N93/02050 [1995] RRTA 484 (10 March 1995)

REFUGEE REVIEW TRIBUNAL
DECISION AND REASONS FOR DECISION

RRT Reference: N93/02050

Tribunal: Dr Judith Winternitz, Member

Date: 10 March 1995

Place: Sydney

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

DECISION UNDER REVIEW

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

The Applicant sought protection as a refugee by applications lodged with the Department of Immigration and Ethnic Affairs (the Department) on 20 July 1992. The decisions were made on 28 October 1993 and the Applicant was notified by letter of the same date. He applied for review of the decisions on 1 December 1993.

BACKGROUND

The Applicant, who was born in 1960 in Belgrade in the Republic of Serbia within the former Socialist Federal Republic of Yugoslavia, holds a current passport from the former Yugoslavia, is of Serbian background and lived most of his life in Serbia in the former Yugoslavia. The Applicant's wife is of Polish background and is living in Poland with the couple's young son. The Applicant arrived in Australia on 2 May 1992 as a visitor and following the expiry of his visitor visa was granted temporary entry permits current until the present under the Government's humanitarian stay arrangements for people from the former Yugoslavia. The Applicant was not assisted by an adviser at the primary decision stage of his application, however was assisted by Mr Brad Kitich of the Yugoslav-Australian Welfare Association with his review application. His adviser did not attend the Tribunal hearing.

JURISDICTION AND STANDING

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

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

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

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

LEGISLATIVE FRAMEWORK

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

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

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

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

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

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

Insofar as relevant to the present matter, Article 1A(2) of the Convention as amended defines a refugee as any person who:

"owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear, is unwilling to return to it."
This definition of a refugee contains various elements.

Firstly, the definition includes only those persons who are outside their country of nationality or, where the applicant is a stateless person, country of former habitual residence.

Secondly, an applicant must have a "well-founded fear" of being persecuted. The term "well-founded fear" was discussed in *Chan Yee Kin v. The Minister for Immigration and Ethnic Affairs (1989-90) 169 CLR 379* (Chan's case). It was observed that this term contained both subjective and objective requirements. "Fear" concerns the applicant's state of mind, but this term is qualified by the adjectival expression "well-founded" which requires a sufficient foundation for that fear (at 396).

The Court in Chan's case held that a fear of persecution is well-founded if there "is a real chance that the refugee will be persecuted if he returns to his country of nationality" (at 389 and 398, 407 and 429). It was observed that the expression " 'a real chance'... clearly conveys the notion of a substantial, as distinct from a remote chance, of persecution occurring..." (at 389) and though it "does not weigh the prospects of persecution... it discounts what is remote or insubstantial" (at 407). Therefore, a real chance of persecution may exist notwithstanding that there is less than a 50% chance of persecution occurring (at 397-398).

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

Thirdly, an applicant must fear "persecution". The term "persecution" is not defined by the Convention, but not every form of harm will constitute persecution for Convention purposes. The Court, in Chan's case spoke of "some serious punishment or penalty or some significant detriment or disadvantage" if the applicant returns to his or her country of nationality (at 388). Likewise, it stated that the "notion of persecution involves selective harassment" whether "directed against a person as an individual" or "because he or she is a member of a group which is the subject of systematic harassment", although the applicant need not be the victim of a series of acts since a single act of oppression may suffice (at 429-430). The harm threatened may be less than a loss of life or liberty and includes, in appropriate cases, measures '"in disregard' of human dignity" or serious violations of core or fundamental human rights. Indeed Hathaway defines persecution as "the sustained or systemic violation of

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

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

Another issue arises as to whether the definition of "persecution" above covers the situation of people suffering severely or displaced as a result of armed conflict, civil war or general unrest in their country of nationality. As Hathaway points out, "persons who fear harm as the result of a non-selective phenomenon are excluded. Those impacted by...civil unrest, war, and even generalized failure to adhere to basic standards of human rights are not, therefore, entitled to refugee status on that basis alone" (Hathaway at 93). Nevertheless, persons coming from a strife-torn state may establish a claim to refugee status "where the violence is not simply generalized but is rather directed toward a group defined by civil or political status; or, if the war or conflict is non-specific in impact, where the claimant's fear can be traced to specific forms of disfranchisement within the society of origin" (Hathaway at 188). These principles have been interpreted in the Australian context in *Murugasu and Minister for Immigration and Ethnic Affairs*, unreported, 28 July 1987, where Wilcox J. stated "The word 'persecuted' suggests a course of systematic conduct aimed at an individual or at a group of people. It is not enough that there be fear of being involved in incidental violence as a result of civil or communal disturbances...it is not essential to the notion of persecution that the persecution be directed against the applicant as an individual. In a case where a community is being systematically harassed to such a degree that the word persecution is apt, then I see no reason why an individual member of that community may not have a well-founded fear of being persecuted." (p.13)

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

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

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

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

CLAIMS AND EVIDENCE

The background to the Applicant's refugee status application is the distintegration of the former Yugoslavia as a unified, if federated, State. He arrived in Australia at a time when the former Yugoslavia had already broken up in the face of declarations of independence from Slovenia, Croatia and Macedonia during 1991. Bosnia-Herzegovina's declaration of independence followed in 1992. The independence claims of these previous component Republics of the former Yugoslavia had already resulted in warfare against the Belgrade-led former Yugoslav National Army and local opponents of independence, by the secessionist regimes first in Slovenia (1991), then in Croatia (1991-4) and Bosnia-Herzegovina (1992-1994). The latter two conflicts remain unresolved at the time of writing : the first in a state of uneasy truce (since April 1994) and the second still embroiled in intractable active warfare, exercising the minds of the United Nations and all major world leaders and appearing daily in newspapers world wide (see Marcus Tanner, "The Conflicts in the former Yugoslavia", pp 87-94 in Eastern Europe and the Commonwealth of Independent States 1994, Second Edition, Europa Publications Ltd, London, 1994).

A few months after the Applicant arrived in Australia, the independence claims of the secessionist Republics and the new shape of the "rump" Yugoslavia was finally formally conceded by those in Belgrade, the central power source of the erstwhile larger Yugoslav federation. This was done through the adoption of a new Constitution for a new "Federal Republic of Yugoslavia" (FRY[S+M]), comprising simply the Republics of Serbia and Montenegro, in April 1992. The new FRY (S+M) Constitution marked the final passing of the former larger Yugoslav federation by those two Republics *de facto* (see United States Department of State Country Report on Human Rights Practices for 1992 : Serbia/Montenegro and Australian Department of Foreign Affairs cable BG 58413 of 27 April 1992), although the dominant Belgrade government of the new "Federal Republic" has still never recognised the independence of any of the secessionist Republics in a formal state-to-state way.

Serbia and Montenegro, in their new guise of the "Federal Republic of Yugoslavia" see themselves as the continuation of the former Yugoslavia. In terms of international recognition, however, the "Federal Republic of Yugoslavia" and its claims to continuity with the former Yugoslavia have not been recognised by the United Nations, nor by the United States or Australia (US Department of State Country Report cited above and Australian Department of Foreign Affairs Report on the Federal Republic of Yugoslavia and its status, 8 June 1993, CIS document CX2382).

The disintegration of the former Yugoslavia and the lack of formal recognition of the self-proclaimed "Federal Republic of Yugoslavia" poses some technical questions of formal nationality status for people from those parts of the former Yugoslavia who are resident abroad. In terms of refugee status determination in Australia, the formal citizenship status of the Applicant is unclear. It is likely to be citizenship of the FRY (S+M) ("probably" because as yet the FRY(S+M) has not passed a new citizenship law, but is still running under the 1976 citizenship law of the former Yugoslavia : see Australia Department of Foreign Affairs cable BG61786 of 3 June 1994). Yet since this is a country which Australia (and the international community) does not recognise, and the former Yugoslavia of which he undoubtedly was a citizen no longer exists, the Applicant has been rendered formally stateless from Australia's (and the international community's) point of view.

The Tribunal considers however that in this case the Applicant's technical statelessness poses no significant issues to the refugee determination process. The reference point for his refugee claims (technically the "country of his former habitual residence") can readily be established as the Republic of Serbia. The Tribunal considers that there is no uncertainty on this point, as the Applicant was born in the Republic of Serbia in the former Yugoslavia, is of Serbian national background, has lived in Serbia for virtually all his life, and holds a passport from the former Yugoslavia, issued by the authorities in the Republic of Serbia. On this basis, and on the basis of the fact that the Applicant himself has never referred to difficulties related to his citizenship or suggested any other reference point for his refugee claims, the Tribunal considers that it is clear that the Applicant's claims should be considered with reference to the situation in the Republic of Serbia.

The Tribunal notes that the Applicant was born and lived most of his life in Belgrade. He was educated in that city, completing qualifications as a technician in 1979. He undertook his 13-month compulsory military service in the then Yugoslav National Army (April 1984 to May 1985), training in a "commando" unit. He thereafter returned to Belgrade and worked in a Belgrade thermal power station as a boiler technician/controller until his departure from the former Yugoslavia. In 1986 he married a woman of Polish background and Roman Catholic religion; the couple continued to live in Belgrade, where their son was born in 1989, until they left the former Yugoslavia for Poland in January 1992. The Applicant's wife and child have not accompanied him to Australia, remaining in Poland for the moment (see below). The Applicant visited Australia during 1988 and his wife has relatives here. His parents remain in the former Yugoslavia. He has only one sibling: his brother (...), who arrived in Australia in 1991 and has also sought refugee status here. At time of writing of this decision, the latter application had not yet been decided at primary level.

The Applicant's claims have been stated in a reasonably consistent fashion through the various stages of the refugee determination process. Because of this consistency no signifiant issues arise as to the timing of presentation of his claims and so the Tribunal will proceed to summarise the claims as a whole, only referring to the timing of making of particular claims where appropriate.

The central core of the Applicant's claims for refugee status has consistently been his fear, if he were to return to Serbia, of the consequences of his decision to evade

conscription into the Serbian military forces in January 1992. The claims related to this are noted below.

However, as background to this decision, he has referred at various times in the refugee determination process to his opposition to the communist regime in Serbia. His political disagreement with the policies of the Serbian leadership is claimed to have existed for some years, both in general, and, increasingly as the former Yugoslavia disintegrated, in terms of the regime's promotion of aggressive Serbian nationalism and intolerance of religions other than the Serbian Orthodox.

In his original application form and at his primary-level interview, the Applicant referred to this political disagreement with the regime and the difficulties that it caused him in general terms. He stated in the application and at the primary level interview, that although his political views had only been expressed to friends, and although he was not a member of any opposition political party, he nonetheless strongly disagreed with the Milosevic regime. He also indicated that, increasingly, his level of loyalty to the Serbian state and its official policies under Milosevic was suspected by his work colleagues. His marriage in 1987 to a woman of Polish and Roman Catholic background and he and his wife's choice to baptise their son as a Roman Catholic had effectively caused him to be identified publicly as "anti-Serbian". The tensions inherent in such an identification mounted in the context of heightened nationality tensions in the former Yugoslavia in 1990/91.

The primary decision-maker did not pursue this point with the Applicant, and led the interview instead to focus solely on the issue of draft evasion, effectively in isolation from the Applicant's stated political opinion.

The issue of political opinion was brought up again by the Applicant at review level. He pointed out in his Tribunal application form that his political views had not been fully explored or taken into account in the primary decision.

At his Tribunal hearing, the Tribunal invited the Applicant to elaborate further on this matter. Even though it was made clear by the Applicant that the main focus of his case remained the draft evasion issue, the Applicant also saw his political views as important and relevant, giving his act of draft evasion its appropriate context.

The Applicant referred again to his anti-regime views and the inherent tensions of his situation, as described above. He added that as the federal ideal of the former Yugoslav state started to disintegrate, he had taken part in major anti-Milosevic demonstrations in Belgrade in May 1991, when tanks were used against the demonstrators and the police had used violent means to suppress opposition voices. At work, too, during 1991, he stated that there had been significant difficulties for him. He had held a responsible position in a thermal power station, controlling heating for a section of the city of Belgrade. Fellow-workers had abused and harassed him, accusing him of being sympathetic to the independence aspirations of Roman Catholic Croatia, because of his wife's and child's religion. He stated that both he and his family had been threatened physically by his work colleagues; he had been accused of being a "traitor" to the Serbian people, and had found himself blamed for problems with equipment or production at work, or put in positions of physical danger. He described how heavy objects would fall "accidentally" as he passed by at work, or

dangerous hot air pressure valves would suddenly, mysteriously be released. He said that he had reported these incidents to his supervisors, in writing and verbally, but nothing was done. He commented that even if they were personally sympathetic to him, his supervisors did not dare intervene, given the heightened nationalist atmosphere of the time. He also indicated that he was afraid for his wife and child; his wife was isolated socially and felt extremely pressured by the intensity of Serbian nationalism and anti-Catholic feeling. She had tried for four years to gain citizenship of the former Yugoslavia but her papers had not been processed and she was still considered an alien, with no status in the country - the family suspected there were anti-Catholic reasons for this.

The Applicant stated to the Tribunal that he was worried about the increasing level of harassment and abuse and political events in Serbia in 1990/91. As Slovenia and Croatia declared its independence, and the mobilisation of the Yugoslav National Army to fight in the breakaway Republics loomed, he came to the conclusion that he would have to leave. He stated that the reason for this decision was quite deliberately to escape his anticipated conscription into the armed forces of Serbia and consequent inevitable involvement in what he saw as an illegal offensive war by Serbia against other parts of what he considered his own country, i.e. former Yugoslavia. The Applicant made it clear to the Tribunal that he identified himself not at a "Serbian" but as a "Yugoslav". He explained to the Tribunal that he would have had no difficulty in serving in the armed forces in a situation where another country had declared war on former Yugoslavia (i.e. a defensive war), however the Serbian role in the "wars of the Yugoslav succession" was that of aggressor, and the aggression was against fellow Yugoslavs of different national background, and he fundamentally disagreed with this.

The Applicant stated that, in the context of his political views, the looming certainty of his conscription into the Serbian army to fight in the "wars of the Yugoslav succession" was the reason that he decided to leave the former Yugoslavia. He indicated that he and his wife had earlier been planning to visit his wife's relatives in Australia to show them their young son; they had already applied for visitor visas in August 1991. Starting in September 1991, he received two sets of papers in connection with his forthcoming conscription into the Serbian armed forces: they involved presenting himself at local military offices to be allocated a uniform and military equipment. He was aware that the actual conscription papers would follow shortly, and stayed away from home, sleeping at friends' houses in order to avoid being served the conscription papers personally, as was the administrative requirement. Military officers actually visited his house on 7 January 1992 to serve his conscription papers, but he was not there to receive them. Instead, two days later, he joined his wife, his son and his mother in a risky attempt to leave Serbia. They travelled north through Vojvodina to Hungary (which required no visa at that time) and on to Poland (also no visa required at the time). He managed to get past the former Yugoslav exit controls in Vojvodina by producing a pass which he had earlier secured from the army authorities, by lying to them to say that his wife and child had gone back to Poland and he wished to visit them. The pass allowed him to leave the country for 14-days, after which he was expected to return, ready for call-up.

After helping the family leave, his mother subsequently returned to Belgrade, and remains there with his father. They are both pensioners. The Applicant stayed in

Poland, travelling around with his wife and son for approximately four months. He explained to the Tribunal that he was looking for a country where he could be assured of protection from being returned to Serbia and decided to try to seek refugee status in Australia because his brother was already here and had sought the same status. The Applicant used the visitor visa he had earlier secured to come to Australia. The Applicant's wife and child remain in Poland, but the family plans to be reunited in Australia if the Applicant is given refugee protection here.

The Applicant stated to the Tribunal that he feared that if he returned to Serbia he would be imprisoned for his draft evasion. He is also in contact with his mother, in Belgrade, and she had strongly advised him not to return, stressing the lack of rule of law in the country and the generally free hand the police have. He is not sure what may happen to him, given his political views, and understands that that the situation in Serbia is so chaotic that previous norms, laws and procedures, are not carried out in practice.

FINDINGS

The Tribunal's overall impression was that the Applicant was credible and genuine in his claims. His case in itself is a very simple one: for political reasons he fundamentally objects to becoming involved in the conflicts in the region of the former Yugoslavia. He fled Serbia after he had already received notification of that State's preparations for mobilisation and just when actual mobilisation papers were attempted to be served on him. Before that time, he had already experienced difficulties because of his marriage to a Roman Catholic and because of his dislike of the turn of Serbian politics in the late 1980's. He fears that if he returns to Serbia he will be prosecuted for draft evasion. There is also an implicit fear that he might be harrassed for his political views, which will be designated as "anti-Serbian" or anti-Milosevic".

In assessing this claim at primary level, as mentioned above, the primary decision-maker did not explore to any significant degree the references the Applicant had repeatedly made to his political views and political/religious difficulties pre-1991. These matters were dismissed as irrelevant. Because of this approach, the primary decision-maker did not consider that the Applicant's draft evasion might have been motivated by anything deeper than a general dislike of military service, or general disagreement with the Serbian government, and therefore did not accept that the Applicant had genuine or valid reasons of conscience for refusing to undertake military service in 1992. In support of her view, the primary decision-maker cited the fact that the Applicant had undertaken his period of compulsory military service in the Yugoslav National Army in 1984/5.

The Tribunal, by taking further evidence on matters of political opinion and related experiences, allowed the Applicant the opportunity to show the continuity and relevance of his political views and his and his family's personal experiences to his decision to evade conscription and flee Serbia in 1992. By contrast with the primary decision-maker, the Tribunal accepts the evidence on these points. In the Tribunal's view, the Applicant's and his family's experiences of harassment on grounds of nationality and religion, linked with the Applicant's anti-Milosevic and pro-Yugoslav

federation political views, provide very fertile and perfectly credible grounds on which to base a claim of principled draft evasion for political reasons in 1992.

On the issue of the Applicant's participation in his compulsory military service in 1984/85, the Tribunal does not consider that this participation allows any significant conclusions with regard to the genuineness or validity of the Applicant's objections to military service in 1992. There appears to the Tribunal to be no justification for inferring from the Applicant's peacetime army service in 1984/5 (a universal requirement for all young men in the former Yugoslavia) anything at all about his objections to forced service under the unprecedented war and state disintegration conditions from 1991 to the present. As outlined below, the civil-war situation from mid-1991 has involved the internal collapse of the very state that the Applicant identified himself with - the former Yugoslavia - and such extraordinary levels of violence that the whole world has condemned it. It has involved members of the armed forces of all sides in human rights abuses, based on nationality and religious differences, against civilians who were previous fellow-citizens and even neighbours. These conditions are entirely different from those the Applicant experienced in peacetime compulsory military service in 1984/5. It appears to the Tribunal perfectly logical and credible that "normal" peacetime circumstances might not cause such difficulties for the Applicant that he felt the need to evade military service, but that the extreme circumstances of the brutal wars of the Yugoslav succession forced him to do so.

To sum up, by contrast with the primary decision-maker, the Tribunal accepts that the Applicant did have genuine and valid reasons of conscience for evading military service in 1992.

The primary decision-maker was also of the view that (even if the Applicant had genuine reasons of conscience for evading military service) he could have availed himself of conscientious objector status provisions within the Serbian army in 1992 and would be likely to be placed in a non-combat role.

The Tribunal has very different information from that of the primary decision-maker on this point, which shows that the Applicant could not have claimed conscientious objector status. Although there is indeed a relevant theoretical provision for conscientious objector status in the FRY Constitution (the primary decision-maker cited this in support of her views on the subject), the required regulations and procedures allowing this theoretical provision to be implemented have not been enacted. This is specifically pointed out by the Special Rapporteur for the UN Commission on Human Rights in his Sixth Periodic Report on the situation of Human Rights in the Former Yugoslavia, dated 21 February 1994. In this Report the UN Special Rapporteur noted with concern reports received from Serbia

"about the violation of the right to conscientious objection to military service as a legitimate exercise of the right to freedom of thought, conscience and religion, and, especially under present circumstances, the right to refuse service in those elements of the military forces which have been responsible for 'ethnic cleansing' and other grave violations of human rights in Croatia and Bosnia and Herzegovina." (ibid, paragraph 131).

The situation for conscientious objectors to service in the Serbian army in 1992, as now, has not changed to that which existed under the former Yugoslav Federation. The Tribunal is aware of plentiful information on this situation which shows that in peace-time, pre-1991, there was no formal acknowledgement of the right to conscientious objection to military service in the Yugoslav National Army. There might have been some in practice recognition of such objections (at least in the late 1980's) on religious grounds, but this was highly limited, only referring to members of specified religious sects. This limited recognition of conscientious objection did not excuse those claiming conscientious objector status from compulsory service in the military; their recognition as conscientious objectors only extended to allowing them to undertake unarmed activities during the time of their compulsory military service : see Amnesty International Report : Conscientious Objection to Military Service, January 1991, p. 23 and Annex 2; and Australian Department of Foreign Affairs cables BG 61225 paragraph A 1 and BG 60031 paragraphs 3 and 6).

It should be noted that, firstly, it appears that the conscientious objection option was rarely able to be used, even by those who might fall within the narrow religious category that had the potential to be recognised. Further Amnesty International Reports indicated the existence of prisoners of conscience serving lengthy terms in former Yugoslav jails on conscientious objection grounds in the former Yugoslavia in the late 1980's (referred to in Refugee Board of Canada Responses to Information Requests YUG 1638, 26 July 1989; and YUG 3104, 4 December 1989).

Secondly, the highly limited provisions for conscientious objectors available to conscripts into the Yugoslav National Army, as outlined above, cannot of course be considered to have been relevant to the Applicant, whose objection to military service was not and is not on religious grounds.

Thirdly, the above limited conscientious objection provisions pertained specifically to "normal" peace-time circumstances. The situation in 1991/2 was anything but normal, and anything but peaceful. In time of war, or state of preparation for war, the limited peacetime provisions came under extreme pressure, as is detailed below.

On the basis of the above extensive information, therefore, and by contrast with the primary decision-maker, the Tribunal concludes that in fact the Applicant had no option to request conscientious objector status in the Serbian army in 1992.

In further assessing the Applicant's claims, the primary decision-maker relied on Australian Department of Foreign Affairs (DFAT) cables describing the normal process of serving a call-up notice in peace time in the former Yugoslavia, concluding that the Applicant's call-up notice in 1992 would have had to be personally received in order to enable the military authorities to prosecute him for draft evasion subsequently. In addition, the primary decision-maker quoted a sentence in DFAT cable F.BG283 of 11 May 1993 to the effect that "There is currently no comprehensive program of pursuing such offenders who avoided the draft prior to 1992." These pieces of information were relied upon to conclude that the Applicant would be unlikely to be penalised for draft evasion if he returned to Serbia, or if penalised, the penalty might only be a fine.

By contrast, the Tribunal is aware of extensive information sources showing that all Serbian draft evaders face prosecution if they return to Serbia and no amnesty has been granted for them. This liability to prosecution pertains regardless of whether the normal administrative processes of peace-time service of conscription papers were or were not followed (see report from Inter Press Service, Belgrade 19 January 1994; Australian Department of Foreign Affairs cable BG 61225 of 31.12.93, paragraph A7). Even those who had not received actual draft papers, but were liable to do so and left the country and have remained abroad, face the same fate (see UN Commision on Human Rights Special Rapporteur's Sixth Periodic Report on the Situation of Human Rights in the Territory of the Former Yugoslavia, February 1994 paras 132 and 133; and report from Inter Press Service, Belgrade, 19 January 1994).

The Tribunal is particularly concerned about the primary decision-maker's conclusions on this point not only because it is contradicted by other sources, as cited above, but also because she considers them to be inappropriate even on the basis of the information apparently relied upon by the primary decision-maker herself. Firstly, the circumstances of Serbia in 1992 were unprecedented in modern Yugoslav history and the administrative processes involved at that time of active warfare in Croatia cannot be equated with those used in peacetime administration. Secondly, it is clear that the quotation used about non-penalisation of draft evasion before 1992 can not apply to the Applicant, whose draft evasion was precisely in the circumstances of 1992. Thirdly, the very cable which has been inappropriately quoted to undermine the Applicant's case regarding penalties for draft evasion, actually contains quite pertinent information in support of his claims. A passage which the primary decision-maker could well have quoted from the same document (but did not) states:

"A Serb from Serbia returning after having fled abroad to avoid a draft notice already served on him could be called-up on return and even prosecuted. Humanitarian lawyers told us that within the last few months a decision was taken to prosecute people from the 1992 draft intake who refused the call-up." (DFAT cable . BG283 of 11 May 1993)

That is to say, the DFAT information which was used to deny that the Applicant might face prosecution for draft evasion on return to Serbia was not in fact appropriately used. The DFAT information involved could well have been interpreted to lead to the opposite conclusion, in support of the Applicant's claims.

Relying on other sources on this point, the Tribunal notes that a pretty clear indication of what the Applicant is likely to face on return to Serbia is given in an important recent article by Fabian Schmidt : "The Former Yugoslavia: Refugees and War Resisters" (RFE/RL Research Report vol 3 no 25, 24 June 1994, pp 47-54). This source shows that in choosing to flee abroad, the Applicant adopted a method of draft avoidance which was very common at the time and up to the present. There has been an estimate that 225,000 men from all over the former Yugoslavia have fled abroad since mid-1991 in order to avoid involvement in the conflicts in Croatia and Bosnia, of which by estimate of the Centre for Anti-War Action in Belgrade 100,000 have come from Serbia alone. The article states:

"Under the Yugoslav Constitution, which is still in force in Serbia and Montenegro, there has never been a right to conscientious objector status, except on religious

grounds; and even then, as in Croatia, conscientious objectors must perform service within the army itself. The only other alternative to serving in the army is desertion, the penalty for which is a maximum of twenty years' imprisonment if the country has been declared to be in "immediate danger of war".

A formal declaration of an immediate danger of war was made by the Belgrade government on 18 October 1991 and was in effect until 22 May 1992....and the courts assume the existence of a state of "immediate danger of war" when dealing with those who avoided military service during that period.

In peacetime the maximum penalty for desertion, disobeying orders, or draft evasion is ten years' imprisonment. The minimum penalty is between one and five years, depending on whether a state of immediate danger of war has been declared. According to data published under Milan Panic's short-lived government between 1 January 1991 and 1 July 1992 3,748 people stood trial for crimes involving evasion of military service; criminal proceedings were initiated against an additional 5,497 individuals, but these people had not yet been tried. Except for that period, the data on the number of people against whom criminal charges have been brought are incomplete.

Estimates do exist, however. According to the Humanitarian Law Fund... the total number of criminal proceedings related to military service that have been conducted in the FRY is between 15,000 and 20,000 and there will probably be more. Yugoslavia's former minister of justice, Tibor Varady, and the former minister for human rights, Momcilo Grubac, said in a joint statement that "those who took refuge in foreign countries in order to avoid participation in armed conflicts remain in serious [legal]danger...Thousands have been prosecuted and further thousands will in all probability be prosecuted in the future. .."

The Belgrade Center for Antiwar Actions estimates that in that city alone some 10,000 deserters or draft dodgers are in hiding in the homes or relatives and friends; the total in the rest of the FRY is thought to be about 200,000..." (p.52)

The Tribunal concludes therefore, in contrast to the primary decision-maker, that the Applicant is indeed liable to prosecution for draft evasion, exactly as he fears, if he were to return to Serbia.

Of the key elements in the Refugee Convention definition which need to be satisfied by the Applicant's claims, there is no issue in this case as to the possibility of state protection from the feared conscription and/or prosecution, as it is the Serbian state which is the direct agent involved. The question remaining for the Tribunal to decide is whether what is likely to happen to the Applicant (as described above) can be considered as amounting to persecution for a Convention reason.

The Tribunal notes the growing body of international opinion in support of the right of individuals to refuse to undertake compulsory military service in some exceptional circumstances. Common examples of such circumstances are "absolute" objections to military service based on strong convictions of conscience or religious belief (such as religious-based or secular/philosophically based pacifism) and "selective" objections to military service based on a refusal to become involved in a type of military action

which is condemned by the international community or which would be likely to involve violations of basic standards of human conduct.

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

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

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

In the Applicant's case, there have been no religious grounds invoked as the basis for his objection to military service, but rather he has cited political/ ethical grounds : his refusal to become involved in combat in the service of a Government and in a war with which he disagrees.

The Tribunal must therefore assess whether the circumstances in the Applicant's case - the particular context of his draft evasion and the prosecution that might follow his return to Serbia - fall into the exceptional category that would allow him to claim persecution for this reason in the Convention sense.

The conflict into which the Applicant was to be forced by conscription notices, which he avoided by fleeing, and in the context of which he is likely to be prosecuted for draft evasion, was the beginning of the wars of the Yugoslav succession (see Refugee Board of Canada Responses to Information Requests no. YUG 9688, 6 November 1991; YUG 10630, 8 April 1992, for the process and purpose of mobilisation of the Yugoslav National Army at this time). These wars have, virtually from the start been condemned internationally and the fact that atrocities and war crimes against civilians were being perpetrated by and/or facilitated by the Yugoslav National Army at that time was well-known. The international community has repeatedly expressed its dismay and disapproval of the warfare in the former Yugoslavia in a series of Resolutions of the UN Security Council. They began with Resolution 713 of 25 September 1991 in which "The Council fully supports the collective efforts for peace

and dialogue in Yugoslavia, and decides that all States immediately implement a general and complete embargo on all deliveries of weapons and military equiment to Yugoslavia". International condemnation continued through Resolutions 721, 724, 727,740,743,749 and at least 48 further Resolutions until the present time, including the establishment of the United Nations Peace-keeping Forces (Resolution 724, 15 December 1991) in various parts of the country, which are still present, and the demand for the withdrawal of the Yugoslav National Army from hostilities in Croatia and Bosnia (see The United Nations and the situation in the former Yugoslavia, United Nations Department of Public Information Reference Paper 15 March 1994).

The war atrocities and deadly "ethnic cleansing" activities which were perpetrated (inter alia) by Yugoslav National Army forces, collaborating with Serbian irregulars on the territory of Croatia in 1991/2 have been overwhelmingly documented. They were known of at the time the Applicant fled to Italy. They are, among other crimes perpetrated by other sides in the "wars of the Yugoslav succession", the subject of investigation by the first International War Crimes Tribunal to be set up since the Second World War. For example the Yugoslav National Army's "ethnic cleansing" of the area around Vukovar and their concerted bombing and utter destruction of the city of Vukovar itself over the period August -November 1991, complete with war atrocities, was internationally known at the time. (See US Committee for Refugees, Yugoslavia torn asunder, February 1992 pp 3-9 which documents some of the early civilian ethnic cleansing experiences in the Vukovar region; see also Human Rights Watch: Helsinki, vol 6 issue 3, February 1994, report on "Former Yugoslavia: The War Crimes Tribunal : One Year Later").

The above information places the Applicant's draft evasion in its proper context. Not only was he refusing to take part in a conflict with which he personally disagreed for political reasons; he was refusing to take part in a conflict and in a set of activities which has been and continues to be internationally condemned. The circumstances of his draft evasion, therefore, fit the profile of those exceptional cases in which objection to military service can ground a case for refugee status.

The Tribunal considers that the Applicant had little choice but to flee Serbia when he did in order to avoid forced involvement in the internationally condemned wars of the Yugoslav succession. If he had not fled, he would either have been forced into military service in that conflict (which would have involved him in collaborating in atrocities and war crimes) or he would have been jailed. In either case, there would have been a serious infringement of basic human rights involved.

The Tribunal notes as background context for the Applicant's fears if he were to return to Serbia that the war in Bosnia is continuing, and that the situation in Croatia remains unsettled. At the time of writing this decision, there are indications that warfare in Croatia may resume later in 1995 after an uneasy truce from April 1994. There have also been public statements from the Serbian leadership to the effect that if the Serbian cause in Bosnia and Croatia is threatened, Serbia itself was willing to intervene militarily (see report of 19 January 1995 from The Guardian newspaper, entitled "Serbia threatens war over Krajina"; and report of February 22, 1995 in the Sydney Morning Herald, p. 9 entitled "Serbs in pact for next round of war"; "Race on to avert Balkan outbreak", The Canberra Times, 3 March 1995, p.5).

If the Applicant returns to Serbia, the latest information indicates that it is possible that he will still be subject to forced conscription, regardless of his objections, and without special provision being made for non-combat activities for him, into the above looming conflicts. This would in itself constitute persecution of the Applicant by the Serbian authorities for reason of political opinion. It is also possible that he will find himself prosecuted for having evaded conscription since 1992. The information cited above indicates that the punishment for draft evasion ranges between 1 and 10 years imprisonment, but the actual extent of the sentence is beside the point in the Applicant's case. This is because any prosecution or punishment of the Applicant for reasons of his draft evasion would in itself constitute a serious abuse of basic human rights in the context of an internationally condemed conflict.

The Tribunal considers that if the Applicant were to return to Serbia, one or other or both of the above situations may occur, which is to say that there is a real chance of persecution of the Applicant by the Serbian authorities, for reason of his political opinion.

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

DECISION

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

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