Date: 20060331

Docket: IMM-5571-05

Citation: 2006 FC 421

Ottawa, Ontario, March 31, 2006

PRESENT: The Honourable Madam Justice Mactavish

BETWEEN:

BRANDON DAVID HUGHEY

Applicant

and

THE MINISTER OF CITIZENSHIP

AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

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PARA.

I. Introduction

[1] Brandon Hughey was a Private in the United States Army who deserted after his unit was deployed to fight inIraq. Mr. Hughey says that he deserted because of his strong moral objections to the war in Iraq, and his belief that the American-led military action in that country is illegal.

[2] After deserting the military, Mr. Hughey came to Canada, and claimed refugee protection, asserting that he had a well-founded fear of persecution in the United States, based upon his political opinion. Mr. Hughey's claim was rejected by the Refugee Protection Division of the Immigration and Refugee Board, which found that he was neither a Convention refugee nor a person in need of protection.

[3] Mr. Hughey now seeks judicial review of the Board's decision, asserting that the Board erred in refusing to allow him to lead evidence with respect to the alleged illegality of the American military action in Iraq. The Board further erred, he says, in ignoring evidence with respect to the alleged condonation of ongoing human rights violations perpetrated by the American military in Iraq, and with respect to the systemic nature of those violations.

[4] In addition, Mr. Hughey says that the Board imposed too heavy a burden on him to demonstrate that he would himself have been involved in unlawful acts had he gone to Iraq. Finally, Mr. Hughey argues that the Board erred in failing to properly consider the fact that an objection to a particular war is not recognized as a legitimate basis on which to grant conscientious objector status in the United States. Given that his sincere conscientious objections to the war in Iraq were not taken into account by the United States Army, Mr. Hughey says that any punishment that he may receive for having deserted automatically amounts to persecution.

[5] For the reasons that follow, I have concluded that this application for judicial review must be dismissed. It should be noted that the question of whether the American-led military intervention in Iraq is in fact illegal is not before the Court, and no finding has been made in this regard.

II. Factual Background

[6] As the Federal Court of Appeal observed in *Zolfagharkhani v. Canada(Minister of Employment and Immigration)*, [1993] 3 F.C. 540, conscientious objector cases are often fact-specific. It is therefore necessary to review the facts underlying Mr. Hughey's refugee

claim in some detail, particularly as they relate to the nature of his objection to military service generally, and to serving in the war in Iraq in particular.

[7] Mr. Hughey enlisted in the United States Army when he was 17 years old, reporting for service on July 9th, 2003, when he was 18. Mr. Hughey testified that he had two reasons for joining the Army. The first was the financial assistance provided by the military, which would have allowed him to attend university upon completion of his term of enlistment. Mr. Hughey's second reason for enlisting was his belief that "some things are worth fighting for". Mr. Hugheytestified that he "was not a total pacifist", stating that he believed in defending home and family.

[8] Mr. Hughey could have signed up for a term of two, four or six years. He chose a four year term of service, explaining that a term of this duration would allow him "to get a good balance of benefits but not be in the military forever ...". For his trade, Mr. Hughey chose to be trained as a tank driver.

[9] Mr. Hughey was sent to Fort Knox, Kentucky, for his basic training. Although Mr. Hughey testified as to his belief that the American government had declared the *Geneva Convention Relative to the Treatment of Prisoners of War*, 75 U.N.T.S. 135, *entered into force* Oct. 21, 1950, to be obsolete, he also acknowledged having attended a class dealing with the provisions of the *Geneva Convention* during basic training.

[10] Mr. Hughey also acknowledged that recruits were never told or encouraged to fire on individuals who they knew were civilians.

[11] Mr. Hughey testified that he disliked basic training, and began having second thoughts about having enlisted in the Army. He felt that the values that he was being taught in basic training went against all of the values that his father had instilled in him, including the need to think for himself and to question authority.

[12] Mr. Hughey figured that his concerns were normal, and would have been shared by his fellow recruits. He did nothing about them, as he saw no way of addressing them.

[13] At the time that Mr. Hughey enlisted in the Army, he did not have any concerns with respect to the American involvement in the war in Iraq, explaining that if the President of the United States had correct information, and Iraq did in fact pose an imminent threat to America, then, in his view, the war was justified.

[14] However, as he went through basic training, Mr. Hughey says that he became aware that no weapons of mass destruction were being found in Iraq. He also learned that no ties between the Iraqi regime and al-Qaeda were being established, al-Qaeda being the terrorist organization responsible for the September 11, 2001 attacks on the United States. By the time that he completed his basic training, Mr. Hughey says that he had formed the belief that the war in Iraq was being waged upon false pretenses.

[15] Mr. Hughey did not tell anyone about his concerns, fearing that expressing his reservations about the war inIraq would turn his fellow recruits against him and "make [him] a target".

[16] After he completed his basic training, Mr. Hughey took a one-month leave. During his leave, he repeatedly heard comments about the "shock and awe" campaign being waged in Iraq, and the killing of innocent civilians by the American military. This further entrenched his reservations about participating in the war in Iraq. He testified that his concern was with "being sent over to a foreign country where I would be put in a position to either lose my life or take somebody else's life for false pretenses and causes that ...at the time my government was struggling to justify".

[17] Mr. Hughey also did his own research over the Internet, which led him to believe that the war in Iraq was contrary to the *Charter* of the United Nations, and had not been approved by the international community.

[18] When Mr. Hughey returned to his base, he discussed his opposition to the war with a non-commissioned officer. He told the officer that he was aware that he would likely soon be deployed to Iraq, explained his concerns with respect to the war, and asked to be discharged from the Army. The officer told Mr. Hughey that nothing could be done because Mr. Hughey had signed a contract. Mr. Hughey says that he was not aware of the option of seeking conscientious objector status at this time.

[19] In January of 2004, Mr. Hughey went Absent Without Leave. He returned home and spoke to his father about his concerns. Mr. Hughey testified that his father suggested that he return to the Army, and try speaking with a different officer. At no point did his father suggest that he apply to be a conscientious objector.

[20] Mr. Hughey returned to his base, and was immediately summoned to see the Sergeant-Major. Mr. Hughey says that he again explained his belief that the war in Iraq was morally wrong, and suggested to the Sergeant-Major that it would be better for all concerned if he could be processed out of the military.

[21] Mr. Hughey says that he was again told that there was no method of leaving the military once a contract had been signed, and that no mention was made of the possibility of applying for conscientious objector status.

[22] Mr. Hughey testified that by February of 2004, he was aware that his unit would be deployed to Iraq the following month. He says that he was distraught, and began contemplating suicide. He did not seek out the assistance of a military chaplain or psychiatrist to help him sort out his feelings. Nor did he consider refusing to go to Iraq, testifying that he did not think that it would be fair for him to be sent to jail for refusing to fight in a war that he believed was wrong.

[23] Mr. Hughey also stated in a television interview granted shortly after he arrived in Canada that he was not prepared to go to jail at the age of 18.

[24] Mr. Hughey testified that even if Iraq had been found to have been in possession of weapons of mass destruction, or to have had ties to al-Qaeda, he would still have been of the view that the war was wrong, because, in his opinion, the people of Iraq posed no imminent threat to the United States.

[25] During this time, Mr. Hughey came across the name of an anti-war activist named Carl Rising Moore while he was surfing the Internet. Mr. Rising Moore was offering to help American soldiers escape the military.

[26] Mr. Hughey contacted Mr. Rising Moore, who offered to help him get to Canada to apply for refugee status. Mr. Hughey arrived in Canada on March 5, 2004 and claimed refugee protection approximately one month later, asserting that he had a well-founded fear of persecution in the United States based upon his political opinion.

[27] Mr. Hughey says that he claimed refugee protection in order to ensure that he was not incarcerated or put to death as a result of his decision to resist participation in the Iraqi war.

[28] If he were returned to the United States, Mr. Hughey says that he would likely be imprisoned for anywhere from one to five years in a military prison. Mr. Hughey is of the view that as a result of his having come to Canada and sought refugee protection, he could well face harsher treatment than other deserters because the Army might want to make an example of him. He concedes, however, that he has no evidence to support this concern.

[29] While Mr. Hughey acknowledges that he would receive a fair trial in the United States, before an independent judiciary, he nonetheless asserts that any form of punishment that he would incur for merely following his conscience would amount to persecution.

III. Evidence with Respect to the Legality of the War in Iraq

[30] Mr. Hughey's refugee claim was heard by the same Board member who had previously heard and decided the refugee claim of Jeremy Hinzman. Mr. Hinzman is another American soldier who deserted the American military because of his objections to serving in the war in Iraq. Mr. Hughey was also represented by the same counsel who represented Mr. Hinzman before the Board.

[31] In the *Hinzman* case, counsel endeavoured to lead evidence as to the alleged illegality of the American military action in Iraq. In a preliminary ruling in that case, the Board found this evidence to be irrelevant to Mr. Hinzman's claim, and refused to admit the evidence.

[32] In Mr. Hughey's case the Board summarily refused to allow the admission of evidence with respect to the legality of the war in Iraq, effectively adopting its reasons for excluding the evidence in the *Hinzman* case. The alleged errors in this ruling form a principle ground for this application for judicial review, and as a consequence, it is necessary to provide a summary of the Board's reasons for excluding the disputed evidence.

IV. The Board's Evidentiary Ruling in the *Hinzman* Case

[33] In the pre-hearing process leading up to the hearing of the refugee claims of Mr. Hinzman and his family, counsel for the applicants indicated that he intended to lead evidence at the hearing as to the alleged illegality of the American military action in Iraq.

[34] This evidence primarily took the form of affidavits from two professors of international law, both of whom focused on the lack of United Nations Security Council approval for the American government's use of force in Iraq. Both professors observed that the *Charter of the United Nations*, 26 June 1945, Can T.S. 1945 No. 7 [UN *Charter*], permits the use of force by one country against another in only two situations: in cases of self-defense, and where there is Security Council approval.

[35] Both professors observed that the United States did not invoke self-defense as a legal justification for its military intervention in Iraq. They further argued that none of the Security Council resolutions relied upon by the United Statesto justify its conduct condoned military action against Iraq in the present circumstances. The professors specifically referred to Security Council Resolution 1441, which recognizes further breaches by Iraq of its disarmament obligations, and requires that any further non-compliance be reported to the Security Council for reassessment. Although this Resolution does not expressly contemplate the need for an additional resolution authorizing force, the professors argued that, given the deep disagreements that led to the adoption of this compromise Resolution, it is impossible to read the Resolution as either an express or implied authority for the use of force.

[36] One of the professors also discussed a developing view of humanitarian intervention as a third possible justification for one State to use armed force against another. However, the professor observed that President Bush made no attempt to justify the American invasion of Iraq as a humanitarian intervention.

[37] Both professors concluded that, in the absence of either Security Council approval or a sound case for self-defense, no legal justification existed for the war in Iraq. As a consequence, each concluded that the American invasion ofIraq was carried out in violation of the prohibition on the use of force enshrined in Article 2(4) of the UN *Charter*, and was thus illegal.

[38] The other evidence which the applicants sought to adduce was to a similar effect.

[39] The Board decided to address the admissibility of this evidence in advance of the hearing, receiving submissions on the following question:

... [W]hether the allegation that the United States' military action in Iraq was not authorized by the UN Charter and UN Resolution is relevant to the question of whether it is the type of military action which is condemned by the international community, as contrary to basic rules of human conduct. If it is relevant, how so?

[40] In a lengthy and detailed ruling, the Board answered this question in the negative, determining that the legality of the American military action in Iraq was not relevant to the question of whether it was "the type of military action" which is "condemned by the international community, as contrary to basic rules of human conduct", within the meaning of paragraph 171 of the United Nations High Commission for Refugees *Handbook on Procedures and Criteria for Determining Refugee Status*: United Nations, Office of the United Nations High Commissioner for Refugees; Geneva, 1988.

[41] Paragraph 171 of the *Handbook* provides that:

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

[42] The Board found that when Canadian and international courts have considered this provision in order to determine whether an individual meets the definition of "Convention refugee", it has almost invariably been the nature of the *acts* that the evading or deserting soldier would be expected to perform or be complicit in, rather than the legality of the conflict as a whole, that have dictated the result.

[43] Based upon this understanding of the relevant test, the Board found that evidence as to the alleged illegality of the war in Iraq was not relevant to the analysis to be carried out in accordance with paragraph 171 of the *Handbook*.

[44] The Board also rejected Mr. Hinzman's submission that the alleged illegality of the war in Iraq was relevant to his claim because it made it more likely that there would be widespread and systematic violations of international humanitarian law going on in Iraq, in which Mr. Hinzman himself would be required to participate. In the Board's view, this argument was purely speculative.

[45] As a consequence, the Board in *Hinzman* refused to admit the evidence regarding the legality of the American military action in Iraq, ruling that this evidence was irrelevant to the applicants' refugee claims. For the same reasons, the Board also refused to admit the evidence in Mr. Hughey's case.

V. The Board's Decision with Respect to the Merits of Mr. Hughey's Claim

[46] The Board identified four substantive issues raised by Mr. Hughey's refugee claim. These were:

1. Had Mr. Hughey rebutted the legal presumption that the government of the United States would be willing and able to protect him?

2. Was Mr. Hughey a Convention refugee? That is, did he have a well-founded fear of persecution by the American government and its military because of his political opinion, religion, or membership in a particular social group, namely conscientious objectors to military service in the United States Army?

3. Is the type of military action with which Mr. Hughey does not wish to be associated condemned by the international community as contrary to basic rules of human conduct within the meaning of Section 171 of the UNHCR Handbook?

4. Is Mr. Hughey a person in need of protection, in that his removal to the United Stateswould subject him personally to a risk of cruel and unusual treatment or punishment by the American government and its military? In this regard, the Board also considered whether the risk of punishment for desertion faced by Mr. Hughey was inherent or incidental to lawful sanctions imposed in conformity with accepted international standards.

i) State Protection

[47] With respect to the issue of State protection, the Board noted that the facts of Mr. Hughey's claim were very similar to those in the *Hinzman* matter, with the exception of the fact that Mr. Hinzman had endeavoured to obtain conscientious objector status while still in the United States Army, whereas Mr. Hughey had made no such attempt.

[48] With that difference noted, the Board went on to adopt its reasoning from the *Hinzman* matter with respect to the issue of State protection.

[49] In *Hinzman*, the Board observed that the responsibility to provide international protection is only engaged when State protection is not available to a claimant in his or her home country. The Board further observed that there is a rebuttable presumption in refugee law that, in the absence of a complete breakdown of the State apparatus, a State will be able to protect its own nationals. Moreover, the more democratic the State, the greater the obligation on a claimant to exhaust all courses of action available in the claimant's country of origin, prior to seeking refugee protection abroad.

[50] Citing the decision of the Federal Court of Appeal in *Canada (Minister of Citizenship and Immigration) v. Satiacum* (1989), 99 N.R. 171, the Board found that refugee claimants from the United States must establish the existence of 'exceptional circumstances', such that the claimant would not have access to a fair and independent judicial process.

[51] That is, an applicant would have to establish that he would not have full access to due process, or that the law would be applied against him in a discriminatory manner, if he were to return to the United States and face court-martial proceedings. The Board found that the Universal Code of Military Justice (UCMJ) and the Manual for Courts-martial of theUnited States reveal a sophisticated military justice system that respects the rights of service personnel, and guarantees appellate review, including limited access to the United States Supreme Court.

[52] Noting that the UCMJ is a law of general application, the Board then reviewed the approach set out by the Federal Court of Appeal in *Zolfagharkhani*, previously cited, to determine whether the prosecution of Mr. Hinzman under an ordinary law of general application would amount to persecution.

[53] The Board thus found that the onus was on Mr. Hinzman to show that the American law was either inherently persecutory, or for some other reason was persecutory in relation to a *Convention* ground. In the Board's view, he had failed to satisfy this onus.

[54] In coming to this conclusion, the Board found that Mr. Hinzman had not brought forward any evidence to support his allegation that he would not be accorded the full protection of the law in the court-martial process.

[55] The Board also observed that the United States has military regulations in place that allow for exemption from military service, as well as for alternative, non-combatant service for persons who can invoke genuine reasons of conscience. The regulations also recognize that conscientious objections can be long-standing, or can result from an evolution in a person's belief system resulting from their military experiences.

[56] The Board recognized that American military regulations do not permit a conscientious objection to be founded on an individual's objection to a particular war, noting that this limitation had been upheld by the Supreme Court of the United States in the Vietnam-war era decision in *Gillette v. United States*, 401 US 437 (1971).

[57] The Board concluded that Mr. Hinzman had failed to offer sufficient evidence to establish that he was denied due process with respect to his application for non-combatant status, or that he would be denied due process or be treated differentially, were he to return to the United States and be court-martialled.

[58] Having failed to rebut the presumption that State protection would be available to him in the United States, the Board held that it followed that Mr. Hinzman's claim under both sections 96 and 97 of the *Immigration and Refugee Protection Act* had to be dismissed.

[59] As was noted above, the Board applied its reasoning from the *Hinzman* case to Mr. Hughey's claim. The Board further found that the presumption of State protection does not displace the burden of proof. According to the Board, even if a claimant succeeds in rebutting the presumption that a State will be able to protect its nationals, the burden remains on the applicant to establish the elements of his or her claim.

[60] The Board also found that the presumption of State protection should be applied, even when the State itself is the alleged agent of persecution.

ii) Did Mr. Hughey Have a Well-founded Fear of Persecution in the United States?

[61] Even though the Board found the issue of State protection to be dispositive of Mr. Hughey's claim, it nonetheless went on to consider the other issues raised by the claim, starting with the question of whether any punishment that would be imposed upon Mr. Hughey as a consequence of his refusal to serve in Iraq would be inherently persecutory, given his political and moral views.

[62] The Board found that Mr. Hughey decided to desert because he was opposed to the American military incursion into Iraq, and not because he was opposed to war generally. The Board noted that Army Regulation 600-43, which governs conscientious objector procedures, does not recognize an objection to a particular war, as opposed to an objection to war in general.

[63] The Board also noted that Mr. Hughey did not oppose the war in Iraq because of any atrocities or crimes against humanity that may allegedly have been committed there. Rather, in the Board's words "he believed the war was immoral and illegal under international law".

[64] Citing the decision of this Court in *Ciric v. Canada(Minister of Employment and Immigration)*, [1994] 2 F.C. 65, the Board held that one cannot be a selective conscientious objector.

[65] As a consequence, while the Board implicitly accepted the sincerity of Mr. Hughey's opposition to the war in Iraq, it nevertheless found that he was not a conscientious objector, because he was not opposed to war in all forms or to the bearing of arms in all circumstances due to his political, religious or moral convictions, and that, as a result, any punishment that he might suffer for his desertion would not be inherently persecutory.

iii) Section 171 of the UNHCR Handbook

[66] Mr. Hughey feared that if he went to Iraq, he could have been called upon to kill innocent civilians. However, the Board rejected his assertion that the type of military action with which he did not wish to be associated in Iraq - that is, the specific acts that he would personally have been called upon to perform - were ones that were "condemned by the international community as contrary to basic rules of human conduct", as that phrase is used in section 171 of the UNHCR *Handbook*, and that, as a result, any punishment that he might receive for deserting would be persecutory.

[67] In support of his contention that he could well have been called upon to commit human rights violations had he gone to Iraq, Mr. Hughey pointed to evidence which he says established that the United States had committed numerous serious violations of international humanitarian law in Iraq. According to Mr. Hughey, this evidence demonstrated that he would have been involved in atrocities, had he agreed to be deployed to Iraq. He further contended that this evidence demonstrates that the United States had conducted itself with relative impunity, and had evidenced a complete disregard for international norms in its conduct on the various fronts of its "War Against Terror".

[68] Before the Board, Mr. Hughey contended that if he were required to participate in offensive action in Iraq, potentially killing innocent civilians, he would be excluding himself as a Convention refugee or person in need of protection by virtue of s. 98 of the *Immigration and Refugee Protection Act*. In such circumstances, Mr. Hughey submitted that any punishment that he might receive for deserting would be persecutory *per se*.

[69] The evidence adduced by Mr. Hughey included reports prepared by Human Rights Watch, Amnesty International, and the International Committee of the Red Cross regarding the conduct of American soldiers in Iraq. In addition, Mr. Hughey put evidence before the Board regarding conditions at the Guantanamo prison facility in Cuba, incidents of torture at the Abu Ghraib prison in Iraq, as well as two legal opinions prepared by the American Department of Justice (the "Gonzales opinions"), suggesting that the *Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment*, G.A. res. 39/46, annex, 39 U.N. GAOR Supp. (No. 51) at 197, UN Doc. A/39/51, 1984, *entered into force* June 26, 1987, might not apply to the interrogation of 'enemy combatants' held by the United States.

[70] After reviewing the evidence adduced by Mr. Hughey, the Board found that the evidence fell short of establishing that the United States is engaged in military actions that are condemned by the international community as contrary to the rules of human conduct.

[71] While accepting that there had been instances where members of the American military in Iraq had engaged in serious violations of international humanitarian law, the Board observed that the military had investigated instances of alleged recklessness or indiscriminate use of force, and had taken disciplinary action, where appropriate.

[72] Referring to Mr. Hughey's testimony that had he gone to Iraq, he would likely have been employed driving a Humvee, patrolling and manning checkpoints, the Board accepted that these activities may have resulted in him killing Iraqi civilians who failed to stop at checkpoints, or who were believed to have been firing on checkpoint personnel. However, the Board also went on to find that the loss of innocent life was an unfortunate consequence of war.

[73] The Board thus concluded that Mr. Hughey had failed to adduce sufficient evidence to establish that, if he had been deployed to Iraq, he would have personally been engaged in, been associated with, or been complicit in acts condemned by the international community as contrary to basic rules of human conduct. The Board further found that Mr. Hughey had failed to demonstrate that, as a matter of policy or practice, the United Stateswas indifferent to alleged violations of international human rights law in Iraq.

[74] As a consequence, the Board found that any punishment that Mr. Hughey might receive for having deserted would not be inherently persecutory.

iv) Punishment for Desertion: Prosecution or Persecution?

[75] After finding that Mr. Hughey was not a conscientious objector, and that any punishment that he would face would not automatically be persecutory in nature, the Board went on to hold that, in order to establish that he faced a risk of persecution, Mr. Hughey had to demonstrate either that the punishment that he feared he would receive for desertion, if he were returned to the United States, would result from a discriminatory application of the UCMJ, or would amount to cruel or unusual treatment or punishment.

[76] In this regard, the Board noted that Mr. Hughey had testified that he would likely face between one and five years in a military prison, and he might be treated more harshly than other deserters by the American authorities, in order to discourage other soldiers from deserting and fleeing to Canada.

[77] In addressing this issue, the Board again adopted its reasoning in *Hinzman*, where Mr. Hinzman had also testified that he would likely face between one and five years in a military prison, and that because he had "probably offended ... military sensibilities", he would likely be treated more harshly than other deserters.

[78] In *Hinzman*, the Board commenced its analysis by reviewing the relevant provisions of the UNHCR *Handbook*, the full text of which are appended to this decision. The Board noted that the *Handbook* recognizes that desertion is invariably considered to be a criminal offence. The Board also noted that penalties for desertion will not ordinarily be considered to be persecutory.

[79] However, the Board also observed that paragraph 169 of the *Handbook* provides that a deserter may be considered to be a refugee if it can be shown that he or she would suffer disproportionately severe punishment for the military offence on account of his or her race, religion, nationality, membership in a particular social group or political opinion. A deserter may also be considered to be a refugee where it can be shown that he or she has a well-founded fear of persecution on the enumerated grounds, above and beyond the punishment for desertion.

[80] On the totality of the evidence before it, the Board concluded that the treatment or punishment that Mr. Hinzman feared in the United States would be punishment for nothing more than a breach of a neutral law that does not violate human rights, and does not adversely differentiate on a *Convention* ground, either on its face, or in its application.

[81] The Board did not accept Mr. Hinzman's argument that he would be punished more severely because of the publicity that has surrounded his case, finding that there was insufficient evidence to justify this assertion.

[82] Moreover, the Board concluded that the punitive articles in the UCMJ were not grossly disproportionate to the inherent seriousness of the offence of desertion. Although the UCMJ allows for the theoretical possibility of a sentence of death for desertion, the Board noted that, in practice, the last time a deserter was sentenced to death was during the Second World War.

[83] After reviewing the evidence, including sentences handed down to other American deserters, the Board found that there was less than a mere possibility that Mr. Hinzman would be sentenced to death. Indeed, counsel for Mr. Hinzman admitted that he would not face the death penalty.

[84] Accepting that Mr. Hinzman would likely be sentenced to a prison term of somewhere between one to five years for his desertion, in addition to having to forfeit his pay and be dishonourably discharged, the Board held that Mr. Hinzman had not established that treatment would be persecutory.

[85] Finally, the Board found that while Mr. Hinzman could ultimately face some employment and societal discrimination as a result of his dishonourable discharge, this also did not amount to persecution.

[86] Applying this reasoning in Mr. Hughey's case, and accepting that Mr. Hughey would also likely receive a sentence of one to five years for his desertion, the Board found that the treatment or punishment that Mr. Hughey feared he would receive in the United States under the UCMJ would be punishment for the breach of a law of general application that did not violate his human rights, and did not differentiate on a *Convention* ground, either on its face or in its application.

[87] According to the Board, Mr. Hughey failed to establish that he would be treated more harshly because of his political opinions, or that the penal provisions of the UCMJ were disproportionate, or amounted to cruel or unusual punishment.

VI. Issues

[88] The issues raised by Mr. Hughey before this Court can be addressed under the following headings:

1. Did the Board err in finding that evidence with respect to the alleged illegality of the American military action in Iraq was irrelevant to the determination that had to be made by the Refugee Protection Division in accordance with paragraph 171 of the UNHCR *Handbook*?

2. Did the Board err in finding that Mr. Hughey had failed to establish that the violations of international humanitarian law committed by the American military in Iraq rise to the level of being systematic or condoned by the State?

3. Did the Board err in imposing too heavy a burden on Mr. Hughey to demonstrate that he would himself have been involved in unlawful acts, had he gone to Iraq? and

4. Did the Board err in its analysis of the State protection and persecution issues?

[89] In addition, the question of the appropriate standard of review will have to be addressed in relation to each of these issues.

VII. Did the Board Err in Finding that Evidence as to the Alleged Illegality of the American Military Action in Iraq was Irrelevant to the Determination That Had to Be Made in Accordance with Paragraph 171 of the UNHCR *Handbook*?

[90] Before addressing Mr. Hughey's submissions on this issue, it is important to observe that paragraph 171 of the *Handbook* cannot be considered in a vacuum, and must be read in conjunction with the other provisions of the *Handbook* dealing with "Deserters and Persons avoiding military service".

[91] In particular, for the purposes of this analysis, paragraph 171 has to be read in conjunction with paragraph 170. For ease of reference, the two paragraphs are reproduced here:

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

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

i) Mr. Hughey's Position

[92] Mr. Hughey asserts that the evidence that he sought to adduce with respect to the alleged illegality of the American-led war in Iraq would have allowed him to establish that the "military action" with which he did not wish to be associated - that is, the war in Iraq - was one that was "condemned by the international community as contrary to the basic rules of human conduct".

[93] Had he been able to establish this, Mr. Hughey says, it follows that any punishment that he might suffer as a result of his objection to serving in the United States Army would constitute persecution, and that, as a result, he should have been entitled to refugee protection.

[94] According to Mr. Hughey, the Board erred in law and improperly fettered its discretion in finding that it was only the legality of the military activities that he would himself have been called upon to perform that were germane to its inquiry, and not the legality of the conflict as a whole.

[95] In other words, Mr. Hughey says that the Board was wrong to conclude that the "type of military action" mentioned in paragraph 171 refers to 'on the ground' violations of international humanitarian law governing the conduct of actions during an armed conflict (*jus in bello*), and not to violations of international law governing the use of force or the prevention of war itself (*jus ad bellum*).

[96] In addition, although the Board found that a decision to go to war was essentially a political one, and that the Board was not entitled to pass judgment on the foreign policies of other countries, Mr. Hughey says that the legality of a given war is just that - a legal question - and not a political one.

[97] Moreover, Mr. Hughey says, the Board can - and regularly does - make determinations as to the legality of specific wars in the context of assessing whether refugee claimants should be excluded from refugee protection as a result of having been involved in crimes against peace.

[98] Finally, Mr. Hughey points to the decisions of the Federal Court of Appeal in *Al-Maisri v. Canada (Minister of Employment and Immigration),* [1995] F.C. J. No. 642 and of the England and Wales Court of Appeal (Civil Division) in *Krotov v. Secretary of State for the Home Department* [2004] EWCA Civ 69, as authority for the proposition that participation in a non-defensive (ie: illegal) war will bring a refugee claimant squarely within the ambit of section 171 of the *Handbook*.

ii) Standard of Review

[99] In considering this issue, I am first required to determine the appropriate standard of review to be applied to this aspect of the Board's decision. This necessitates identifying the nature of the question that the Board was called upon to answer in this regard.

[100] As is noted above, in determining whether the disputed evidence could have assisted Mr. Hughey by bringing him within the exception created by paragraph 171 of the *Handbook*, the question that the Board was called upon to answer was whether, in the

circumstances of this case, the phrase "the type of military action" relates solely to "on the ground" actions, or also relates to the legality of the war itself. This is a question of law, and is thus reviewable against the standard of correctness: see *Mugesera v. Canada (Minister of Citizenship and Immigration)*, [2005] S.C.J. No. 39, 2005 SCC 40, at ¶ 37, where the Supreme Court of Canada recently reaffirmed that decisions of the Immigration and Refugee Board relating to questions of law are to be reviewed against the correctness standard.

[101] With this understanding of the appropriate standard of review, I turn now to consider Mr. Hughey's arguments as to the proper interpretation of paragraph 171 of the UNHCR *Handbook*.

iii) The Status and Purpose of the UNHCR Handbook

[102] Before addressing these arguments, it is necessary to start by considering the role that the *Handbook* plays in the determination of refugee claims in Canada.

[103] In *Chan v. Canada (Minister of Employment and Immigration),* [1995] S.C.J. No. 78, the Supreme Court ofCanada stated that the *Handbook*:

... has been formed from the cumulative knowledge available concerning the refugee admission procedures and criteria of signatory States. This much-cited guide has been endorsed by the Executive Committee of the UNHCR, including Canada, and has been relied upon for guidance by the courts of signatory nations. Accordingly, the UNHCR *Handbook* must be treated as a highly relevant authority in considering refugee admission practices.

[at ¶ 46]

[104] It is also necessary to have an understanding of the purpose behind paragraph 171. In this regard, the *Handbook* provisions dealing with conscientious objection and desertion recognize that, as a general rule, punishment for the breach of a domestic law of general application prohibiting desertion will not necessarily be persecutory, even where the desertion is motivated by a sincere conscientious objection.

[105] There are, however, exceptions to this - where, for example, the punishment that the individual faces is disproportionate, or where the individual faces an increased level of punishment by reason of his or her race, religion or other similar personal attribute.

[106] Paragraph 171 of the *Handbook* creates a further exception to the general rule, which has been described as the "right not to be a persecutor": see Mark R. von Sternberg, *The Grounds of Protection in the Context of International Human Rights and Humanitarian Law: Canadian and United States Case Law Compared* (The Hague; New York: Martinus Nijhoff, 2002), at p. 124, 133.

[107] That is, the structure of the *Convention Relating to the Status of Refugees*, 189 UNTS 150, *entered into force* 22 April, 1954, including the exclusion grounds, requires an interpretation of paragraph 171 of the *Handbook* that would allow would-be refugees to avoid military actions that would make they themselves 'persecutors', and thus excluded from protection under the *Convention*: von Sternberg, at p. 133.

[108] In other words, paragraph 171 makes refugee protection available to individuals who breach domestic laws of general application if compliance with those laws would result in the individual violating accepted international norms: Lorne Waldman, *Immigration Law and Practice*, 2nd edition (Buttersworth) at § 8-212.

[109] Interpreting paragraph 171 of the *Handbook* in conjunction with the exclusion provisions of the Refugee *Convention* is the approach favoured by the Council of the European Union. As the English House of Lords observed in *Sepet and Another v. Secretary of State for the Home Department*, [2003] UKHL 15, [2003] 3 All. E.R. 304, the Joint Position adopted by the Council of the European Union on the harmonised application of the term 'refugee' is that refugee protection may be granted on the grounds of conscience in cases of desertion where the performance of the individual's military duties would lead the person to participate in activities falling under the exclusion clauses in Article 1F of the Refugee *Convention*. (See *Sepet*, at ¶ 14.)

[110] I acknowledge that the views of the Council of the European Union are not binding on me, but they are nevertheless indicative of the state of international opinion on this issue.

[111] Interpreting the provisions of paragraph 171 in this manner also accords with the preponderance of the Canadian jurisprudence on this issue. Perhaps the leading Canadian authority addressing this question is the decision of the Federal Court of Appeal in *Zolfagharkhani*, previously cited.

[112] *Zolfagharkhani* involved a claim for refugee protection by an Iranian Kurd who deserted the Iranian army because of the Iranian government's intention to use chemical weapons in the internal war being waged against the Kurds. The use of chemical weapons had unquestionably been condemned by the international community as evidenced by international conventions such as the *United Nations Convention on the Prohibition of the Development, Protection and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction*, G.A. Res. 65, U.N. GAOR, 48th Sess., Supp. No. 49, at 68, U.N. Doc. A/48/40 (1993), 1015 U.N.T.S. 163 *entered into force* March 25, 1975.

[113] Even though the applicant worked as a paramedic in the Iranian army, and would have thus not been directly responsible for the discharge of the chemical weapons, the Federal Court of Appeal observed that he could nevertheless be called upon to assist fellow soldiers unwittingly caught in the chemical clouds. As a result, Mr. Zolfagharkhani's work as a paramedic would have been of material assistance in advancing the goals of the Iranian forces, by helping the violators of international humanitarian law deal with the side effects of the unlawful weapons.

[114] The Federal Court of Appeal then observed that this level of participation could arguably have led to the exclusion of Mr. Zolfagharkhani from refugee protection for having committed an international crime. As a consequence, the Court found he came within the provisions of paragraph 171 of the *Handbook*.

[115] The issue was revisited by the Federal Court of Appeal the following year in *Diab v. Canada(Minister of Employment and Immigration)*, [1994] F.C.J. No. 1277. In *Diab*, the Court again allowed the appeal of a refugee claimant who refused to be involved in military activities which amounted to crimes against humanity.

[116] In *Radosevic v. Canada(Minister of Citizenship and Immigration)*, [1995] F.C.J. No. 74, this Court dismissed an application for judicial review on the basis that, on the evidence, it was unlikely that the claimant would *personally* have been called upon to commit atrocities.

[117] Thus these cases clearly establish that direct participation or complicity in military actions that are in violation of international humanitarian law will bring a refugee claimant within the exception contemplated by paragraph 171 of the *Handbook*. What is less clear is whether the mere participation of a foot soldier in an illegal war of aggression will also allow a claimant to derive the benefit of the provision.

[118] As was noted earlier, Mr. Hughey relies on the decisions of the Federal Court of Appeal in *Al-Maisri* and of the English Court of Appeal in *Krotov*, both previously cited, as authority for the proposition that mere participation in a non-defensive (ie: illegal) war will bring a refugee claimant squarely within the ambit of paragraph 171 of the *Handbook*.

[119] I will first consider the decision in *Krotov*. Both sides rely heavily on this case in support of their respective positions, and, as a result, it is necessary to look closely at what the decision actually says. Such an examination discloses that, when read fairly, in its entirety, the decision supports the interpretation of paragraph 171 discussed in the preceding paragraphs.

[120] *Krotov* involved a refugee claim by a Russian citizen who had evaded military service. Mr. Krotov objected to his country's involvement in the war in Chechnya based upon his belief that the war was politically motivated, and because it offended his conscience.

[121] In considering an appeal from the denial of Mr. Krotov's claim, the Court of Appeal adopted the view that the test in paragraph 171 is ultimately whether the conduct in question is contrary to international law or international humanitarian law, as opposed to condemnation by the international community, which involves a more politically-dependent analysis.

[122] The Court found that propounding the test in terms of actions contrary to international law or international humanitarian law norms applicable in times of war is also consistent with the overall framework of the Refugee *Convention*, specifically having regard to the exclusion provisions of the *Convention*.

[123] In this regard the Court stated:

It can well be argued that just as an applicant for asylum will not be accorded refugee status if he has committed international crimes as defined in [the *Convention*], so he should not be

denied refugee status if return to his home country would give him no choice other than to participate in the commission of such international crimes, contrary to his genuine convictions and true conscience. [at ¶ 39]

[124] The Court further observed that claims based on a fear of participation in crimes against humanity should be limited to cases where there is a:

... reasonable fear on the part of the objector that he will be *personally involved in such acts*, as opposed to a more generalized assertion of fear or opinion based on reported examples of individual excesses of the kind which almost inevitably occur in the course of armed conflict, but which are not such as to amount to the multiple commission of inhumane acts pursuant to or in furtherance of a State policy of authorization or indifference. [at ¶ 40, emphasis added]

[125] In coming to this conclusion, the Court of Appeal relied upon its decision in *Sepet and Bulbul v. Secretary of State for the Home Department* [2001] EWCA Civ 681, [2001] INLR 376 [subsequently affirmed by the House of Lords, previously cited], where the Court held that:

... it is plain (indeed uncontentious) that there are circumstances in which a conscientious objector may rightly claim that punishment for draft-evasion would amount to persecution: where the military service to which he was called involves acts, *with which he may be associated*, which are contrary to basic rules of human conduct: where the conditions of military service are themselves so harsh as to amount to persecution on the facts; where the punishment in question is disproportionately harsh or severe. [emphasis added]

[126] The Court in *Krotov* concluded by promulgating a three-part test to be used in cases such as this. That is, it must be established that:

1. The level and nature of the conflict, and the attitude of the relevant governmental authority towards it, has reached a position where combatants are or may be required on a sufficiently widespread basis to act in breach of the basic rules of human conduct generally recognized by the international community;

2. They will be punished for refusing to do so; and

3. Disapproval of such methods and fear of such punishment is the genuine reason motivating the refusal of an asylum seeker to serve in the relevant conflict.

[127] It is true that in *Krotov*, the Court of Appeal held that the test should be propounded in terms of acts contrary to both international humanitarian law and international law. This, Mr. Hughey says, supports his contention that his participation in an illegal war would bring him within the purview of paragraph 171 of the *Handbook*.

[128] As will be explained further on in this decision, I am of the view that a refusal to be involved in the commission of a crime against peace could indeed potentially bring a senior member of a government or military within the ambit of paragraph 171. A crime against peace cannot occur without a breach of international law having been committed by the State in question: *R. v. Jones*, [2006] UKHL 16, at ¶ 16. As a result, in the case of a senior official, the legality of the war in issue could well be germane to the claim.

[129] This presupposes, however, that the involvement and level of the individual is such that he or she could be guilty of complicity in a crime against peace. Crimes against peace have been described as "leadership crimes": *Jones*, above, at ¶ 16. That is, it is only those with the power to plan, prepare, initiate and wage a war of aggression who are culpable for crimes against peace. Mr. Hughey was not such an individual. As a result, I am of the view that the reference to breaches of international law in *Krotov* does not assist him.

[130] This then leaves the Federal Court of Appeal's decision in *Al-Maisri v. Canada(Minister of Employment and Immigration)*, previously cited. Mr. Al-Maisri was a Yemeni citizen, Yemen being one of the few countries to support the 1990 Iraqi invasion of Kuwait. While Mr. Al-Maisri was prepared to fight to protect his own country from foreign aggression, he was not prepared to fight for the defence of Iraq, in a conflict that had involved hostage-taking and mistreatment of the Kuwaiti people. Accordingly, he deserted, came to Canada, and sought refugee protection.

[131] The Immigration and Refugee Board rejected Mr. Al-Maisri's claim, finding that what he faced in Yemen was prosecution and not persecution. His appeal to the Federal Court of Appeal was allowed, with the Court finding that the Board had misapplied the guidance afforded by paragraph 171 of the *Handbook* when it found that the Iraqi invasion of Kuwait had not been condemned by the international community as contrary to the basic rules of human conduct, even though the invasion had been condemned by the United Nations itself. Quoting Professor Hathaway in *The Law of Refugee Status*, (Toronto: Butterworths, 1991), the Court stated that:

.... there is a range of military activity which is simply never permissible, in that it violates international standards. This includes military action intended to violate basic human rights, ventures in breach of the Geneva Convention standards for the conduct of war, and *non-defensive incursions into foreign territory*. Where an individual refuses to perform military service which offends fundamental standards of this sort, "punishment for desertion or draft evasion could, in light of all other requirements of the definition, in itself be persecution. [my emphasis]

[132] The Federal Court of Appeal itself then went on to dispose of the appeal with the following statement:

On the basis of these views, the correctness of which was not challenged, I am persuaded that the Refugee Division erred in concluding that Iraq's actions were not contrary to the basic rules of human conduct. Accordingly, in my view, the punishment for desertion which would likely be visited upon the appellant if he were returned to Yemen, *whatever that punishment might be*, would amount to persecution of which the appellant has a well-founded fear. [my emphasis]

[133] Thus, *Al-Maisri* arguably accepts that a non-defensive incursion into foreign territory would constitute a military action condemned by the international community as contrary to the basic rules of human conduct, with the result that any punishment visited upon a deserter would be persecutory *per se*.

[134] The Minister says that *Al-Maisri* should not be followed as, in counsel's words, it is "dubious authority" for the proposition that a desire to avoid participation in an illegal war will be sufficient to justify the grant of refugee protection to a deserting soldier. Moreover, counsel contends that there was evidence before the Court as to human rights violations in the form of hostage-taking and the mistreatment of the Kuwaiti people, and that it is not clear what role these "on the ground" breaches of international humanitarian law played in the Court's decision. Counsel also notes that the Court in *Al-Maisri* cites no jurisprudence in support of its conclusions, and further observes that the case has only been considered once in over a decade: see *Zuevich v. Canada (Minister of Citizenship and Immigration)*, [1999] F.C.J. No. 453.

[135] In my view, I cannot simply disregard a decision of the Federal Court of Appeal for these reasons. Nor can I do as the Board did, and decline to follow the decision because I might not accept the premises on which it is based. That said, a close review of the decision reveals that the Federal Court of Appeal was not called upon to turn its mind directly to the issue before the Court in this case, that is, whether, when one is considering the claim of a low-level 'foot soldier' such as Mr. Hughey, the legality or illegality of the military conflict in issue is relevant to the analysis that must be carried out in accordance with paragraph 171 of the *Handbook*.

[136] As a consequence, I am of the view that the decision in *Al-Maisri* is of limited assistance in this case.

[137] For these reasons, I am satisfied that paragraph 171 of the *Handbook* should be interpreted in light of the exclusion provisions of the Refugee *Convention*, such that refugee protection is available to those who breach domestic laws of general application, where compliance with those laws would result in the individual breaching accepted international norms.

[138] If one accepts that paragraph 171 of the *Handbook* should be interpreted in this fashion, the question then arises as to whether Mr. Hughey could have been excluded from refugee protection merely for having participated in the war inIraq, should it be that the American-led military action in that country is, in fact, illegal. This issue will be considered next.

iv) Individual Culpability for Crimes Against Peace

[139] Article 1(F)(a) of the Refugee *Convention* excludes individuals from protection where there are serious reasons for considering that those individuals have committed crimes against peace, war crimes, or crimes against humanity. Mr. Hughey says that had he participated in the war in Iraq, he would have been complicit in a crime against peace, and would thus have been excluded from the protection of the *Convention*.

[140] A review of the jurisprudence in this area does not bear this out.

[141] First of all, no suggestion has been made in this case that the United States Army is an organization that is principally directed to a limited, brutal purpose such that mere membership in the organization could be sufficient to meet the requirements of personal and knowing participation in international crimes: see *Penate v. Canada (Minister of Employment and Immigration)*, [1994] 2 F.C. 79 (T.D.).

[142] Moreover, in 1945, the Charter of the International Tribunal at Nuremberg defined the elements of the offense of "crime against peace" as the "planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy [to do so]": as cited in Michael J. Davidson, *War and the Doubtful Soldier*, 19 ND J.L. Ethics & Pub Pol'y 91, at p. 123.

[143] Since that time, the jurisprudence developed by international tribunals, including those considering charges of crimes against peace arising out of the military action in Europe and the Far East during the Second World War, has shed further light on when it is that an individual will be held to account for a crime against peace.

[144] In summary, this jurisprudence establishes that an individual must be involved at the policy-making level to be culpable for a crime against peace: see Davidson, above, at pp. 122-124, and the Papers for the Preparatory Commission for the International Criminal Court (the "Princeton Papers"), United Nations Documents PCNICC/2002/WGCA/L.1, and PCNICC/202/WGCA/L.1/Add.1.

[145] That is, the ordinary foot-soldier such as Mr. Hughey is not expected to make his or her own personal assessment as to the legality of a conflict in which he or she may be called upon to fight. Similarly, such an individual cannot be held criminally responsible merely for fighting in support of an illegal war, assuming that his or her own personal wartime conduct is otherwise proper: Davidson, above, at p. 125. See also François Bugnion, *Just Wars, Wars of Aggression, and International Humanitarian Law*, International Review of the Red Cross, "Just Wars, Wars of Aggression, and International Humanitarian Law" (2002) 847 Int'l Rev. of the Red Cross 523.

[146] As a consequence, it appears that the legality of a specific military action could potentially be relevant to the refugee claim of an individual who was involved at the policy-making level in the conflict in question, and who sought to avoid involvement in the commission of a crime against peace. However, the illegality of a particular military action will not make mere foot soldiers participating in the conflict complicit in crimes against peace.

[147] As a result, there is no merit to Mr. Hughey's contention that had he participated in the war in Iraq, he would have been complicit in a crime against peace, and should thus be afforded the protection offered by paragraph 171 of the *Handbook*.

v) Other Potential Relevance of the Disputed Evidence

[148] Finally, Mr. Hughey contends that the evidence as to the illegality of the war in Iraq was potentially relevant to his claim as the willingness of the President of the United States to ignore international law, and the resultant illegality of the American military action in Iraq, made it more likely that he would himself have been called upon to participate in violations of international humanitarian law, had he actually gone to Iraq.

[149] That is, Mr. Hughey says that the fact that the United States has allegedly acted with a blatant disregard for international law in going into Iraq suggests that members of the American military would be more likely to act with impunity once they got there.

[150] The Board found such a contention to be purely speculative, a finding with which I agree.

vi) Conclusion

[151] For these reasons, I am satisfied that when one is dealing with a foot soldier such as Mr. Hughey, the assessment of the "military action" that has to be carried out in accordance with paragraph 171 of the *Handbook* relates to the 'on the ground' conduct of the soldier in question, and not to the legality of the war itself.

[152] As a consequence, I am satisfied that the Board did not err in finding evidence as to the alleged illegality of the American-led military action in Iraq to be irrelevant to the determination that had to be made by the Refugee Protection Division in this case, in accordance with paragraph 171 of the UNHCR *Handbook*.

[153] When one is considering the case of a mere foot soldier such as Mr. Hughey, the focus of the inquiry should be on the law of *jus in bello*, that is, the international humanitarian law that governs the conduct of hostilities during an armed conflict. In this context, the task for the Board will be to consider the nature of the tasks that the individual has been, is, or would likely be called upon to perform "on the ground".

[154] This then takes us to the second issue raised by Mr. Hughey.

VIII. Did the Board Err in Finding That Mr. Hughey Had Failed to Establish That the Violations of International Humanitarian Law Committed by the American Military in Iraq Rise to the Level of Being Systematic or Condoned by the State?

[155] The Board found that the evidence before it did not establish that the United States has, "as a matter of deliberate policy or official indifference, required or allowed its combatants to engage in widespread actions in violation of humanitarian law", that is, that the breaches of international humanitarian law that have been committed by American soldiers in Iraq rise to the level of being either systematic or condoned by the State. This is a finding of fact, and is thus reviewable against the standard of patent unreasonableness: *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982, at ¶ 40, and *Aguebor v. Canada(Minster of Employment and Immigration)* (1993), 160 N.R. 315 (F.C.A.).

[156] It is generally accepted that isolated breaches of international humanitarian law are an unfortunate but inevitable reality of war: see *Krotov*, previously cited, at ¶ 40. See also *Popov v. Canada(Minister of Employment and Immigration)*, [1994] F.C.J. No. 489.

[157] As the British Court of Appeal noted in *Krotov*, at ¶ 51, the availability of refugee protection should be limited to deserters from armed conflicts where the level and nature of the conflict, and the attitude of the relevant government, have reached a point where

combatants are, or may be, required, on a sufficiently widespread basis, to breach the basic rules of human conduct (see also *Popov*, previously cited).

[158] In this case, Mr. Hughey says that the Board erred in failing to properly address the evidence before it with respect to the allegedly systematic violations of international humanitarian law committed by members of the American military in Iraq and elsewhere, and further failed to properly consider the evidence of the official condonation of these human rights violations by the American government.

[159] In support of his contention that he could well have been called upon to commit human rights violations had he gone to Iraq, Mr. Hughey relies, in part, upon evidence regarding conditions at the Guantanamo prison facility in Cuba and at the Abu Ghraib prison in Iraq, as well as the alleged failure of the American government to respect the provisions of the *Geneva Convention Relative to the Treatment of Prisoners of War*, previously cited, in its treatment of the detainees held at those facilities.

[160] Mr. Hughey places particular reliance on two legal opinions prepared for the President of the United Statesby the Office of the Attorney General in January and August of 2002 (the "Gonzales opinions"). These opinions relate to the supposed unconstitutionality of American domestic legislation implementing the *Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment*, previously cited, if applied to the interrogation of 'enemy combatants' pursuant to the President of the United States' powers as Commander-in-Chief of the American military.

[161] According to Mr. Hughey, these documents demonstrate that the United States has conducted itself with relative impunity, and has evidenced a complete disregard for international norms in its conduct of the various fronts of its so-called "War Against Terror".

[162] As a general rule, the Board does not have to specifically refer to every piece of evidence, and will be presumed to have considered all of the evidence in coming to its decision: see *Woolaston v. Canada (Minister of Manpower and Immigration)*, [1973] S.C.R. 102 and *Hassan v. Canada (Minister of Employment and Immigration)*, [1992] F.C.J. No. 946, 1992, 147 N.R. 317.

[163] In this case, the Board did canvas the evidence before it in some detail. While recognizing that violations of international humanitarian law by American soldiers had occurred in Iraq and elsewhere, the Board also noted that the evidence revealed that civilians were not being deliberately targeted by the American military, and that incidents of human rights violations by American military personnel were investigated, and the guilty parties punished.

[164] It is true that the Board did not specifically reference the Gonzales opinions in its reasons. It is also true that the more important the evidence that is not specifically mentioned and analysed in a decision, the more willing a court will be to infer from the silence that the Board made an erroneous finding of fact without regard to the evidence: *Cepeda-Gutierrez v. Canada (MCI)* (1998), 157 F.T.R. 35 at ¶ 14 - 17.

[165] While the content of the Gonzales opinions is unquestionably disturbing, one must not lose sight of the nature of the documents. The opinions are just that - legal opinions prepared for the President of the United States. They do not represent a statement of American policy. In these circumstances, I am not persuaded that the probative value of the Gonzales opinions is such that the failure of the Board to specifically discuss them in its decision amounts to a reviewable error.

IX. Did the Board Err in Imposing Too Heavy a Burden on Mr. Hughey to Demonstrate That He Would Have Been Involved in Unlawful Acts, Had He Gone to *Iraq?*

[166] Mr. Hughey takes issue with the Board's finding that he:

... failed to establish that, if deployed to Iraq, he **would have** engaged, been associated with, or been complicit in military action, condemned by the international community as contrary to the basic rules of human conduct. [at ¶ 121, emphasis added]

[167] Mr. Hughey says that in coming to this conclusion, the Board erred by imposing too heavy a burden on him to establish that he would himself have been implicated in violations of international humanitarian law. According to Mr. Hughey, the decision of the Federal Court of Appeal in *Adjei v. Canada(Minister of Employment and Immigration)*, [1989] F.C.J. No. 67, establishes that they need only show that there was more than a mere possibility of this occurring.

[168] A question as to the appropriate standard of proof to be applied in a given case is a question of law, and is thus reviewable against the standard of correctness: *Mugesera*, previously cited,

at ¶ 37.

[169] With this in mind, I am satisfied that the Board applied the correct standard of proof in making the finding in issue.

[170] The decision in *Adjei* stands for the proposition that a refugee claimant need only demonstrate that there is more than a mere possibility that the individual would face persecution in his or her country of origin in the future. That is not what the Board was deciding in the disputed paragraph.

[171] A distinction has to be drawn between the legal test to be applied in assessing the risk of future persecution, and the standard of proof to be applied with respect to the facts underlying the claim itself. While the legal test for persecution only requires a demonstration that there is more than a mere possibility that the individual will face persecution in the future, the standard of proof applicable to the facts underlying the claim is that of the balance of probabilities: *Adjei*, at p. 682. See also *Li v. Canada(Minister of Citizenship and Immigration)*, [2005] F.C.J. No. 1, 2005 FCA 1 at ¶ 9-14 and 29.

[172] In other words, where, for example, a woman is claiming protection based upon the abuse that she says that she suffered at the hands of her partner, it will not suffice for her to

establish that there is more than a mere possibility that she is telling the truth about her past abuse. She must establish the facts underlying her claim on a balance of probabilities. At the same time, she need only show that there is more than the mere possibility that she would face abuse amounting to persecution in the future.

[173] As a consequence, I am not persuaded that the Board erred in this regard.

[174] Moreover, Mr. Hughey's argument is premised on it having been established that the violations of international humanitarian law that have taken place in Iraq rise to the level of being systematic or condoned by the State and that, therefore, any involvement would amount to complicity in a crime. As was discussed in the previous section, I have found that the Board did not err in concluding that this was not, in fact, the case.

X. Conclusion to this Point

[175] Based upon the foregoing analysis, I am satisfied that, as a mere foot soldier, Mr. Hughey could not be held to account for any breach of international law committed by the United States in going into Iraq. As a result, in the circumstances of this case, the "type of military action" that is relevant to Mr. Hughey's claim, as that phrase is used in paragraph 171 of the *Handbook*, is the "on the ground" activities with which he would have been associated in Iraq.

[176] I have also found that the Board did not err in finding that the breaches of international humanitarian law that have been committed by American soldiers in Iraq do not rise to the level of being either systematic or condoned by the State. In addition, I have found that the Board did not err in finding that Mr. Hughey had failed to establish that he would himself have been called upon to commit, or be associated with, breaches of international humanitarian law, had he gone to Iraq.

[177] The question that is left, then, is whether Mr. Hughey nonetheless faces persecution in the United Statesas a result of his political opinions. The answer to this question hinges on whether, in these circumstances, Mr. Hughey's right to freedom of conscience extends to allow him to refuse to fight in Iraq because of his sincerely held moral objection to that specific war, and whether the denial of such a right, and the ensuing punishment for the breach of a law of general application, amounts to persecution. These issues will be considered next.

XI. Did the Board Err in its Analysis of the State Protection and Persecution Issues?

i) Mr. Hughey's Position

[178] Mr. Hughey contends that the Board erred in finding that he had failed to rebut the presumption that adequate State protection would be available to him in the United States, based upon the Board's conclusion that he would have been afforded the full protection of a law of general application in that country.

[179] While recognizing that the ordinary presumption that a State will be able to protect its own nationals will be higher in the case of a highly-developed democracy such as the

United States, and recognizing as well that refuge will only be granted to American claimants in exceptional circumstances, Mr. Hughey nonetheless says that the failure of the United States to recognize conscientious objection to specific wars results in there being a 'gap' between the rights guaranteed through American domestic law and those protected by international law.

[180] According to Mr. Hughey, this 'gap' amounts to an 'exceptional circumstance', and justifies the conclusion that, in this case, the American law of general application was persecutory in its effect. This, in turn, made it objectively reasonable for him to seek refugee protection in Canada.

[181] Mr. Hughey observes that paragraph 172 of the *Handbook* provides that:

Refusal to perform military service may also be based on religious convictions. If an applicant is able to show that his religious convictions are genuine, and *that such convictions are not taken into account by the authorities of his country in requiring him to perform military service*, he may be able to establish a claim to refugee status. Such a claim would, of course, be supported by any additional indications that the applicant or his family may have encountered difficulties due to their religious convictions. [emphasis added]

[182] While conceding that he would be accorded due process in the United States, Mr. Hughey nevertheless submits that the Board failed to recognize or address the fact that he was unable to assert his conscientious objection to the war inIraq, as a result of the under-inclusiveness of the American law relating to conscientious objection.

[183] According to Mr. Hughey, the failure of the Board to deal with this issue renders inadequate and erroneous its conclusion that the American law regarding conscientious objectors does not discriminate on a Convention ground, and is therefore not persecutory.

[184] Moreover, Mr. Hughey says, given that the United States government was itself the agent of persecution, it follows that the Board's conclusion that adequate State protection was available to him in the United States was fundamentally flawed.

ii) Standard of Review

[185] The error alleged is the failure of the Board to recognize the existence of a 'gap' between the limited right to conscientious objection recognized in American domestic law, and that ostensibly protected by international law. This allegedly resulted in the Board's finding that Mr. Hughey would not face persecution in the United States, and its finding that he would receive adequate State protection in that country both being fatally flawed.

[186] Questions as to whether an individual faces persecution in his or her country of origin and questions as to the adequacy of State protection are both questions of mixed fact and law, and are ordinarily reviewable against a standard of reasonableness: *Pushpanathan*, previously cited.

[187] However, as was noted earlier, in this case, Mr. Hughey's arguments as to the error of omission allegedly committed by the Board hinge on the premise that there is an

internationally recognized right to object to a particular war, other than in the circumstances specifically identified in paragraph 171 of the *Handbook*. If there is no such right, then his arguments must fail.

iii) Analysis

[188] Refugee protection is available to those who face persecution in their country of origin by reason of their political opinion or their religion: see Article 1A(2) of the *Convention Relating to the Status of Refugees*.

[189] Although we are not dealing with a conscript in this case - Mr. Hughey having voluntarily enlisted in the US Army - there is broad international acceptance of the right of a State to require citizens to perform military duty. Indeed, mandatory military service is often described as an 'incident of citizenship'.

[190] It is also well-recognized that the refusal of a soldier to fight is an inherently political act: see *Ciric*, previously cited. Indeed, as Professor Goodwin-Gill noted in *The Refugee in International Law*, (Oxford: Clarendon Press, 1996, at p. 57), cited with approval in *Zolfagharkhani*, the refusal to bear arms reflects an essentially political opinion as to the permissible limits of a State's authority, and goes to the very heart of the body politic.

[191] Does this then mean that anyone who sincerely opposes a particular war has an absolute right to conscientious objector status? Does it follow that if conscientious objector status is not available to the individual in his or her country of origin, that any punishment that the individual may receive for refusing to fight will be inherently persecutory?

[192] There is no question that freedom of thought, conscience and religion are fundamental rights well recognized in international law: see, for example Article 18 of the 1948 *Universal Declaration of Human Rights*, GA Res. 217(III), UNGAOR, 3d Sess., Supp. No. 13, UN Doc. A/810 (1948) 71, Article 12 of the *International Covenant on Civil and Political Rights*, 19 December 1966, 999 U.N.T.S. 171, arts. 9-14, 6 I.L.M. 368 (*entered into force* 23 March 1976) and Article 9 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms*,

4 November 1950, 213 U.N.T.S. 221 at 223, Eur. T.S. 5.

[193] At the present time, however, there is no internationally recognized right to either total or partial conscientious objection. While the UN Commission on Human Rights and the Council of Europe have encouraged member States to recognize a right to conscientious objection in various reports and commentaries, no international human rights instrument currently recognizes such a right, and there is no international consensus in this regard: see *Sepet*, previously cited, at ¶ 41-44.

[194] Indeed, the notion that such a right could even exist is one of relatively recent origin: *Sepet*, at ¶ 48.

[195] It has been suggested that the failure to recognize a right of conscientious objection stems, at least in part, from the real difficulties that would be encountered in achieving an

international consensus as to the minimum scope of any such right. As Lord Rodger of Earlsferry noted in his concurring reasons in *Sepet*, questions could arise, for example, as to whether the same outcome should result in relation to an objection made during peacetime, as opposed to one advanced when a State is fighting for its very survival: at ¶ 57.

[196] Certainly, it is arguable that if freedom of conscience is truly to be recognized as a basic human right, individuals should not be forced, on pain of imprisonment, to comport themselves in a way that violates their fundamental beliefs: see Hathaway in *The Law of Refugee Status*, previously cited, at p. 182.

[197] If, on the other hand, conscientious objection is viewed as more of a relative right, then the specific nature of the consequences faced by the claimant will have to be taken into account in the assessment of the claim: see von Sternberg, *The Grounds of Protection in the Context of International Human Rights and Humanitarian Law*, previously cited, at p. 42. This appears to be the approach favoured by the UNHCR, as reflected in the *Handbook*.

[198] Moreover, consideration has to be given to the fact that States have a legitimate interest in the maintenance of their military forces and national defence. As Professor Goodwin-Gill observes, the provision of alternative service helps to reconcile these competing interests in a way that promotes the State's interest in defence, while, at the same time, taking into account individual beliefs: see *The Refugee in International Law*, at p. 58.

[199] Indeed, paragraph 173 of the *Handbook* recognizes that many States now provide forms of alternate service to citizens who object to serving in the military for genuine reasons of conscience.

[200] How far, then, does a State have to go in providing alternate service to its citizens?

[201] Mr. Hughey says that the United Statesdid not go far enough by failing to recognize that one could have a legitimate conscientious objection to a specific war, asserting that this brings him within the ambit of paragraph 172 of the *Handbook*. In these circumstances, he says, any punishment that he might receive in the United Stateswould be inherently persecutory.

[202] There are several reasons why I cannot accept this argument. First of all, paragraph 172 of the *Handbook* has to be read in context. The preceding paragraph - paragraph 171 - explicitly states that it is not enough for a person merely to be in disagreement with his or her government with respect to the political justification for a particular military action.

[203] Secondly, Mr. Hughey bases his claim for refugee protection on his political opinion, and not his religion. Paragraph 172 relates to religious objections and not to political ones.

[204] Finally, in considering Mr. Hughey's argument that American law is under-inclusive, in that it denies members of the military the right to assert genuine conscientious objections to specific military actions, regard must be had to paragraph 60 of the *Handbook*. Paragraph 60 provides that in assessing whether punishment meted out under the law of

another nation is persecutory, the domestic legislation of the country being asked to grant protection may be used as a 'yardstick' in evaluating the claim.

[205] An examination of the approach of the Canadian Armed Forces to the issue of conscientious objection discloses that the protection afforded to Canadian conscientious objectors is very similar to that provided by the United States. The relevant provisions of the Department of National Defence's *Defence Administrative Orders and Directives on Conscientious Objection* (DAOD 5049-2, July 30, 2004) provides that:

Enrolment of persons in the [Canadian Forces] is strictly voluntary and CF members must be prepared to perform any lawful duty to defend Canada, its interests and its values, while contributing to international peace and security. A CF member who has a conscientious objection remains liable to perform any lawful duty, but may request voluntary release on the basis of their objection.

Eligibility for Voluntary Release

A CF member may request voluntary release on the basis of conscientious objection if the CF member has a sincerely held objection to participation in:

- war or armed conflict in general; or

- the bearing and use of arms as a requirement of service in the CF.

An objection based primarily on one or more of the following does not permit voluntary release on the basis of a conscientious objection:

- *participation or use of arms in a particular conflict or operation*;

- *national policy*;

- personal expediency; or

- *political beliefs*. [emphasis added]

[206] As Professor Goodwin-Gill observed in *The Refugee in International Law*, at p. 59, States are free to recognize conscientious objection as a sufficient ground on which to base a grant of refugee protection. However, each State has to decide for itself how much value should be attributed to the fundamental right to freedom of conscience.

[207] While acknowledging that the Canadian scheme governing conscientious objection is "broadly analogous" to the American one, Mr. Hughey nonetheless submits that there is an important difference between the two. That is, relying on the decision of the Supreme Court of Canada in *Operation Dismantle Inc. v. Canada*, [1985] 1 S.C.R. 441, he says that the

Canadian scheme is subject to judicial review to ensure that it complies with the *Charter*, whereas the American scheme is immune from judicial scrutiny under the "political questions" doctrine.

[208] Leaving aside the fact that there is no expert evidence before the Court as to the justiciability of challenges to the American policy on conscientious objection, and assuming for the sake of argument that Mr. Hughey is correct in his submission, the fact is that, at the present time, Canada does not accord the members of its own armed forces the latitude to object to specific wars. In my view, this is further evidence of the fact that there is no generally accepted right to conscientious objection on the grounds being advanced by Mr. Hughey.

[209] If this is so, it follows that there is nothing inherently persecutory in the American system.

[210] My conclusion in this regard is reinforced by the recent decision of the Federal Court of Appeal in *Ates v.Canada(Minister of Citizenship and Immigration)*, [2005] F.C.J. No. 1661. In *Ates*, the Court stated that even in a country where military service is compulsory and where there is no alternative to military service available, the repeated prosecutions and imprisonments of a sincere conscientious objector do not amount to persecution on a Convention ground.

[211] If persecution does not arise in the circumstances described in *Ates*, then surely the prosecution and potential imprisonment of a volunteer soldier by a country that does provide some, albeit limited, alternatives to military service would similarly not amount to persecution on a *Convention* ground.

[212] It should be noted that Mr. Hughey has not asserted that the punishment that he faces in the United Statesis outside the range of what is considered acceptable under international human rights law. Rather he argues that *any* punishment that he might suffer for following his conscience would be inherently persecutory. As a consequence, it is unnecessary to consider whether the term of imprisonment that he might receive is disproportionate.

[213] Finally, given that there is no error in the Board's finding that what Mr. Hughey faces in the United Statesis prosecution and not persecution, it follows that the issue of State protection does not arise.

iv) Conclusion

[214] While it would have been preferable for the Board to have specifically addressed Mr. Hughey's arguments with respect to the alleged under-inclusiveness of the American policy governing conscientious objection, I am satisfied that this failure on the part of the Board did not affect the outcome of Mr. Hughey's claim.

[215] For the reasons given, I am satisfied that there is currently no internationally recognized right to object to a particular war, other than in the circumstances specifically identified in paragraph 171 of the *Handbook*. As a result, while Mr. Hughey may face prosecution in the United States for having acted in accordance with his conscience, this does not amount to persecution on the basis of his political opinion.

[216] The reality is that States, including Canada, can and do punish their citizens for acting in accordance with their sincerely-held moral, political and religious views when those individuals break laws of general application. The environmentalist who blocks a logging road may face prosecution and imprisonment, as may the individual who opposes the payment of taxes used to support the military on deeply-felt religious grounds, notwithstanding that in each case, the individual may merely have been following his or her conscience.

[217] Indeed, as Lord Hoffman noted in *Sepet*:

As judges we would respect their views but might feel it necessary to punish them all the same... We would take into account their moral views but would not accept an unqualified moral duty to give way to them. On the contrary we might feel that although we sympathized and even shared the same opinions, we had to give greater weight to the need to enforce the law. [at ¶ 34]

[218] I have sympathy for Mr. Hughey. He appears to be a young and unsophisticated individual whose real concerns with respect to the legality of the American-led military intervention in Iraq were found by the Board to be sincere. However, sympathy alone does not provide a foundation for finding that there is an internationally recognized right to object to a particular war, the denial of which results in persecution.

[219] Given that conscientious objection is a fundamental aspect of the right to freedom of thought, conscience and religion enshrined in international instruments such as the *Universal Declaration of Human Rights* and the *European Convention on Human Rights*, it may be that as the law continues to evolve in this area, both on the international and domestic fronts, a sincerely-held political or religious objection to a specific war may some day provide a sufficient basis on which to ground a claim for refugee protection. This, however, represents the "international consensus of tomorrow" (*Sepet*, at ¶ 20), and not the state of the law today.

XII. Summary of Conclusions

[220] For these reasons I have concluded that there is no basis for interfering with the decision of the Immigration and Refugee Board in this case. Accordingly, Mr. Hughey's application for judicial review is dismissed.

[221] As was noted at the outset, the issues raised by this application have not required me to pass judgment on the legality of the American-led military action in Iraq, and no finding has been made in this regard.

XIII. Certification

[222] Counsel have jointly proposed the following two questions for certification:

1. Is the question whether a given conflict may be unlawful in international law relevant to the determination which must be made by the Refugee Division under s. 171 of the UNHCR *Handbook*?

2. Where a claimant can establish that a particular war involves systematic violations of international humanitarian law, must he also establish that it is more probable than not that he would be required to participate in such acts, or must he establish only a serious possibility of having to do so?

[223] With respect to the first question, as I have noted earlier, I am satisfied that the lawfulness of a conflict could well be relevant where a refugee claimant is a high-level policy-maker or planner of the military conflict in issue, who could thus be held responsible for a crime against peace. The question that arises here is whether the legality of the conflict is relevant in the case of a mere foot soldier such as Mr. Hughey.

[224] For the reasons given, I have found that the weight of authority favours the view that when dealing with a mere foot soldier, the lawfulness of the military conflict in question is not relevant to the question of whether or not the claimant is a refugee. However, given the decision of the Federal Court of Appeal in *Al-Maisri*, it is fair to say that the issue is not entirely free from doubt. As a consequence, I am prepared to certify the first question, varying it only to specify that the question is posed in the context of a foot soldier.

[225] The second question is premised on the assumption that Mr. Hughey has established that the war in question in fact involves systematic violations of international humanitarian law. Given my conclusion that the Board did not err in concluding that he had not shown this to be the case, the second question submitted for certification would not be dispositive of his claim, and I decline to certify it.

JUDGMENT

[226] **THIS COURT ORDERS** that:

1. This application for judicial review is dismissed.

2. The following serious question of general importance is certified:

When dealing with a refugee claim advanced by a mere foot soldier, is the question whether a given conflict may be unlawful in international law relevant to the determination which must be made by the Refugee Division under paragraph 171 of the UNHCR *Handbook*?

"Anne Mactavish"

Judge

APPENDIX

Chapter V section B of the UNHCR *Handbook* states as follows under the heading "Deserters and Persons avoiding military service":

167. In countries where military service is compulsory, failure to perform this duty is frequently punishable by law. Moreover whether military service is compulsory or not, desertion is invariably considered a criminal offence. The penalties may vary from country to country, and are not normally regarded as persecution. Fear of prosecution and punishment for desertion or draft-evasion does not in itself constitute well-founded fear of persecution under the definition. Desertion or draft evasion does not, on the other hand, exclude a person from being a refugee, and the person may be a refugee in addition to being a deserter or draft-evader.

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

169. A deserter or draft-evader may also be considered a refugee if it can be shown that he would suffer disproportionately severe punishment for the military offence on account of his race, religion, nationality, membership of a particular social group or political opinion. The same would apply if it could be shown that he has a well-founded fear of persecution on these grounds above and beyond the punishment for desertion.

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

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

172. Refusal to perform military service may also be based on religious convictions. If an applicant is able to show that his religious convictions are genuine, and that such convictions are not taken into account by the authorities of his country in requiring him to perform military service, he may be able to establish a claim to refugee status. Such a claim would, of course, be supported by any additional indications that the applicant or his family may have encountered difficulties due to their religious convictions.

173. The question as to whether objection to performing military service for reasons of conscience can give rise to a valid claim to refugee status should also be considered in light of more recent developments in this field. An increasing number of States have introduced legislation or administrative regulations whereby persons who can invoke genuine reasons of conscience are exempted from military service, either entirely or subject to their performing alternative (ie: civilian) service. The introduction of such legislation or administrative regulations has also been the subject of recommendations by international agencies. In light of these developments, it would be open to Contracting States to grant refugee status to persons who object to performing military service for genuine reasons of conscience.

174. The genuineness of a person's political, religious or moral convictions, or of his reasons of conscience for objecting to performing military service, will of course need to be established by a thorough investigation of his personality and background. The fact that he may have manifested his views prior to being called to arms, or that he may have already encountered difficulties with the authorities because of his convictions, are relevant considerations. Whether he has been drafted into compulsory service or joined the army as a volunteer may also be indicative of the genuineness of his convictions.

FEDERAL COURT

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	IMM-5571-05
STYLE OF CAUSE:	BRANDON DAVID HUGHEY v. THE MINISTER OF CITIZENSHIP AND IMMIGRATION
DATE OF HEARING:	February 8, 2006
PLACE OF HEARING:	Toronto, Ontario
REASONS FOR JUDGMENT	
AND JUDGMENT BY:	Mactavish J.
DATED:	March 31, 2006

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