Federal Court  Cour fédérale

Date: 20090810

Docket: IMM-215-09

Citation: 2009 FC 814

Ottawa, Ontario, August 10, 2009

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

KIMBERLY ELAINE RIVERA
MARIO RIVERA
CHRISTIAN ALEXANDER RIVERA
REBECCA ANGELINA RIVERA

Applicants

and

THE MINISTER OF
CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application pursuant to subsection 72 (1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (Act) for judicial review of a decision of a Pre-Removal Risk Assessment (PRRA) officer (Officer), dated December 8, 2008 (Decision) refusing the Applicants' PRRA application.

BACKGROUND

[2] The Applicants are all citizens of the United States (U.S.).

[3] The Principal Applicant (Kimberly Rivera) graduated high school in 2001 and joined the U.S. Army Reserve in order to obtain funding for college. She was discharged from the Army Reserve in November 2001 after learning she was pregnant with her first child (Christian). By 2006, the Principal Applicant was married and had two children. She was working at Wal-Mart, but she and her husband (Mario) could not earn enough money to live and were forced to reside with her parents. After tensions developed with her parents, she decided to join the U.S. Army. She reported for duty with the Regular Army on March 1, 2006.

[4] After receiving Advanced Training at Aberdeen Proving Ground in Maryland, Kimberly qualified as a truck driver and arrived in Baghdad, Iraq on October 27, 2006. Shortly thereafter, she was harassed by her platoon sergeant after she had a fight with her husband on the telephone. She felt that the sergeant did not approve of her communicating with her husband.

[5] Kimberly was assigned to guard the front gate of a forward-operating base and it was her job to work with an Iraqi partner to ensure that no dangerous objects or devices made their way into the base. After her partner asked to leave the army because her sister had been hit by a mortar

round, Kimberly began soul-searching and praying, and came to the conclusion that the U.S. military was careless about creating civilian casualties.

[6] During a telephone call with her husband, Kimberly learned that they had been contemplating the same Bible verse and she concluded that the war in Iraq was incompatible with the teachings of the Bible.

[7] Kimberly was scheduled to return to the U.S. on leave in January 2007. Her assistant platoon sergeant warned her that if she deserted she would be severely punished and would not be able to obtain employment. He said that she could go to prison or even be put to death.

[8] After Kimberly arrived back in the U.S. on a two-week leave, she began to research the possibility of applying for conscientious objector status, but thought that her application would not be accepted because she had volunteered for the military. She was convinced that the U.S. military would deploy her back to Iraq.

[9] In mid-February 2007, Kimberly and her family decided to leave for Canada. They entered Canada on February 18, 2007 and made claims for refugee protection.

[10] On October 26, 2007, the Immigration and Refugee Board (RPD) rendered a negative decision and an application for leave for judicial review of the negative decision was denied by the Federal Court on March 25, 2008.

[11] The Applicants subsequently filed both PRRA and H&C applications. The Applicants' PRRA and H&C applications were both refused on December 8, 2008 by the PRRA officer and communicated to the Applicants in person on January 7, 2009.

[12] On March 12, 2009, it was determined that there was no serious issue with the H&C decision and Application for Leave and Judicial Review was dismissed. Leave was granted on the PRRA application for judicial review on April 21, 2009.

[13] The Applicants submit that, if returned to the U.S., they have a well-founded fear of persecution under section 96 of the Act and that there are serious grounds to believe that they would be exposed to a risk under section 97 of the Act. Kimberly believes that as a member of the U.S. Army, with her political opinion and public involvement against the war in Iraq, she will be charged with being Absent Without Leave (AWOL) or desertion, and subjected to a court-martial proceeding. She does not believe that she will receive a fair trial and will face disproportionate non-judicial punishment because of her opposition to the war in Iraq.

DECISION UNDER REVIEW

[14] The Officer did not consider documents that pre-dated the RPD decision or those that would have been available to the RPD where no explanation was provided as to why the documents could not have been presented. The rest of the evidence was accepted as new evidence. The Officer also noted that each piece of evidence would not be assessed and weighed individually, but that all the

evidence that met the requirements of the Act had been considered. See: *Ozdemir v. Canada (Minister of Citizenship and Immigration)* 2001 FCA 331 at paragraph 9.

[15] The Officer noted that on March 31, 2007, the Federal Court released *Hinzman v. Canada (Minister of Citizenship and Immigration)* 2006 FC 420 and *Hughey v. Canada (Minister of Citizenship and Immigration)* 2006 FC 421 which dealt with U.S. military deserters who had sought refugee protection before the Immigration and Refugee Board (IRB). Those cases decided that the legality of the U.S. war in Iraq was not a relevant consideration. This position was upheld by the Federal Court of Appeal on April 30, 2007.

[16] The RPD had established that the determinative issue was state protection and that, although Kimberly disagreed with the U.S. war in Iraq and sought information from the internet, she "did not take any further steps to attempt to obtain conscientious objector status." The RPD also concluded that "any punishment meted out to the claimant in the U.S. would be in accordance with the law of general application, after a court martial or other due process in which the claimant would be accorded the right to counsel and the advantage of open and transparent due process."

[17] The RPD had concluded that "there are adequate procedural and legal safeguards within the U.S. military to protect the claimant, where her deeply held personal beliefs conflicted with U.S. government, or military policy. Her desertion, or refusal to serve, would have been, in all probability, dealt with through administrative means and furthermore there was adequate legal recourse and due process available to the claimant within her own country." Kimberly had not

"shown that exceptional circumstances exist which exempt her from seeking protection in her own state before seeking the surrogate protection of international refugee law."

[18] The Officer noted that the PRRA application was substantively the same as the claim assessed by the RPD. She had not identified new risk developments in support of her application. The Officer found that the Principal Applicant's past treatment, in and of itself, did not warrant a granting of protection, nor was it necessarily indicative of a forward-looking risk in light of the documentary evidence regarding country conditions and her personal circumstances.

Judicial Punishment

[19] The Officer notes that although Kimberly's submissions and independent research indicate that the death penalty is a maximum punishment for desertion, her submissions specifically reference being imprisoned for desertion and the imposition of a harsher sentence than other deserters because of the high-profile nature of her case and her public speeches in opposition to the war in Iraq.

[20] The Officer, however, relies upon the Federal Court of Appeal in *Hinzman v. Canada (Minister of Citizenship and Immigration)*, [2007] FCA 171 at paragraph 58:

> Statistics adduced by the Crown indicate that approximately 94% of deserters from the U.S. Army have not faced prosecution and imprisonment, but have merely been dealt with administratively by being released from the military with a less-than-honourable discharge. Arguably, the chance of receiving an administrative

> discharge will be even higher for those who attempt to negotiate a discharge before deserting their units.

[21] While the Officer accepted that the percentage of soldiers who are AWOL from the U.S. military will differ throughout certain periods of time, he felt that the fact that the number varies does not show that any punishment Kimberly might receive would amount to persecution. The Officer found that the evidence did not support that the U.S. military has suspended or fundamentally altered any of its due process safeguards in the military justice system as a result of an increase in soldiers going AWOL. The Officer also stated that the affidavits and letters presented by the Applicants do not support that the United States is unable or unwilling to provide state protection to the Applicants, or that Kimberly would not receive due process in the military and/or civilian court system in the United States. The Officer again quoted the Federal Court of Appeal decision of *Hinzman* at paragraph 47 that "[a]lthough the United States, like other countries, has enacted provisions to punish deserters, it has also established a comprehensive scheme complete with abundant procedural safeguards for administering these provisions justly."

[22] The Officer concluded that the possibility of prosecution under a law of general application is not, in and of itself, sufficient evidence that an applicant faces persecution or harm under section 96 and 97 of the Act. As well, the documentary evidence shows that Kimberly will be afforded due process and have access to state protection.

[23] The Officer also notes that Kimberly did not file a conscientious objector status application and that her explanation for not doing so was based on "speculation" and was not evidence that she

would not meet the criteria for conscientious objector status under U.S. military law. The Officer concluded that "should the principal applicant decide not to file a conscientious objector application, the evidence before me demonstrates that she would still receive due process in the military justice system."

Non-Judicial Punishment

[24] Kimberly submitted that she feared hazing, physical discipline and public ridicule by her military superiors for having gone AWOL from her unit, and that this non-judicial punishment would amount to persecution. Non-judicial punishment in the U.S. military is a form of discipline authorized by Article 15 of the Uniform Code of Military Justice (UCMJ). The Officer found that the "existence of the regulation, in and of itself, does not support that it will be applied towards the principal applicant in a manner that amounts to cruel and unusual treatment or punishment." The Officer also commented that while Kimberly "indicates that she fears that she will suffer arbitrary and cruel and unusual punishment in the form of non-judicial punishment, submissions do not support that she has experienced such treatment in the past." The affidavits of the experience of other officers was not "objective documentary evidence which supports that the principal applicant would be subjected to non-judicial punishment upon her return which would amount to cruel and unusual treatment or punishment as a result of her decision to speak out publicly." The Officer concluded that the authority of military commanders to impose non-judicial punishment is "a law of general application under which the principal applicant would be afforded due process should it be inappropriately imposed."

Conclusion

[25] The Officer concluded that if Kimberly were to seek state protection, she would be afforded such protection and that the onus was on her "to show that she ha[d] exhausted all avenues of redress available to her in her country of nationality."

[26] The Officer concluded that state protection, while not perfect, was adequate. The Officer relied upon the Federal Court of Appeal decision in *Hinzman* at paragraph 46:

> **46** The United States is a democratic country with a system of checks and balances among its three branches of government, including an independent judiciary and constitutional guarantees of due process. The appellants therefore bear a heavy burden in attempting to rebut the presumption that the United States is capable of protecting them and would be required to prove that they exhausted all the domestic avenues available to them without success before claiming refugee status in Canada…

[27] The Officer concluded that Kimberly had not established that, if returned to the U.S., she would be unable to access avenues of state protection, including the military and civilian justice systems. In addition, there were no substantial grounds to believe that the Applicants face torture, or reasonable grounds to believe they face a risk to life or cruel and unusual treatment or punishment.

ISSUES

[28] The Applicants raise the following issues for review:

a. Did the Officer misconstrue the risks put forward by the Applicants?

b. Did the Officer ignore evidence on the record?

c. Was the Officer's finding that the Applicants had not rebutted the presumption of state protection unreasonable and made without regard to the evidence?

STATUTORY PROVISIONS

[29] The following provisions of the Act are applicable in these proceedings:

Convention refugee	**Définition de « réfugié »**
96. A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,	**96.** A qualité de réfugié au sens de la Convention — le réfugié — la personne qui, craignant avec raison d'être persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques :
(*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	*a*) soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de chacun de ces pays;
(*b*) 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.	*b*) soit, si elle n'a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle, ne peut ni, du fait de cette crainte, ne veut y retourner.
Person in need of protection	**Personne à protéger**

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

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

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

(i) the person is unable or, because of that risk, unwilling to avail themself of the protection of that country,

(ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country,

(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and

(iv) the risk is not caused by the inability of that country to provide adequate health or

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

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

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

(i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,

(ii) elle y est exposée en tout lieu de ce pays alors que d'autres personnes originaires de ce pays ou qui s'y trouvent ne le sont généralement pas,

(iii) la menace ou le risque ne résulte pas de sanctions légitimes — sauf celles infligées au mépris des normes internationales — et inhérents à celles-ci ou occasionnés par elles,

(iv) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins

medical care.

médicaux ou de santé adéquats.

Person in need of protection

(2) A person in Canada who is a member of a class of persons prescribed by the regulations as being in need of protection is also a person in need of protection.

Personne à protéger

(2) A également qualité de personne à protéger la personne qui se trouve au Canada et fait partie d'une catégorie de personnes auxquelles est reconnu par règlement le besoin de protection.

Consideration of application

113. Consideration of an application for protection shall be as follows:

Examen de la demande

113. Il est disposé de la demande comme il suit :

(*a*) an applicant whose claim to refugee protection has been rejected may present only new evidence that arose after the rejection or was not reasonably available, or that the applicant could not reasonably have been expected in the circumstances to have presented, at the time of the rejection;

a) le demandeur d'asile débouté ne peut présenter que des éléments de preuve survenus depuis le rejet ou qui n'étaient alors pas normalement accessibles ou, s'ils l'étaient, qu'il n'était pas raisonnable, dans les circonstances, de s'attendre à ce qu'il les ait présentés au moment du rejet;

(*b*) a hearing may be held if the Minister, on the basis of prescribed factors, is of the opinion that a hearing is required;

b) une audience peut être tenue si le ministre l'estime requis compte tenu des facteurs réglementaires;

(*c*) in the case of an applicant not described in subsection 112(3), consideration shall be on the basis of sections 96 to 98;

c) s'agissant du demandeur non visé au paragraphe 112(3), sur la base des articles 96 à 98;

(*d*) in the case of an applicant described in subsection 112(3), consideration shall be on the basis of the factors set out in section 97 and	*d*) s'agissant du demandeur visé au paragraphe 112(3), sur la base des éléments mentionnés à l'article 97 et, d'autre part :
(i) in the case of an applicant for protection who is inadmissible on grounds of serious criminality, whether they are a danger to the public in Canada, or	(i) soit du fait que le demandeur interdit de territoire pour grande criminalité constitue un danger pour le public au Canada,
(ii) in the case of any other applicant, whether the application should be refused because of the nature and severity of acts committed by the applicant or because of the danger that the applicant constitutes to the security of Canada.	(ii) soit, dans le cas de tout autre demandeur, du fait que la demande devrait être rejetée en raison de la nature et de la gravité de ses actes passés ou du danger qu'il constitue pour la sécurité du Canada.

STANDARD OF REVIEW

[30] Generally speaking, the issues raised by the Applicants require me to apply the standard of reasonableness. In *Dunsmuir v. New Brunswick* 2008 SCC 9, the Supreme Court of Canada recognized that, although the reasonableness *simpliciter* and patent unreasonableness standards are theoretically different, "the analytical problems that arise in trying to apply the different standards undercut any conceptual usefulness created by the inherently greater flexibility of having multiple standards of review": *Dunsmuir* at paragraph 44. Consequently, the Supreme Court of Canada held that the two reasonableness standards should be collapsed into a single form of "reasonableness" review.

[31] The Supreme Court of Canada in *Dunsmuir* also held that the standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to the particular question before the court is well-settled by past jurisprudence, the reviewing court may adopt that standard of review. Only where this search proves fruitless must the reviewing court undertake a consideration of the four factors comprising the standard of review analysis.

[32] Thus, in light of the Supreme Court of Canada's decision in *Dunsmuir* and the previous jurisprudence of this Court, I find the standard of review applicable to the issues on this application to be reasonableness. When reviewing a decision on the standard of reasonableness, the analysis will be concerned with "the existence of justification, transparency and intelligibility within the decision-making process [and also with] whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law": *Dunsmuir* at paragraph 47. Put another way, the Court should only intervene if the Decision was unreasonable in the sense that it falls outside the "range of possible, acceptable outcomes which are defensible in respect of the facts and law."

ARGUMENTS

The Applicants

Misconstruing the Risk of Differential Prosecution

[33] The Applicants submit that the Officer seriously misconstrued the risk of differential prosecution on the basis of political opinion put forward by the Applicants in their application. The Applicants note that the risk of differential prosecution on the basis of political opinion was a new risk that was not raised at or addressed by the RPD.

[34] The Applicants say that when the law is applied in a way that is not neutral vis-à-vis the grounds of Convention refugee status, which include political opinion, then that law is applied in a persecutory manner. This persecutory application of a law of general application can occur regardless of whether the intent of the punishment or sanction is persecution. The Applicants point out that they were not asserting that the U.S. should not punish deserters, but that punishing deserters differentially for their political opinion amounts to persecution. See: *Chan v. Canada (Minister of Employment and Immigration)*, [1995] S.C.J. No. 78; *Zolfagharkhani v. Canada (Minister of Employment and Immigration)*, [1993] 3 F.C. 540 (F.C.A.); *Samhat v. Canada (Minister of Citizenship and Immigration)*, [2006] F.C.J. No. 1530 (F.C.) and *Djebli v. Canada (Minister of Citizenship and Immigration)* 2007 F.C.J. No. 1024 (F.C.).

[35] The Applicants cite the United Nations Refugee Agency (UNHCR) Handbook at section 169:

> A deserter or draft-evader may also be considered a refugee if it can be shown that he would suffer disproportionately sever punishment for the military offence on account of his race, religion, nationality, membership of a particular social group or political opinion.

[36] The Applicants submit that the Officer does not address the decision to prosecute deserters based on the improper consideration of the deserter's political opinion. The Officer simply addresses the variance in judicial sentences imposed after a deserter is selected for prosecution and court-martialed. The Officer does not address the primary thrust of the risk of differential prosecution. If persons are selected for prosecution on the basis of their political opinion, this would arguably be in violation of the principles of natural justice and contrary to accepted standards.

[37] The Applicants also note that differential prosecution on the basis of political opinion was not considered by the Federal Court or the Federal Court of Appeal in the *Hinzman* decisions. The *Hinzman* decisions considered "whether any punishment for refusing to serve in an 'illegal war' would be inherently persecutory." Therefore, the Officer's assessment of the evidence in the Applicants' PRRA and the analysis of available state protection in the U.S., demonstrates that the Officer did not appreciate that the risk of differential punishment comes from being selected for prosecution in the first place on the basis of political opinion.

[38] The Officer also failed to appreciate that there were affidavits which demonstrated that soldiers are being selected for court-martial and are court marshalled because of their political opinion. The Officer mistakenly found that a court-martial proceeding is itself "due process" and state protection. The Applicants say that the very fact that Kimberly would be subject to prosecution

and a hearing is a differential and persecutory application of the law based on her political opinion. The existence of procedural safeguards that exist within the hearing process would not alleviate or protect her against the persecution of being subjected to the proceeding itself. This persecution comes from the fact of being prosecuted for her political opinions and not from the manner in which the prosecution is carried out.

[39] The Applicants propose that the key question to answer on the risk of differential prosecution is “In what circumstances does the military prosecute deserters?” The Applicants say that the Officer did not answer this question and failed to understand that the risk of differential punishment put forward by the Applicants was also the risk of a harsher sentence. The Officer failed to appreciate that the risk of differential and more severe punishment stems from the decision on whether or not to prosecute in the first place.

[40] The Applicants contend that the Officer seriously misconstrued the nature of the risk of differential punishment and, in so doing, effectively failed to reasonably assess a primary risk put forward by the Applicants in their application.

[41] The Applicants conclude on this issue by submitting that the Officer’s Decision is unreasonable and “misconstrues and therefore fails to properly address the risk of differential prosecution raised by the Applicants in their application.”

Misconstruing Risk Fatal to State Protection Finding

[42] The Applicants also submit that it is important to properly characterize the alleged risks in a given application before conducting a state protection analysis; otherwise, the decision-maker risks short-circuiting a full assessment of the claim. See: *Lopez v. Canada (Minister of Citizenship and Immigration)*, [2007] F.C.J. No. 1733 at paragraph 21 and *Medina v. Canada (Minister of Citizenship and Immigration)* 2008 FC 728 at paragraphs 15-16.

[43] The Applicants note that an analysis of state protection cannot simply involve general statements pertaining to legislative and procedural mechanisms within a given country, but must actually have some bearing on the risks raised in an application. See: *Garcia v. Canada (Minister of Citizenship and Immigration)* 2007 FC 79 and *Villalva v. Canada (Minister of Citizenship and Immigration)* 2008 FC 314.

[44] The Officer discusses due process guarantees that would not protect Kimberly from being selected for prosecution based on her political opinions. Access to civilian and/or military counsel, the right to a recorded hearing, the right to present evidence in one's defence and the right to appeal a court-martial sentence, do not protect from the discriminatory exercise of prosecutorial discretion on the basis of political opinion. The Officer lists general protections available in the military justice system, but does not discuss protections from the risk of differential prosecution raised by the Applicants.

[45] The Applicants conclude on this issue by stating that the Officer's Decision is unreasonable as it misconstrues and fails to assess a primary risk raised by the Applicants. The failure of the Officer to properly address the risk of differential prosecution and punishment is fatal to the Officer's determinative conclusion that state protection would be available to the Applicants in the U.S. because there is no finding on whether state protection would exist against being targeted for prosecution in the first place.

Ignoring Evidence on the Risk of Differential Prosecution

[46] The Applicants further submit that, in addition to misconstruing the risk of differential prosecution, the Officer ignored material evidence on the record before him concerning that risk. A decision-maker must make reference to, and provide analysis of, important evidence that directly contradicts the findings made. This duty increases the more the evidence is relevant to the disputed finding. The failure of a decision-maker to provide any assessment of the contradictory evidence renders a decision unreasonable. See: *Hassaballa v. Canada (Minister of Citizenship and Immigration)*, [2007] F.C.J. No. 658 (F.C.) at paragraphs 23-26; *Nyoka v. Canada (Minister of Citizenship and Immigration)*, [2008] F.C.J. No. 720 (F.C.) at paragraph 21; *Cepeda-Gutierrez v. Canada (Minister of Citizenship and Immigration)*, [1998] F.C.J. No. 1425 (F.C.T.D.) and *Ranji v. Canada (Minister of Public Safety and Emergency Preparedness)*, [2008] F.C.J. No. 675 (F.C.).

[47] Despite the Officer's general reference to the evidence, and specific reference to two of the documents relating to prosecution and imprisonment of similarly situated individuals by the U.S.

military, he does not engage in any meaningful way with the other multiple pieces of evidence demonstrating differential prosecution initiated against those who have publicly opposed the war in Iraq, particularly the information concerning the court-martials of James Burmeister, Robin Long and Lt. Watada.

[48] The Applicants point out that the evidence before the Officer dealing with James Burmeister, Robin Long and Lt. Watada directly and strongly contradicts the findings that Kimberly would not be subjected to differential prosecution based on her political opinion. The evidence demonstrates that the U.S. military does select persons for prosecution based on the public expression of their political opinions and, in some cases, has openly argued in court martial proceedings that those public opinions should be aggravating factors. The Officer ignored these pieces of evidence.

[49] The Applicants also submit that the Officer does not directly mention the affidavit of Stephen Funk or the letter from Monica Bendermen, and so overlooked or failed to reference the portions of these documents that directly contradict the Officer's findings on differential punishment.

[50] The Applicants submit that the Officer ignored multiple pieces of evidence before him that directly contradict his finding that Kimberly would not be subjected to differential punishment. This renders the Decision unreasonable.

State Protection Findings Unreasonable: Conscientious Objector Status

[51] On this issue, the Applicants submit that the Officer's finding that they had not rebutted the presumption of adequate state protection was made without regard to the evidence before him. The Officer's conclusion that Kimberly could access the protection of a conscientious objector status application is unreasonable.

[52] The fact that Kimberly is not prohibited from filing a conscientious objector application does not mean that doing so will afford her protection from the risks raised in her application. See: *Key v. Canada (Minister of Citizenship and Immigration)* 2008 FC 838; *Garcia v. Canada (Minister of Citizenship and Immigration)* 2007 FC 79 and *Villalva*.

[53] The Applicants rely upon *Eler v. Canada (Minister of Citizenship and Immigration)* 2008 FC 334 at paragraph 8:

> **8** Where the Board relies upon the existence of certain legislation to provide protection, but the evidence before the Board is to the effect that the legislation has no application to the claim before it, the Board's reasons are not reasonable as they are insufficiently justified.

[54] The Applicants say that the Officer's conclusion that Kimberly had open to her the protection of conscientious objector status was unreasonable given the multiple pieces of evidence before the Officer demonstrating that applying for this status would not in any way protect her from the risks raised in the application. Applying for conscientious objector status would, in fact, exacerbate Kimberly's risks.

[55] While the Officer makes a brief reference to the affidavit of Eric Seitz, an expert in U.S. military law, he does not acknowledge that evidence when discussing conscientious objector status applications. Based on Eric Seitz affidavit, persons who file conscientious objector status applications are not protected from judicial punishment but are "subjected to severe punishments including lengthy periods of incarceration," and both the military and civilian communities subject conscientious objectors to "persecution, punishment, vindictiveness, and intimidation." The Officer provides no reasons for his conclusion that, despite expert evidence to the contrary, applying for conscientious objector status would offer Kimberly protection, or why he dismisses expert evidence that directly contradicts his conclusion on this point.

[56] There was evidence of individuals who had filed conscientious objector status applications and who were provided no protection from risks similar to those raised in the Applicants' application. One of these individuals was deployed and re-deployed to combat zones despite pending conscientious objector status applications, which demonstrates that their risk was increased.

[57] The Applicants cite an Amnesty International Letter dated June 18, 2008 that was before the Officer:

> Some US military personnel who have refused to deploy to Iraq or Afghanistan due to their conscientious objection to US policy and practice in the "war on terror" have been imprisoned solely for their beliefs. Amnesty International has considered some to be prisoners of conscience who should be released immediately and unconditionally. Some of these conscientious objectors have been court-martialed and sentenced despite pending applications for conscientious objector status, others were imprisoned after their applications were turned down on the basis that they were objecting to particular wars rather than to war in general.

[58] The Applicants say that the evidence on the record before the Officer shows that if Kimberly filed an application for conscientious objector status, the application would offer no protection from the risks raised in the Applicants' application, and might in fact exacerbate those risks. Ignoring relevant evidence on this issue renders the Decision unreasonable because it does not meet the test of "justification, transparency and intelligibility" found in *Dunsmuir* at paragraph 47.

[59] The Applicants conclude that the Officer seriously misconstrued a primary risk put forward by the Applicants and failed to conduct an analysis of state protection that actually applies to the risks raised by the Applicants in their application. The Officer ignored multiple pieces of evidence before him that directly contradicted his primary findings and cited domestic avenues of protection that would not provide any protection from the risks the Applicants have asserted. In light of these errors, the Decision is unreasonable and should be remitted back to a different Officer for redetermination.

Respondents

The Applicants did not claim that being court martialed constitutes punishment

[60] The Respondent submits that the Applicants are claiming that the Officer erred because she mistakenly understood the risk of "differential punishment" put forward by the Applicants as involving a harsher sentence rather than being selected for court martial. The Applicants use the terms "differential punishment" and "differential prosecution" interchangeably and "differential prosecution" was not used in the submissions of the Officer. The Respondent notes that the "normal

definition of punishment does not include being subject to a legal proceeding; it only encompasses the sanctions imposed during the sentencing stage of a legal proceeding. The Respondent relies on *R. v. Rodgers* 2006 SCC 15 at paragraph 62 which states that "in its ordinary sense, 'punishment' refers to the arsenal of sanctions to which an accused may be liable upon conviction for a particular offence." The Respondent says that the Applicants never requested that the Officer give the word punishment an alternative meaning, so the Officer was bound to interpret the language in their submissions according to its plain and ordinary meaning.

[61] The Respondent also submits that the Applicants never explicitly claimed that a court martial itself would constitute punishment. The Officer cannot be faulted because she evaluated the risk the Applicants claimed they would suffer. The Respondent highlights the submissions of the Applicants to the Officer:

> - That any additional incarceration that Ms. Rivera receives because of her political and religious opinion, be it even one additional day constitutes the application of law of general application in a persecutory manner;
> - The evidence presented in support of Ms. Rivera's case clearly indicates that those who speak out publicly against the war are specifically punished for their involvement with the media, when their sentences are decided in court martial proceedings, resulting in them receiving longer prison sentences;
> - Mr. Mejia outlines at paragraph 14 of his affidavit that he was given the maximum sentence allowed by a special court martial for desertion;
> - Kevin Benderman, who did not go AWOL and who was sentences to 15 months imprisonment, loss of all pay and allowances, loss of rank and dishonourable discharge;
> - Despite having voluntarily turned himself into the military control, Ivan was sentenced to 8 months in a Marine prison and given a bad conduct discharge.

[62] The Respondent notes that in the Applicants' submissions, there is "but one vague reference to the possibility that the Principal Applicant may be improperly selected for prosecution." This reference was not in the section of submissions that described how the laws of general application were applied regarding war deserters, but was buried in the Applicants' discussion of the personal experience of Robin Long and did not claim that being selected for prosecution constituted punishment. The Respondent also notes that "no evidence was provided to demonstrate that individuals who publicly spoke out against the war were disproportionately prosecuted."

[63] The Respondent notes that, in the Applicants' materials, there are statistics that illustrate that only 6% of deserters are court marshalled. However, the Applicants claim that the Officer failed to determine whether the 6% consisted of individuals who spoke out against the war. The Respondent contends that the Officer was never asked to determine this and that the Applicants did not provide evidence to support this claim. The evidence provided mainly consisted of affidavits from a number of specific individuals who spoke out against the war and were court marshalled, documenting their personal circumstances. In order to establish a differential prosecution claim the Applicants would have had to indicate what portion of the 6% spoke out against the war and what portion did not. This was never done.

[64] The Respondent submits that the Officer specifically noted that no charge may be referred to a general court martial for trial until a thorough and impartial investigation of all the matters has been made and that an accused has a right to be represented by counsel during the investigation. After considering the Applicants' evidence, the Officer concluded that it did not indicate that the

UCMJ will be applied in a disproportionately harsh manner against Kimberly. The Officer's conclusions clearly go beyond an analysis of the sentences that may be imposed upon conviction.

Officer's analysis was reasonable and did not ignore evidence

[65] The Applicants' argument of citing the Court's findings in the stay motions dealing with other war deserters to demonstrate that the Officer's risk findings were unreasonable ignores that fact that each case must be determined on its own merits and that a stay motion before the Court involves a different analysis than a PRRA decision. The Applicants submitted the same evidence to the Court as they did to the Officer to document irreparable harm based on risk.

[66] As well, the Respondent points out that the Applicants' application for leave and judicial review regarding their rejected H&C application claimed that it was not unreasonable for the Officer to conclude that Kimberly would not receive a disproportionately harsh punishment for speaking out against the war. The Applicants relied on the same arguments regarding this issue in both matters and, on March 12, 2009, Justice Kelen determined that there was no serious issue with the H&C decision and dismissed the Application for Leave and Judicial Review. The Respondent reminds the Court that the threshold for establishing risk in an H&C application is lower than the threshold for a PRRA.

[67] The Respondent notes that the Officer commented that no charge may be referred to a general court-martial for trial until a thorough and impartial investigation of all the matters has been

made. Therefore, the Applicants' claim that the Officer did not consider whether state protection would exist against being selected for prosecution is incorrect. The Officer also noted that a defendant has a right to counsel throughout the entire process and that proceedings are recorded and there are extensive appeal rights. Therefore, the Officer conducted a reasonable analysis of the fairness of this process.

[68] The Respondent notes that questions of fact are within the Officer's jurisdiction and expertise and are owed considerable deference. The Court may not substitute its decision for that of an officer when an applicant has failed to prove that a decision was based on an erroneous finding of fact made in a perverse or capricious manner or without regard for the material before it. See: *Canada (Minister of Citizenship and Immigration) v. Khosa* 2009 SCC 12 at paragraphs 45-46 and 59; *Aguebor v. Canada (Minister of Employment and Immigration)*, [1993] F.C.J. No. 732 (F.C.A.); *Grewal v. Canada (Minister of Employment and Immigration)*, [1983] F.C.J. No. 129 (F.C.A.); *R.K.L. v. Canada (Minister of Citizenship and Immigration)* 2003 FCT 116 at paragraph 7-8 and *Kanyai v. Canada (Minister of Citizenship and Immigration)*, [2002] F.C.J. No. 1124 at paragraph 9.

[69] The Respondent also disagrees with the Applicants' claim that the Officer ignored material evidence, and says it could not be clearer that he was aware of, and considered, all of the Applicants' evidence. The Respondent cites the Officer as follows:

> - I have read the PRRA applications, submissions and documentary evidence in their entirety. I have also read and considered the RPD's Reasons for Decision.

> - As a result of the extensive nature of the submissions, I note that each piece of evidence will not be assessed and weighted individually in this assessment…Nevertheless, all evidence that meets the requirements of the above IRPA section has been considered.

[70] The Respondent submits that the Officer reviewed the affidavits provided by the Applicants from other war deserters and noted that they were convicted of various offences, including, unauthorized absence, desertion and missing movement. As well, they received prison sentences ranging from 6 to 15 months, demotions, forfeiture of pay, fines and bad conduct discharges. The Officer accepted that these documents recount first-hand experiences of certain U.S. military personnel, and that the U.S. military does, in some circumstances, prosecute personnel for being AWOL, for desertion and for missing movement. The Officer concluded that the evidence did not establish that the UCMJ would be applied in a disproportionably harsh manner against Kimberly.

[71] The Respondent also notes that the Officer made reference to the evidence of Eric Seitz, Stephen Funk, James Glass, Kevin Benderman, Moncia Benderman, Camilo Mejia and Christian Kjar. The Officer noted that Mr. Funk believed that he had received disproportionately harsh punishment. The Respondent stresses that Mr. Funk did not pursue his appeal rights and, if an individual truly believed they were treated unfairly, it would be logical that they would pursue their legal rights. The Officer did not ignore evidence.

[72] The Respondent relies upon *Ozdemir v. Canada (Minister of Citizenship and Immigration)* 2001 FCA 331 at paragraphs 9-10 where the Federal Court of Appeal held that an officer is not bound to explain why she or he did not accept every item of evidence before them. The Officer

must assess the evidence on its significance and probative value. The Officer's analysis in this case was extensive and more than sufficient.

[73] The Respondent submits that, when assessing documentary evidence, the Officer has a large amount of discretion and is entitled to give some documents more weight than others. The failure to mention some documentary evidence is not fatal to the Officer's Decision, as the Officer is presumed to have weighted and considered all the evidence presented unless the contrary is shown. See: *Florea v. Canada (Minister of Employment and Immigration)*, [1993] F.C.J. No. 598 (F.C.A.) at paragraph 1.

Officer's Analysis Regarding Conscientious Objector Status Reasonable

[74] The Respondent submits that Officer considered the evidence presented by the Applicants and found it speculative as to whether a conscientious objector application made by Kimberly would be denied. No such application was ever in front of the U.S. military. *Hinzman* (F.C.A.) teaches that a refugee claimant from the U.S. must exhaust all domestic avenues of state protection available to them without success before claiming protection in Canada. The Respondent cites paragraph 46 of the Federal Court of Appeal decision in *Hinzman:*

> **46** The United States is a democratic country with a system of checks and balances among its three branches of government, including an independent judiciary and constitutional guarantees of due process. The appellants therefore bear a heavy burden in attempting to rebut the presumption that the United States is capable of protecting them and would be required to prove that they exhausted all the domestic avenues available to them without success before claiming refugee status in Canada…

Applicant's Reply

[75] In reply, the Applicants contend that they have raised entirely distinct arguments with respect to the PRRA decision from those put forward regarding the H&C decision. For example, the Applicants did not assert in their H&C memorandum of law and argument that the Officer misconstrued the nature of the risk of differential punishment and that her findings on state protection were fatally flawed.

[76] The Applicants stress that the PRRA Officer focused on the sentences the Principal Applicant could receive if she was convicted at a court-martial. The Applicants' submissions, however, clearly asserted that the differential punishment the Principal Applicant would receive in the U.S. stems from being court-martialed and imprisoned rather than being administratively discharged from the military. As the Federal Court of Appeal has found, 94% of the deserters receive an administrative discharge. Those who have spoken out against the war in Iraq are not administratively discharged, but are selected for prosecution via a court-martial proceeding and are sentenced to imprisonment.

[77] The Applicants agree with the Respondent that they did not put forward a different definition of punishment in their PRRA submissions. However, a different definition of punishment was not required in these circumstances. The Applicants have at no time asserted that a court-martial proceeding would constitute punishment. Court-martial proceedings are the vehicle used by military prosecutors to pursue more severe punishment, such as imprisonment, instead of an

administrative discharge against those deserters who have a demonstrated political opposition to the war in Iraq.

[78] The Applicants insist that the Officer plainly indicated that evidence was put before her to demonstrate the differential treatment of court-martial and imprisonment for political opponents of the war, as opposed to the usual punishment of an administrative discharge received by the majority. The Applicants did not focus their submissions on the variation of the length of prison sentences facing the Principal Applicant if returned, but rather outlined that differential and more severe punishment results from being selected for court-martial as opposed to being administratively discharged.

[79] The Applicants point out that the crux of risk of differential punishment is that military prosecutors decide whether to court-martial soldiers for desertion based on whether they have demonstrated a political or moral opposition to the war in Iraq. The differential punishment results from a court-martial, which is a necessary means to the end of imprisonment. The punishment is not actually the court-martial itself. The Officer misconstrued the nature of the risk of differential punishment by assuming that the difference in punishment results from the variation in the length of prison sentences rather than the discretionary decision on whether to pursue imprisonment through a court-martial in the first place.

[80] The Applicants also note that the Officer mistakenly cites Article 38 as opposed to Article 32 in relation to a hearing under the UCMJ. This does not demonstrate that the Officer’s analysis

goes beyond an assessment of the variation in sentences imposed through a court-martial. When discussing Article 32 the Officer is again conceptually already within the court-martial process and past the decision on whether to prosecute an individual in the first place. An Article 32 hearing is clearly not a safeguard against the improper exercise of prosecutorial discretion as the Article 32 process has no bearing on whether an individual is selected for prosecution via court-martial.

[81] The Applicants submit that punishment for desertion would be unjustified. Kimberly has made a claim for protection in Canada, and has been very public about this fact, clearly demonstrating an intention to remain absent from her unit permanently. She has not asserted that she should not be punished for desertion; she has asserted that she risks differential punishment on the basis of her political and moral beliefs.

[82] The Applicants submit that the conclusion of the Officer was reproduced in two separate decisions that are not indicative of whether the Officer actually did consider, or was aware of, all of the evidence put forward by the Applicants. The reproduction of statements in separate decisions indicates that the Officer was relying on a template, rather then reviewing all of the evidence. Given that the analysis of the evidence that is provided by the Officer is merely a duplicate of the analysis conducted by another officer in decisions dated months earlier when certain material pieces of evidence were not available, it is only reasonable to conclude that the failure of the Officer to reference these new pieces of evidence signifies that the Officer ignored them. See: *Hassaballa* at paragraphs 23-26; *Nyoka* at paragraph 21; *Cepeda-Gutierrez* and *Ranji*.

[83] The Applicants submit that a successful conscientious objector status application would not exempt Kimberly from facing legal consequences from the U.S. military. A conscientious objector status application has no retroactive function and would have no bearing on any court-martial proceeding which Kimberly faces.

[84] The Applicants also assert that the *Hinzman* matter decided by the Federal Court of Appeal does not alter the basic principle enunciated in *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689, which states that evidence of a similarly situated individual's efforts to obtain state protection and their failure to do so can serve as clear and convincing evidence to rebut the presumption of state protection. *Hinzman* does not excuse the Officer from assessing the multiple pieces of evidence that demonstrated that filing for conscientious objector status would not offer Kimberly any protection and would likely exacerbate the risks she faces. The Applicants cite *Key* at paragraphs 34 and 35:

> **34** …If there is clear and convincing evidence presented that Mr. Key faced a serious risk of prosecution and incarceration notwithstanding the possible availability of less onerous, non-persecutory treatment, he is entitled to make that case and to have that risk fully assessed. The significance of a failure to exhaust the options for domestic protection is not, after all, assessed in a vacuum. Such protections must be actually available and not illusory. It is also not a complete answer to the problem presented in cases like this to point to the presence of due process guarantees (although that is an aspect of the analysis).
>
> **35** While the *Hinzman* (C.A.) decision has certainly set the bar very high for deserters from the United States military seeking refuge in Canada, the Court of Appeal acknowledged in that case the point made in *Ward v. Canada (A.G.)*, [1993] 2 S.C.R. 689, 103 D.L.R. (4th) 1 that one's failure to fully pursue state protection opportunities will not always be fatal to a refugee claim. Clear and convincing evidence about similarly situated individuals who

> unsuccessfully sought to be excused from combat duty or who were prosecuted and imprisoned for a refusal to serve, may be sufficient to rebut the presumption of state protection in the United States. I would add that because Pte. Key would have been deployed back to Iraq within 2 weeks of his arrival in the United States, the opportunity to pursue a release or re-assignment may not have been realistic…

Applicants' Further Memorandum

[85] In order to bring the Court up to date with the jurisprudence, the Applicants point out that four decisions have recently been released which address the risk of differential punishment faced by individuals who are similarly situated to Kimberly: *Hinzman v. Canada (Minister of Citizenship and Immigration)* 2009 FC 415; *Walcott v. Canada (Minister of Citizenship and Immigration)* 2009 IMM-5527-08; *Walcott v. Canada (Minister of Citizenship and Immigration)* 2009 IMM-5528-08 and *Landry v. Canada (Minister of Citizenship and Immigration)* 2009 FC 594.

[86] The Applicants cite the June 2, 2009 *Hinzman* decision at paragraphs 95 and 96:

> **95** The Applicants introduced evidence to show that, although the Principal Applicant will be subject to laws of general application in the U.S., he will, because of his high profile and virulent criticism of the U.S. policy in Iraq, be singled out for differential treatment, which could well amount to unusual and undeserved or disproportionate hardship and which would take the punishment he faces outside of the range of what is considered acceptable under international human rights law.
>
> **96** I have reviewed the evidence in question and the Officer's treatment of it in the Decision, and, in my view, while it is certainly possible to disagree with the Officer's conclusions on this issue, I cannot say that relevant evidence was overlooked or that the Officer's conclusions were unreasonable within the meaning of

> *Dunsmuir*. I cannot re-weigh the evidence and substitute my own opinion for that of the Officer in these circumstances.

[87] The Applicants state that there was crucial evidence pertaining to risk of differential punishment on the record before the PRRA Officer in the present case that was not before the officer who decided the Hinzman family's H&C. This evidence was also not before the Court when deciding the application for judicial review of the *Hinzman* decision. The Hinzman family's H&C application was decided in July of 2008 and final submissions in that application were made July 7, 2008. Evidence pertaining to the court-martials of Mr. James Burmeister and Mr. Robin Long (discussed in the Applicants' memorandum of law and argument and memorandum of argument in reply) were not on the record in the *Hinzman* case. The Applicants submit that my findings in the recent *Hinzman* decision are not applicable to the current application since the evidence before the Officer was entirely different.

ANALYSIS

[88] In their PRRA application the Applicants introduced evidence and argument of a change of position by the U.S. military authorities; a cracking down on deserters who have spoken out publicly against the war in Iraq. Their point was that the state, or at least the military arm of the state, has now targeted for special treatment those who have gone AWOL and who have publicly expressed their opposition to the war in Iraq. This differential treatment involves a decision by the authorities to subject such people to court martial proceedings, rather than administrative discharge, and to punish them more harshly in order to make an example of them that will discourage others from taking similar action. The Applicants' point was that the laws relating to desertion in the U.S.

are now being applied differently based upon the deserters profile as an outspoken critic of the U.S. war effort in Iraq. This means that a law of general application has ceased to be neutral and is being applied in a discriminatory way that could amount to persecution and cruel and unusual punishment because it is disproportionately targeting and punishing deserters for their political opinions.

[89] The Principal Applicant has always feared that she risks being treated differently from other deserters purely because of her outspoken political opinions on the war in Iraq. Her new evidence was intended to demonstrate that similarly situated persons have been, upon return to the U.S., targeted for court martial – as opposed to administrative discharge – and have been dealt with more severely as they went through the court martial process and received disproportionate punishments as a result. The argument is that a law of general application ceases to be a law of general application if it is used in a non-neutral way to punish soldiers for their political opinions.

[90] The Officer certainly appears to acknowledge the risks put forward by the Applicants when he identifies two components to the Principal Applicant's stated risks:

1. "The principal applicant believes that, as a member of the U.S. Army, with her political opinion and public involvement against the war in Iraq, she will be charged with being Absent Without Leave (AWOL) or desertion, and subjected to a Court Martial proceeding";
2. "She does not believe that she will receive a fair trial. In addition, she states that she will receive disproportionate non-judicial punishment because of her stand opposing the war in Iraq."

[91] So the Officer acknowledges that the risks identified by the Applicants are the risk of being subjected to prosecution in the first place, and the consequential risk of what will follow in terms of due process and punishment.

[92] The Officer addressed the identified risks by invoking the procedural safeguards available to the Applicant and by pointing out that the discretion afforded to judges in sentencing is an inherent component of an independent judiciary, unless it can be demonstrated that the discretion is applied in violation of the principles of natural justice, or imposed in disregard of accepted international standards:

> The evidence before me does not support that the sentences imposed on the individuals referred to in the principal applicant's submissions were disproportionately harsh because of her (*sic*) public opposition to the war in Iraq. Similarly, the evidence before me does not support that the UCMJ will be applied in a disproportionately harsh manner against the applicant as a result of her personal circumstances.

[93] As regards the risk of prosecution *per se*, the Officer has the following to say:

> The possibility of prosecution under a law of general application is not, in and of itself, sufficient evidence that an applicant faces persecution or harm under sections 96 or 97 of the IRPA. The principal applicant was a member of the U.S. military and is, therefore, subject to its laws of general application. The evidence before me does not indicate that the principal applicant has been charged with an offence in the United States. Regardless, accepting her submissions that she will face charges and prosecution upon returning to the United States, documentary evidence shows that she will be afforded due process and have access to state protection.

[94] This approach of the Officer raises several key issues:

a. If the Principal Applicant is targeted for court martial proceedings in the U.S. because of her political opinion against the war in Iraq, is she still being subjected to a law of general application?

b. Does the fact of due process and access to state protection following the decision to prosecute legitimize the exercise of a prosecutorial discretion based upon the political opinion of the target;

c. Has the Applicant adduced evidence to show that she will be targeted for prosecution (in terms of the applicable standard of proof) because of her political opinion?

d. If the Applicant is targeted for prosecution because of her political opinion against the war, does this amount to persecution under section 96 of IRPA or harm under section 97?

[95] Generally speaking, the Officer's explanation as to why he cannot accept the stated risks is as follows:

a. The documentary evidence shows that Army Regulations in the U.S. allow for the processing of conscientious objector status. The Principal Applicant did not file a conscientious objector application, but she could do so;

b. Even if the Principal applicant chooses not to file a conscientious objector application, the evidence demonstrates that she will still receive due process in the military justice system because state protection exists in the United States and the

> Principal Applicant has recourse available to her should the authorities act in contravention to their mandate.

[96] What the Officer's analysis leaves out of account is the whole issue of whether targeting soldiers and subjecting them to court martial because of their political opinion is a neutral application of a general law and, if it is not, whether such conduct by the state can be persecution under section 96 or harm under section 97.

[97] In other words, the Officer identifies the act of prosecution as a stated risk but does not analyse that aspect of the Applicants' case. He focuses on what happens after the decision to prosecute has been taken. This approach infects his whole analysis because, in looking at state protection, he never asks whether the state can, or is likely to, protect the Principal Applicant against targeting in the event that such targeting can be said to be section 96 prosecution or section 97 harm.

[98] In the present application, the Minister says that the act of prosecution itself was never clearly identified by the Applicants as a new risk and, if it was, the Decision addresses the whole court martial system and not just due process and punishment. I agree with the Respondent that the distinction between prosecution *per se* and punishment for desertion is not as clearly delineated in the submissions as it might be. This gave me some initial concern that the Officer had not addressed the targeting issue because the written submissions appear to emphasize process and punishment. However, it would appear that the Officer's own identification of the stated risks shows that he was

fully aware that the Principal Applicant feared not only the trial process and punishment but also the act of being charged with desertion and subjection to court martial proceedings.

[99] In the end, there is no meaningful examination in the Decision of selected and targeted prosecution based upon political opinion of those deserters who have spoken out against the war in Iraq. The Principal Applicant provided ample evidence of the targeting of similarly situated individuals, but this evidence is never addressed from this perspective. In addition, there was also evidence before the Officer of prosecutors seeking harsher treatment, and judges imposing harsher sentences, for deserters who have spoken out against the war. This again raises the issue of the exercise of prosecutorial and judicial discretion in a way that discriminates against those soldiers who have expressed public opposition to the war in Iraq. In turn, this calls into question the procedural and state protection safeguards available to targeted individuals who are prosecuted (instead of receiving an administrative discharge) and who are punished harshly for their political opinions, and whether this amounts to section 96 persecution or section 97 harm. In her written submissions, the Principal Applicant raised the issue, not only of disproportionate punishment, but of the improper exercise of prosecutorial discretion based upon an individual deserter's profile as an opponent or critic of the U.S. war effort. In my view, the availability of the conscientious objector process, even if it were available to the Principal Applicant, which does not appear likely or the evidence, is irrelevant to this issue.

[100] The Officer has failed to examine and review a significant aspect of the Applicants' case. I am not saying that the targeting based upon political opinion must necessarily constitute section 96

persecution or section 97 harm. But this issue needs to be addressed head on and the evidence adduced by the Applicant needs to be reviewed and assessed in this light.

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

[102] In my view, the Officer's failure to fully address the targeting issue, and the evidence that supports the Applicants' position, renders the Decision unreasonable and it must be returned for reconsideration.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that

1. This application for judicial review is allowed. The decision is quashed and the matter is referred back for reconsideration by a different officer.

2. There is no question for certification.

"James Russell"
Judge

FEDERAL COURT

NAMES OF COUNSEL AND SOLICITORS OF RECORD

COURT FILE NO.:	IMM-215-09
STYLE OF CAUSE:	***KIMBERLY ELAINE RIVERA ET AL.*** ***v.*** ***THE MINISTER OF CITIZENSHIP AND IMMIGRATION***
PLACE OF HEARING:	Toronto, ON
DATE OF HEARING:	July 8, 2009
REASONS FOR JUDGMENT:	RUSSELL J.
DATED:	August 10, 2009

WRITTEN REPRESENTATIONS BY:

Ms. Alyssa Manning	FOR THE APPLICANTS
Mr. Stephen H. Gold Mr. Neal Samson	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Ms. Alyssa Manning Barrister & Solicitor Toronto, ON	FOR THE APPLICANTS
John H. Sims, Q.C. Deputy Attorney General of Canada	FOR THE RESPONDENT