.

[145] There can be no doubt that he was describing the same day as he recalled seeing Franjo Calosevic who he recalls having a knee wound.[106] Similarly, the witnesses state that Franjo Calosevic (variously spelled Calusic, Calusica or Causic) was with them that day and had a knee or leg wound.[107]

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[106] Transcript December 11, 2007, page 31, line 12 and page 32, line 13.
[107] Exhibit 41, Vol I, pages 89, 94, 143, 154, 156, 163, 167, and 196.

[146] Franjo was not seen again. The Minister alleges he was killed and the body later identified.[108]

[147] There is no inconsistency between Mr. Bosanac's testimony and that of the Respondent regarding the reason for the trip to Sarvas. The Respondent made it clear he needed to get permission to move to Sarvas and he went there to get that permission and to see ifhe could live in his relative's house. He did not say he was moving that day.[109]

[148] The panel has found both Mr. Bosanac and the Respondent's testimonies to be credible, trustworthy and consistent regarding the events on the day in October of 1991. Although the panel did question the Respondent why he would be compelled to stop at the scene on the side of the road, the panel accepts the explanation provided by the Respondent that he was simply curious, had recognized some of the captives as coming from his home town, and wanted to locate the whereabouts of his brother. The witness Mr. Bosanac confirms they did not stay long, that the Respondent recognized some of the men, and that in no way did the Respondent touch or harm any of the captives.

[149] The Respondent submits that no weight be given to the Affidavit of Mr. Towaij.[110] The panel agrees. Mr. Towaij indicated in his affidavit that after reading Mr. Bosanac's evidence in this case, and comparing it to the information Mr. Bosanac provided the Australian immigration authorities, he was able to conclude: "it is my considered opinion that there are serious inconsistencies between these two versions of events." This affidavit was filed after the hearing was over and accepted in evidence on 26 March 2008.

[150] There is no evidence concerning the information Mr. Towaij says he has read from Mr. Bosanac's Australian immigration file. There is no evidence of what information he compared that to. There is insufficient evidence, and only speculation, as to what those inconsistencies refer to. The panel has no idea whether they are even relevant.

[151] The handling of Mr. Bosanac as a witness was challenging and contentious from day one. The Minister's Representative made a written application pursuant to Rules 43 and 44 of

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108 Exhibit 41, Vol III, page 163.
109 Minister's submissions paragraph 176, and transcript December 5, 2007, pages 114-117, 119-120.
110 Affidavit of Marc TOWAIJ, dated March 27, 2008, paragraph 15.

the *Refugee Protection Rules*[111] on October 25, 2007 requesting that the Board order the Respondent to provide the following information pertaining to the witness Nedjeliko Bosanac:

- Date of birth
- Details of his immigration history in Australia, including the manner in which he immigrated there
- Complete records and history of military service in the former Yugoslavia
- Complete records and history of employment in the former Yugoslavia
- Complete records of any criminal charges, arrests (or warrants for), and convictions in any country

[152] That application was denied on the basis the Respondent had complied with the requirements of Rule 38. In the same ruling, the panel stated the following:

> The application is denied. The Minister's Representative has received notice of this witness significantly prior to the 20 day disclosure requirement. As noted, the Minister Representative has all the information about the witness that is required by the rules. If he wishes to undertake this research he has sufficient time to do so. In contrast with civil proceedings, the refugee determination process does not provide for a discovery process beyond the requirements of Rule 38. Accordingly, the Minister's Representative is free to undertake whatever investigations or research he deems necessary in advance of the hearing.[112]

[153] This issue was raised again at a further pre-hearing conference where the Presiding Member took measures to explain there was no "property in a witness", and they could undertake to contact Mr. Bosanac themselves.[113] The Minister, perhaps to alleviate any impression they may be coercing a witness, elected to not make direct contact with Mr. Bosanac in advance of the hearing.

[154] The Presiding Member was concerned there was the possibility this witness may be precluded from coming to Canada to provide his testimony, if he was not granted a temporary

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111 *Immigration and Refugee Protection Act*, Division Rules, SOR/2002-228.

112 As noted by Lord Denning in *Harmony Shipping Co. S.A. v. Davis* [1979] 3 All E.R. 177 (C.A.): "So far as witnesses of fact are concerned, the law is plain as can be. There is no property in a witness."

113 November 1, 2007 transcript page 20.

visa. This was raised during the pre-hearing conferences[114], and is referenced in the interlocutory decision by the Panel Member regarding the witness Mr. Bosanac (attached as Appendix B). The Presiding Member, was worried the witness Mr. Bosanac might be intimidated from personally attending the hearing, and offered that his testimony could be heard by phone or video conference from Australia.

[155] Despite these obstacles, Mr. Bosanac came all the way from Australia to testify. The panel can find no ulterior motivation for his testimony. Conversely, there appeared to be more downsides and risks for Mr. Bosanac to come to Canada and testify.

[156] The handling of Mr. Bosanac continued to be problematic at the hearing. At the virtual end of Mr. Bosanac's testimony, the Minister asked if Mr. Bosanac would sign a consent for the release of his Australian immigration file. At first the witness said he would, and then upon reflection and intervention of the Respondent's counsel, he retracted this. It was abundantly clear at this point in the hearing the Minister already had Mr. Bosanac's file in hand, and this was confirmed later by the Minister.

[157] The Presiding Member declined to order the witness to sign the release, and no release has arrived since the hearing. The following is the Minister's submissions in this regard:

> On December 11, 2007, the last day of the oral hearing, the Minister received reliable information from the Government of Australia which reveals serious inconsistencies with Mr. Bosanac's testimony.[115]
>
> The Minister obtained the aforementioned information from the Government of Australia by way of a "Memorandum of Understanding with Respect to Investigations Relating to Genocide, War Crimes, and Crimes against Humanity" ("the MOU"). The Minister was prevented from disclosing this information, as Australian privacy laws limit the disclosure of personal information to third parties without the consent of the individual. Accordingly, the Minister was informed by the Australian Department of Citizenship and Immigration that Mr. Bosanac could provide written consent authorizing the release of the information and the Minister would then be permitted to disclose the information.[116]
>
> Mr. Bosanac consented to the release of the information at the oral hearing, but then upon objection by counsel for the Respondent, he withdrew his consent. Upon his return to Australia and following repeated attempts by the Minister

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114 November 1, 2007 transcript pages 20, 21.
115 Affidavit of Marc TOWAIJ, dated March 27, 2008, para. 15.
116 *Ibid*., at paras. 13-14.

> requesting his consent, Mr. Bosanac refused to consent to the release of the information.
>
> The Minister submits that Mr. Bosanac, by failing to consent to the release of the information, effectively prevented the Minister from conducting a full cross examination of his evidence. In turn, the Board was also prevented from assessing all of the evidence and was prevented from considering Mr. Bosanac's testimony in light of the sealed information.
>
> The Minister submits that the Board should draw a negative inference from Mr. Bosanac's refusal to provide his consent to the release of this information. The Board has been prevented from conducting a full assessment of Mr. Bosanac's credibility in light of the undisclosed information.

[158] In fairness the Minister's Representatives were bound to the terms of the memorandum of understanding with Australia to not disclose the file. In the absence of Mr. Bosanac' consent, they were unable to produce this evidence. Nor was there any legal obligation upon Mr. Bosanac to produce such a consent.

[159] The panel concludes the witness Mr. Bosanac was a credible and trustworthy witness, conclusions based on the fact the panel was able to observe the witness, test and question him, and witness the cross-examination by the Minister's Representatives. No evidence was produced to suggest that Mr. Bosanac was complicit in the alleged events. Nor was any evidence adduced to suggest Mr. Bosanac himself had committee any war crimes, crimes against humanity, or any serious non-political crimes. There was no reason or indication to question his credibility. Despite the efforts of the Minister to discredit him, those efforts have failed. Despite extensive cross examination by the Minister's Representatives, the panel finds the credibility of the witness Mr. Bosanac remains intact.

[160] The panel is not in a position to "speculate" as to what the discrepancies may be in his file. Given this overall context, the panel declines to exercise its discretion to make a finding of a negative inference against Mr. Bosanac for the failure to sign the consent. The evidence of this witness was weighed accordingly, even with his failure to produce his consent.

[161] The Respondent has maintained that Mr. Bosanac was with him on the day in question for many years now, which is credible evidence that Mr. Bosanac was indeed present on the day in question. On 28 March 2003 the Respondent voluntarily went to an interview with the

RCMP. He told the RCMP about what happened on the drive between Tenja and Sarvas. He said there was a witness to what happened and gave that person's name as Bosanac.

[162] Admittedly he did not give the correct legal first name of the person but he did identify him by correct surname and former employment.[117] The Respondent did again voluntarily attend an interview on 25 August 2005 where he advised the Applicant of the correct first name of Mr. Bosanac.[118] The Respondent explained that he knew two people with Bosanac, both with different first names and he confused the two. The panel finds given the passage of time it would not be unreasonable to have mixed up his first name, and finds this mistake to be relatively minor in nature.

EVIDENCE OF PROTECTED WITNESS #1

[163] As per the panel's interlocutory order (Appendix A) regarding the application for a public hearing, the order contemplated there may be witnesses whose identities needed to be protected. Witness #1 fit into this category. He is acquainted with the Respondent, and comes from the same home town as the Respondent, namely Osijek, Croatia.

[164] This case has received media attention in Croatia, and accordingly, witness #1 was concerned that if people back in Croatia heard he had come to Canada to testify, he might be fired from his job, hurt, or even killed.

[165] Oddly, neither counsel for the Respondent, nor counsel for the Minister, chose to refer to any great extent regarding witness #1 in their submissions. The panel found this witness credible, even taking into account his relationship to the Respondent and any potential bias that might arise in that context.

[166] Witness #1 testified during the hearing he had several conversations with several of the witnesses. One compelling piece of evidence pertains to Witness #1's encounter with one of the witnesses, Ivan Radic, in Bizovec in Kralja in December of 1991. Witness #1 states he overheard Mr. Radic telling the Respondent's father he had run into the Respondent on the front

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117 Exhibit 41, Vol II, pages 403 and 416.
118 Exhibit 41, Vol II, pages 468 and 480.

line. Witness #1 testified Mr. Radic did not appear mad or upset, and did not indicate the Respondent had treated him poorly.

[167] On another occasion, Witness #1 had a further encounter with Mr. Radic, where Witness #1 asked Mr. Radic about the allegations against the Respondent. Witness #1 states that Mr. Radic said he had told Judge Dragan Simenic that he only saw the Respondent on October 12, 1991, and that the Respondent did not kill anybody.

[168] Witness #1 stated that Mr. Radic indicated that the Respondent was "in the wrong spot at the wrong time", and that he did not kill anyone, and was only seen at the site. Mr. Radic also stated that Vjekoslav Stetka was killed by a soldier from JNA under the command of the captain of JNA, and not by the Respondent.

[169] The most telling testimony, however, concerns Witness #1's spontaneous evidence about his ongoing relationship with Mr. Radic. The panel was somewhat surprised to hear about the extent of this relationship. The Witness #1 stated he had no problems with Mr. Radic, and spoke with him often. Many times this was over coffee on the weekends at the local coffee shop. Mr. Radic maintained that the Respondent was simply in the wrong spot, at the wrong time. Mr. Radic told Witness #1 that he had told the judge the Respondent was not armed when he saw him.[119]

[170] Part of the Minister's case is that it would be implausible, or highly unlikely, that the Respondent would not have known about the charges laid against him back in 1994. Witness #1 also provided corroborative evidence regarding the timing of the notice regarding the charges laid against the Respondent, and when the Respondent's family became aware. Witness #1 confirmed that the Respondent's mother only heard about the charges in 1997, when a letter came to her from the courts in Osijek. It was only then that the Respondent's family knew that he had been charged with killing Vjekoslav Stetka.

[171] Witness #1 corroborates the Respondent's evidence he did not know about the charges before leaving for Canada.

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[119] Transcript from December 7, page 66.

EVIDENCE OF THE RESPONDENT BUDIMCIC

[172] The panel will conclude this portion of the decision by commenting on the evidence, demeanour and credibility of the Respondent in this case. The Respondent, from the outset, has cooperated with the RCMP authorities. He has dealt with the Minister's application head on. He agreed to having the hearing heard in public, which the panel thought was very odd at first, given the extensive publicity that surrounded his case. The Respondent clearly wanted to clear his name, in the most public of manners.

[173] The panel has found the Respondent credible, and believes his version of the events of what took place in October of 1991. He admits to travelling with Bosanac from Tenja to Sarvas with a friend to check into living at a relative's house. While enroute, they encountered heavy military activity, and at one point they were ordered to turn off the main road onto a road which went through a field.

[174] They were driving along, and noticed a number of prisoners of war, some on their knees with their hands behind their heads. The Respondent recognized one of the prisoners, Ivan Radic. He knew Mr. Radic was from his village, and he also thought maybe he might find his brother. He recalls approaching Mr. Radic, and asking what he was doing here. He remembers asking Mr. Radic if he knew where his brother was. Mr. Radic told him his brother was on the other side of the river Drava, at a place called Nard. The Respondent testified this was a calm discussion.

[175] The Respondent went on to testify that the military then ordered him to move along. The entire encounter he says took maybe three minutes. He testified he was not armed, and did not assault or shoot anyone at the scene.

[176] Clearly the Respondent admits to being at the front line on October 11, 1991, and to stopping at the scene where a number of army vehicles, soldiers, and apparent prisoners were being held. He admits to exiting his vehicle, and inquiring as to what was going on. The evidence filed by the Minister's Representatives, namely the various witness statements and the weight the panel places on them, does not override or shake the viva voce evidence provided by the Respondent, Mr. Bosanac and Witness #1.

[177] As indicated, during the hearing the panel expressed some surprise that the Respondent would venture out during a period of war activity, and then also stop and get out of the vehicle in such circumstances. Upon reflection, the panel has taken into consideration that this was a period of ongoing turbulent activity and war, and that the Respondent recognized one of the prisoners and wanted to find the whereabouts of his brother. It is difficult and dangerous for those not in such a situation to assess with our own lens what we would have done in the situation.

[178] Given these credibility findings, the panel finds there is no evidence that the respondent was involved in the commission of any crimes, whether a war crime or a serious non-political crime on the day in question. The panel further finds the Respondent was neither a perpetrator, nor a conspirator. Furthermore, the panel finds that simply being at the scene does not amount to complicity. The Respondent was at the scene for only a few minutes, and moved on shortly thereafter. The situation was beyond his control, and he could not have prevented what happened.

3.s. 109(2) - was there other sufficient untainted evidence (at the time of application) to justify a determination for refugee protection.

[179] The panel has already determined the original decision allowing the Respondent's claim for refugee protection was obtained as a result of withholding or omitting material facts relating to a relevant matter. The Respondent has admitted this. The first part of section 109 has been met.

[180] The matter does not stop here. Despite what one might think, the omission and misrepresentation in and of itself is not sufficient to vacate the original determination for refugee protection. The Act requires the panel to conduct a further under analysis as per s. 109(2):

> (2) Rejection of application – The Refugee Protection Division may reject the application if it is satisfied that other sufficient evidence was considered at the time of the first determination to justify refugee protection.

[181] There have been many court cases dealing with how this sub-section is to be interpreted and applied. Effectively, it requires the panel to eliminate the "tainted" evidence

considered at the time of the original application for refugee protection, and assess whether there is any remaining "untainted" evidence which would have justified refugee protection.

[182] The applicable time period is "at the time of the first determination".

> …(e) When carrying out the analysis set out in s. 109(2), the RPD can refer to its findings under section 109(1) but only to identify what "old" evidence remains untainted by the withholding or misrepresentation. The RPD cannot reassess the "old" evidence in light of new evidence adduced by the Minister or the claimant pursuant to section 109(1).The RPD cannot give any weight or even consider the new evidence produced by either party when exercising its discretion pursuant to section 109(2).[120]

[183] The use of evidence at vacation proceedings was also discussed in *Coomaraswamy*:[121]

> In *Maheswaran*, Rothstein, J.A. elaborated, in part, as follows:
>
> Subsection 69.3(5) <the equivalent to the present *IRPA* provision> is an exceptional provision of narrow application. It only comes into play once it has been established by the Minister, under subsection 69.2(2), that the previous positive Convention refugee determination was obtained by fraud, misrepresentation, suppression or concealment of any material fact. Subsection 69.3(5) recognizes that notwithstanding the fraud, misrepresentation, suppression or concealment established at the subsection 69.2(2) stage, there may be other independent evidence that could have supported the positive determination (emphasis added).
>
> The provision thus calls upon the Refugee Protection Division to base its decision on evidence before the original panel that survived the subsection 69.2(2) assessment. In doing so, the subsection 69.3(5) panel must place itself in the position of the panel that made the original determination and reassess whether a positive determination was or could have been based on the untainted evidence.
>
> This provision does not call for new evidence, either from the Minister or the applicant. In other words, the Minister is not entitled to adduce new evidence as to why the remaining untainted evidence should not be believed and the applicant is not entitled to adduce new evidence to bootstrap the untainted evidence. The parties, of course, may make submissions, but based solely on what would have been before the original panel after excluding anything established under subsection 69.2(2) as being affected by fraud, misrepresentation, suppression or concealment.

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120 *Wahab v MCI* 2006 FC 1554.

121 *Coomaraswamy v. Canada (Minister of Citizenship and Immigration)*, 2001 FCT 47.

> The panel does not accept the applicant's argument. In my respectful view, the facts of *Maheswaran* can be distinguished from the case at bar. In *Maheswaran*, in reaching its conclusions, the vacation panel, in considering whether there was sufficient remaining evidence before the original panel to maintain the determination of refugee status, relied on evidence submitted by the Minister in his application to vacate the original determination. The applicants argued in that case that if the Minister was entitled to rely on new evidence to argue that the remaining evidence for the applicant was not credible or did not support the positive determination, then fairness demanded that the applicants be given an opportunity to introduce responding evidence.

[184] The Board must confine itself to evidence that was before the initial decision maker. The untainted evidence must be assessed on its own.[122]

[185] In cases such as this, the requirements of section 109(2) become more difficult to apply. For one, this was an overseas application for protection, made during a difficult period of time as the former Yugoslavia broke apart. Furthermore, the actual contents of the overseas file were not available at the time the Minister made the application to Vacate. It took some time, and considerable prompting by the Presiding Member who emphasized that the entire contents would really vital evidence for the hearing.[123] Finally, the initial application by the Respondent took place a long time ago.

[186] As previously stated, the panel finds there were other sufficient reasons to justify the granting of refugee protection to the Respondent. Several possible reasons were raised, including the fact the Respondent lived in a mixed marriage, the allegations he lost property and that he suffered from employment discrimination.

[187] The panel finds the fact the Respondent was from a mixed marriage, during the period in question, to be sufficient to have granted him refugee protection.

[188] It is truly remarkable that both the visa officer, Stephen Stebelsky and his supervisor Brian Casey were still available and able to attend at the hearing. They provided helpful and credible evidence, and as indicated, that evidence went a long way to establishing that a misrepresentation or the withholding of a material fact by the Respondent had taken place.

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122 *Coomaraswamy v. MCI* 2002 FCA 153.

123 Letter from the Board to counsel dated September 6, 2007.

[189] Similarly, their evidence regarding the inclusion portion of this claim (as it pertains to s. 109) was entirely credible and pertinent.

[190] This finding is supported by the Minister's witness, Mr. Stebelsky, who conducted the initial interview of the Respondent in Belgrade in 1994. Mr. Stebelsky, having worked as a visa officer during the conflict and break down of the former Yugoslavia, was able to provide some context of the human conditions at that time:

> What would happen in the office, the Belgrade visa office resettled probably 30,000 or 40,000 refugees to Canada during the period of time that I was there. It was a massive migration of people who were negatively affected by the dissolution of the former Yugoslavia. [124]

[191] Mr. Stebelsky also confirmed during his testimony that persons of mixed marriage might meet the definition of members of a particular social group.[125] Mr. Stebelsky was asked about the situation concerning persons from mixed marriages:

> Q I would suggest to you from 1992 to 1995 the situation in Yugoslavia was very serious and the Croats and the Serbs in mixed marriages, in particular, their safety and lives had been threatened.
>
> A Yes, I think mixed marriages were in a difficult situation then; yes.[126]

[192] Mr. Stebelsky had clearly put his mind to the fact the Respondent and his wife were in a mixed marriage during the initial interview. His notes from that interview, as found in the Eligibility Determination and the Immigration Assessment Record – Abroad, indicate: "mixed marriage several times over, but by name he is Croatian; The families are mixed marriage heritage several times over; Harassment and discrimination of Serb minority and mixed couples took place; Suffered harassment by Krajina Serbs due to mixed heritage and working with UN; Definitely displaced and in danger."[127]

[193] Mr. Casey, who in 1994 and 1995 was the Immigration Program Manager and Consul at the Belgrade office, also provided testimony at the hearing. He played a role in the process which conferred refugee status upon the Respondent. Mr. Casey confirmed he had written a

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124 Transcript December 3, 2007, page 23, line 35.
125 Transcript December 3, 2007, page 69, line 27.
126 Transcript December 3, 2007, page 130.
127 Exhibit 37, and Exhibit 41, Vol III, tab 2, pages 121 and 130.

report that indicated that there were approximately 160,000 registered refugees in Serbia that had been displaced from Croatia and probably the number of unregistered refugees was in the low tens of thousands.[128]

[194] The Presiding Member questioned Mr. Casey regarding the reason the Respondent and his family were granted refugee status:

> Q. You reviewed the file with Mr. Budimcic before you came today. I think you said that.
>
> A. Yes. Yeah.
>
> Q. What is your understanding about what the basis for approving them as refugees, was the basis for it?
>
> A. The basis was that they -- they were a mixed-marriage couple from Croatia. They could -- they could not settle -- they could not remain either in Belgrade nor return to Croatia because of that fact.

[195] Mr. Casey also confirmed that those processing the applications would know by people's names and background what their ethnicity was, and he confirmed that he could identify what the Respondent and his wife's backgrounds were. Mr. Casey was most definite that the wife would be of Serbian ethnicity, similarly he knew the Respondent was Croatian.[129]

[196] One of the interesting issues in this file is the question of country conditions, at the time in question. In the lead up to this hearing, several authoritative texts were proposed, one of which would be entered as an exhibit, and used in the hearing to help provide a contextual and historical perspective. All of the parties reviewed the various texts, and a consensus was reached to rely upon *The Fall of Yugoslavia – the third Balkan War,* by Misha Glenny. Glenny, along with his various books on this subject, are widely considered as factual and unbiased.

[197] Although the following passage refers to Glina and Zagreb, further west than the area from which the Respondent comes from, it is indicative of the tensions that occurred between mixed marriages during the period in question:

> Before the Croat leadership had recovered from its independence hangover on the morning of 26 June, the forces of the Marticevci had begun a serious offensive a

[128] Transcript December 4, 2007, page 78, line 26.
[129] Transcript December 4, 2007, page 134.

> mere thirty-five miles from Zagreb in the town of Glina. The Marticevci, the largest paramilitary force among Serbs, had launched a surprise attack on Glina police station where Croat police holed up. Glina is an instructive example of the complexity of the Serb-Croat conflict. It is a charming town, resting in a gentle, shaded valley between two ranges of hills, which were Partizan strongholds during the Second World War. Much, but not all, of the fighting in 1991 took place in areas where the Paritzans had fought guerrilla war against the Ustasha state exactly half a century before. Glina is just in the region known as Banija, which borders Kordum to the West. It is close to the village, Topusko, which was the regional Partizan headquarters during the Second World War and from where the Kordum and Banija Partizans spread into the surrounding hills. In this region the Partizans were nationally mixed-by the end of the war, 60 per cent of the guerrillas were anti-fascist Croats. In 1991 it was a simple battle between Croats and Serbs-journalists came across mixed marriages in Banija which had been split by the war. One female Croat solider on the front line south of Sisak (the Croat headquarters for Bajina) told reporters she had joined the National Guard when her husband signed up for the Serb paramilitaries. She explained without bitterness how she was firing at her husband. Many mixed marriages have been wrecked by the war, although I observed a general pattern in the crisis area of women assimilating the national consciousness of their husbands: Croat women espousing the Serb ideals of their partners and Serb women denouncing Serb aggression against the homeland of their lovers.
>
> On the field in Glina and elsewhere in Kordun and Banija, Serbs were shooting Serbs. The cultural and political splits within the Serb and Croat communities had an enormous impact on the intensity of the struggle, as we shall observe later, especially in eastern Slavonia. Anybody who doubts the deeply nationalist aspect of this war has clearly never been anywhere near the battlegrounds.
>
> Ironically, the greatest victims of the respective nationalisms have been those Serbs and Croats who live under the administration of the other nation.[130]

[198] It is also worth noting that the Board country condition documents used during the period of time in question, made reference to mixed marriages, and confirm that persons in such marriages were likely to suffer from persecution during the break up of Yugoslavia. For example, one such document was the 1994 Ron Redman article entitled *Neither here nor there* for the UNHCR Refugee Magazine,[131] which highlighted the problems for those from mixed marriages:

> Ethnically mixed families like the Bubrics were once common all over former Yugoslavia. Nobody paid much attention to the spelling of one's name - often the only way to tell a person's ethnicity - until the past two years when extreme

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130 Exhibit 38, *The Fall of Yugoslavia,* Misha Glenny, pages 89, 90, 91, and 123.

131 Exhibit 7, item #14.

> nationalists began their ugly campaign of "ethnic cleansing." Today, hundreds of thousands of people have been driven from their homes, in many cases simply because their names are spelled differently than their neighbor's.
>
> The tragic division of Bosnia-Herzegovina along ethnic lines has been especially traumatic for mixed families like the Bubrics who no longer know where they really belong.
>
> "We're not welcome now on the Muslim side, we're not welcome on the Croat side and we're not welcome on the Serb side," Mr. Bubric said. "And here in Croatia, it is also very difficult. I'm worried. I don't know where we belong."
>
> Several countries outside former Yugoslavia have indicated to the U.N. High Commissioner for Refugees that they will extend temporary protection to persons unable to remain in their homeland because their spouses are of a different ethnic origin or religion. But getting to those third countries in the first place is a major hurdle. And a mixed marriage does not in and of itself make a displaced or refugee couple in former Yugoslavia eligible for resettlement.
>
> Despite the strains, the Bubric's mixed marriage has remained strong. But that is not the case for thousands of other families who have been unable to withstand the hatred and prejudice of their former neighbors. Husbands have left their wives, children have been taken from their parents.

[199] The panel thereby concludes there is ample objective documentation to demonstrate that people from mixed marriages were at risk during the early 1990's in both Serbia and Croatia. The evidence from both Mr. Stebelsky and Mr. Casey confirm that the Respondent and his family met the conditions for refugee protection, based on their mixed marriage.

CONCLUSION

[200] The Minister has established that the Respondent withheld material facts during the application process to be granted refugee status in 1994.

[201] The Minister has not met the test for exclusion based on the Respondent having committed a war crime, a crime against humanity or a serious non-political crime.

[202] Having determined that the Respondent is not excluded, the panel then conducted the analysis required in s. 109(2). The panel finds there are sufficient, untainted reasons on which the visa officer in 1994 could have determined the Respondent was a Convention refugee.

[203] Accordingly, the application of the Minister of Public Safety and Emergency Preparedness' to vacate the decision to grant Convention refugee status to Josip BUDIMCIC on November 9, 1994 is hereby dismissed.

[204] The prior determination of Convention refugee status stands.

"Ross Pattee"

(signed) _____

Ross Pattee

19 November 2008

Date (day/month/year)

APPENDIX A

IMMIGRATION AND REFUGEE BOARD OF CANADA

Refugee Protection Division

COMMISSION DE L'IMMIGRATION ET DU STATUT DE RÉFUGIÉ DU CANADA

Section de la protection des réfugiés

RPD File No. / N° de dossier de SPR : VA7-00522

Private Proceeding
Huis clos

IN THE MATTER OF AN APPLICATION BY *THE NATIONAL POST* PURSUANT TO S. 166 OF THE *IMMIGRATION AND REFUGEE PROTECTION ACT* AND RULE 51

Respondent (s)	**Intimé (s)**
JOSIP BUDIMCIC	
Date(s) and Place of Hearing	**Date(s) et Lieu de l'audience**
September 5, 2007 Vancouver, B.C.	
Date of Decision	**Date de la Décision**
September 6, 2007	
Panel	**Tribunal**
Ross Pattee	
Respondent's Counsel	**Conseil de l'»intimé**
Dennis McCrea Barrister & Solicitor	
Tribunal Officer	**Agente de tribunal**
Mumtaz Rana	
Designated Representative	**Représentant désigné**
Nil	
Minister's Counsel	**Conseil du ministre**
Jesse Davidson	

INTERLOCUTORY ORDER
APPLICATION FOR A PUBLIC HEARING

[1] On August 20, 2007 the Immigration and Refugee Board (the "Board") received an application by the *National Post* to have the vacation hearing in the matter of Josip BUDIMCIC opened to the public, pursuant to s. 166 of the *Immigration and Refugee Protection Act* (the *Act*).[132] The vacation application by the Minister of Public Safety and Emergency Preparedness is currently scheduled for five days of hearing commencing on December 3, 2007 in Vancouver.

[2] Copies of this application were forwarded to the respondent's counsel and the Minister's counsel on August 29, 2007 requesting that they come to the next scheduled pre-hearing conference on September 5, 2007 prepared with their submissions and position with respect to the *National Post* application.

[3] On September 5, 2007 the Minister's counsel indicated that it took no position with respect to the *National Post* application.

[4] Furthermore, the respondent, through his counsel, indicated he did not object to having the hearing opened to the public. The one *proviso* to this was that might likely be witnesses that will want to have their identities protected.

DECISION

[5] For the reasons given below, and subject to the measures outlined, I have decided to grant the *National Post* application and conduct most of the hearing in public.

Factors Considered

[6] The manner in which refugee hearings are to be held is governed by section 166 of the *Act*. Usually hearings before the Refugee Protection Division are held in private. Section 166 of the *Act* states:

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[132] *Immigration and Refugee Protection Act,* S.C. 2001, c. 27.

Proceedings before a Division are to be conducted as follows:

> (a) subject to the other provisions of this section, proceedings must be held in public;
>
> (b) on application or on its own initiative, the Division may conduct a proceeding in private, or take any other measure that it considers necessary to ensure the confidentiality of the proceedings, if, after having considered all available alternate measure, the division is satisfied that there is
>
> (i) a serious possibility that the life, liberty or security of a person will be endangered if the proceeding is held in public,
>
> (ii) a real and substantial risk to the fairness of the proceeding such that the need to prevent disclosure outweighs the societal interest that the proceeding be conducted in public, or
>
> (iii) a real and substantial risk that matters involving public security will be disclosed;
>
> (c) subject to paragraph (d), proceedings before the Refugee Protection Division and the Immigration Division concerning a respondent of refugee protection, proceedings concerning cessation and vacation applications and proceedings before the Refugee Appeal Division must be held in private;
>
> (d) on application or on its own initiative, the division may conduct a proceeding in public, or take any other measure that it considers necessary to ensure the appropriate access to the proceedings if, after having considered all available alternate measures and the factors set out in paragraph (b), the Division is satisfied that it is appropriate to do so;

[7] In deciding whether to grant an application for a public hearing, I am required to consider and balance a number of factors. On the one hand there is the right of the public and the media to have access to information. On the other hand, there is the question of whether, if the hearing were to be held in public, there is a serious possibility that anyone's life or security will be endangered, there is a substantial risk to the fairness of the proceedings, or a risk that matters of public security would be disclosed.

[8] As pointed out in the application, there has already been a significant amount of media coverage concerning this case. In addition, the respondent himself does not object to an open hearing, and indeed, welcomes it. There were no submissions or evidence that any of the factors listed above in paragraph 7 are present in the case with the sole exception there were submissions pertaining to maintaining the confidentiality of certain witnesses which may be called at the

hearing. Some of those potential witnesses continue to reside in the country from which the respondent comes and it is appropriate to adopt measures to protect their confidentiality, safety and security.

[9] Accordingly, the hearing will be held in public, with the exception that certain witnesses will be entitled to provide their evidence in private, and their identities will remain protected. Counsel for the respondent will disclose to the Minister and the Refugee Protection Division the names of any witnesses whose identity and testimony is to be kept confidential in a timely manner.

MEASURES REGARDING PUBLIC ACCESS

[10] The final consideration is the extent and form of public access that will be granted, especially as it relates to the media. Although the *National Post* application does not spell out how it wishes to participate in the hearing, nevertheless I will make rulings on the type of access that will be granted to the media, and for that matter, to the members of the public.

[11] The intent of section 166 of the *Act* is to provide appropriate guidelines when public access to RPD hearings is granted to ensure the hearing can proceed in a fair and orderly fashion, all the while protecting the rights, dignity and privacy of the participants.

[12] I find that the presence of a film crew, cameras or recording devices are not necessary to ensure appropriate public access to the proceedings. The presence of cameras or recording devices would be disruptive to the hearing, and possibly could affect the manner and quality of the evidence. Participants have the right to a reasonable expectation of calm and privacy, which might be jeopardized by the presence of cameras and film crews.

[13] Accordingly, I order that no electronic devices will be allowed in the hearing room. This includes, but is not limited to, still, video, movie or cell phone cameras, in addition to any audio or recording devices.

[14] This decision is not being made in private, and may be disclosed to the general public.

"Ross Pattee"
Ross Pattee

6 September 2007
Date (day/month/year)

APPENDIX B

IMMIGRATION AND REFUGEE BOARD OF CANADA

Refugee Protection Division

COMMISSION DE L'IMMIGRATION ET DU STATUT DE RÉFUGIÉ DU CANADA

Section de la protection des réfugiés

RPD File No. / N° de dossier de SPR : VA7-00522

Private Proceeding
Huis clos

Preliminary Ruling

Respondent (s)	**Intimé**
JOSIP BUDIMCIC	
Date(s) and Place of Hearing	**Date(s) et Lieu de l'audience**
25 October 2007 Vancouver, BC	
Date of Decision	**Date de la Décision**
06 November 2007	
Panel	**Tribunal**
Ross Pattee	
Claimant's Counsel	**Conseil du demandeur d'asile**
Dennis McCrea Barrister & Solicitor	
Tribunal Officer	**Agente de tribunal**
Nil	
Designated Representative	**Représentant désigné**
Nil	
Minister's Counsel	**Conseil de l'intimé**
Jesse Davidson Ron Yamauchi	

[1] The Minister's Representative made a written application pursuant to Rules 43 and 44 of the *Refugee Protection Rules*[133] on October 25, 2007 requesting that the Board order the Respondent to provide the following information pertaining to the witness Nedjeliko Bosanac:

- Date of birth
- Details of his immigration history in Australia, including the manner in which he immigrated there
- Complete records and history of military service in the former Yugoslavia
- Complete records and history of employment in the former Yugoslavia
- Complete records of any criminal charges, arrests (or warrants for), and convictions in any country

[2] Counsel for the Respondent, and the Minister's Representative both made oral submissions at a pre-hearing conference held on November 1, 2007 regarding this application. This is the decision regarding that application.

[3] Rule 38 provides the framework for calling witnesses. It provides that a party wishing to call a witness must provide the following information:

- The witness's contact information
- The purpose and substance of the witness's testimony
- The time needed for the witness's testimony
- The party's relationship to the witness
- Whether the witness will testify by videoconference or telephone

[4] In this instance, the Respondent has complied with the Rule. The Minister's Representative argues that this additional information is required to ensure that no delays will occur for the hearing set for the week of December 3, 2007. He argues this information and history is required for the Minister to be prepared to question the witness, and to assess his

133 *Immigration and Refugee Protection Act, Division Rules*, SOR/2002-228.

credibility. He submits this information is relevant, and furthermore, he will need additional time to research it.

[5] The Minister's Representative also went on to state that section 55 of the *Immigration and Refugee Protection Act* (the "*Act*")[134] may apply to the witness upon his arrival in Canada from his country of residence, Australia. In particular, the Minister's Representative indicated the witness may need to be detained for examination on the basis of inadmissibility on the grounds the witness potentially has violated human or international rights. The presiding member is left with the impression that the Minister's Representative actually wishes the additional information requested in his application to assist Canada Board Services Agency (CBSA) in this regard.

[6] The application is denied. The Minister's Representative has received notice of this witness significantly prior to the 20 day disclosure requirement. As noted, the Minister Representative has all the information about the witness that is required by the rules. If he wishes to undertake this research he has sufficient time to do so. In contrast with civil proceedings, the refugee determination process does not provide for a discovery process beyond the requirements of Rule 38. Accordingly, the Minister's Representative is free to undertake whatever investigations or research he deems necessary in advance of the hearing.[135]

[7] Finally, it should also be noted that this witness has other options to provide his evidence, such as via telephone.

"Ross Pattee"
Ross Pattee

06 November 2007
Date (day/month/year)

134 *Immigration and Refugee Protection Act*, S.C. 2001, c. 27.

135 As noted by Lord Denning in *Harmony Shipping Co. S.A. v. Davis* [1979] 3 All E.R. 177 (C.A.): "So far as witnesses of fact are concerned, the law is plain as can be. There is no property in a witness."