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"Qui bene interrogat bene docet" "He who questions well teaches well"

Canadian Federal Court Treatment of American War Resisters

Edward C. Corrigan

There has been mixed treatment at the Canadian Federal Court of U.S. deserters who have claimed refugee status in Canada on the basis of refusal to serve in the U.S. military.[1]

To date, there have been at least ten cases considered by the Canadian Federal Court and the Federal Court of Appeal on the U.S. war resister issue. In seven of those cases, the decision went against the Americans who claimed refugee status on the basis of refusal to serve in the U.S. military. These cases include *Hinzman, Re*[2] and *Hughey v. Canada (Minister of Citizenship & Immigration)*.[3] Both of these decisions were rendered by Madam Justice Mactavish of the Federal Court. *Hinzman* was appealed to the Federal Court of Appeal where the Appellate Court rejected the appeal. Hinzman was also before the Federal Court in a failed judicial review of his Humanitarian and Compassionate Application. Mr. Justice Russell was the presiding judge in that case.[4]

Colby v. Canada (Minister of Citizenship & Immigration)[5] also went against the U.S. soldier refugee claimant. The main issue was state protection following the Federal Court of Appeal decision in

1 Janice Tibbetts and Linda Nguyen, "Courts send mixed messages to U.S. deserters" *National Post* (15 July 2008), online: http://www.nationalpost.com/news/story.html?id=656822.

2 2006 FC 420.

3 2006 FC 421.

4 2009 FC 415.

5 2008 FC 805.

Full story on page 2

INSIDE

Focus—Protected Persons Part II

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Please send your questions to *ImmQuest* care of Mario D. Bellissimo at mdb@obr-immigration.com. If you have any questions you would like asked of either Citizenship and Immigration Canada or the Canada Border Services Agency, send it along and we will ask on your behalf.

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Canadian Federal Court Treatment of American War Resisters

continued from page 1

Hinzman. The Federal Court judge in that case was The Honourable Mr. Justice Beaudry.

In *Robin Long v. Canada*, the Federal Court dismissed an Application for a Stay of Removal. The judge in that instance was Justice Mactavish.[6]

Another case where the Federal Court rejected a U.S. war resister's judicial review of his negative decision of his refugee claim is *Landry v. Canada (Minister of Citizenship & Immigration)*.[7] This case was decided on June 8, 2009 with Mr. Justice Harrington presiding. The case followed the Federal Court of Appeal decision in *Hinzman* and was decided on the basis of state protection.[8]

There was an interesting decision of the Federal Court rendered on February 5, 2009 in *Canada (Minister of Citizenship & Immigration) v. Hund*.[9] The refugee claimants in this case had not served in the U.S. Army, had not been to Iraq, had failed to make a refugee claim in their widespread travels, and while many would agree with their political sentiments in opposing the war in Iraq, it was an unusual decision for the Immigration and Refugee Board (IRB). It contained many errors in law and the Federal Court judge, Mr. Maurice E. Lagace, not surprisingly, overturned the IRB's positive decision.[10]

There have been three decisions of the Federal Court where U.S. Army deserters won their cases at the Federal Court. The first decision was in *Key v. Canada (Minister of Citizenship & Immigration)*.[11] Key testified to witnessing numerous human rights violations while serving in the U.S. military in Iraq. The presiding Federal Court judge in that case was Mr. Justice Barnes.[12]

The second case where the Federal Court ruled in favour of a U.S. deserter overturning a PRRA decision is in *Glass v. Canada (Minister of Citizenship & Immigration)*.[13] The presiding Federal Court judge in that case was Deputy Judge Frenette.

The most recent decision which went in favour of the U.S. war resister, rendered August 10, 2009, is *Rivera v. Canada (Minister of Citizenship & Immigration)*.[14] Mr. Justice Russell was the presiding judge in that case. In *Rivera*, the Federal Court overturned a decision of a PRRA officer on the basis of differential treatment of war resisters who have publicly expressed political opinions opposing the war in Iraq.

HINZMAN AT THE FEDERAL COURT

The leading case on this issue is *Hinzman* where Madame Justice Mactavish extensively reviewed the law on conscientious objection.[15] Jeremy Hinzman had volunteered to serve in the U.S. Army and had been willing to serve in the U.S. armed forces in Afghanistan, but not in Iraq. He objected that the war in Iraq did not have UN approval and in his opinion was a war of aggression, as it was the non-defensive invasion of a sovereign state. Hinzman argued that his objection to the war should fall under paragraph 171 of the *UNHCR Handbook*. He also objected that the U.S. armed forces were known to engage in torture in Iraq, and that any participation in the war would associate him with acts contrary to his conscience. Again, this objection relates to paragraph 171 of the *UNHCR Handbook*.

The UNHCR Handbook on Procedures and Criteria for Determining Refugee Status, Geneva, 1988, paragraph 171, states as follows:

> Where . . . the type of military action, with which an individual does not wish to be associated, is condemned by the international legal community as contrary to basic rules of human conduct, punishment for desertion or draftevasion could . . . in itself be regarded as persecution.[16]

6 *Robin v. Canada (MCI & MPSEP)*, (IMM-3042-08) (July 14, 2008).
7 2009 FC 594.
8 *Ibid.* at paras. 25-31.
9 2009 FC 121.
10 *Ibid.* at para. 45.
11 2008 FC 838
12 *Ibid.*
13 2008 FC 881.
14 2009 FC 814.
15 2006 FC 420.
16 *Ibid.* at para 38.

The Federal Court in *Hinzman* (2006 FC 420) gave detailed consideration to the issue of the proper interpretation of paragraph 171 of the Handbook. However, the Court found that a mere foot-soldier cannot claim to fear association with human rights abuses committed by an army he serves in. This distinction confuses the test for exclusion with the test for allowing a person to refuse to associate with a military action.[17]

Justice Mactavish certified the following "serious question of general importance" in *Hinzman*:

> 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?[18]

Although Justice Mactavish certified a question in *Hinzman*, the Federal Court of Appeal declined to answer the certified question. The Court instead rejected the appeal on the narrow grounds that the applicant had not made enough of an attempt to access potential protective mechanisms in the United States.[19]

The unanimous conclusion of the Federal Court of Appeal:

> [62] In conclusion, the appellants have failed to satisfy the fundamental requirement in refugee law that claimants seek protection from their home state before going abroad to obtain protection through the refugee system. Several protective mechanisms are potentially available to the appellants in the United States. Because the appellants have not adequately attempted to access these protections, however, it is impossible for a Canadian court or tribunal to assess the availability of protections in the United States. Accordingly, the appellants' claims for refugee protection in Canada must fail.[20]

The failure of the Court of Appeal to directly address the interpretation of paragraph 171 in the *UNHCR Handbook* is unfortunate. The Supreme Court of Canada did not grant leave in *Hinzman*, on the question of the legality of the U.S. invasion of Iraq and the application of s. 171 of the *Handbook* on conscientious objection and its applicability to volunteer soldiers has not been dealt with by the higher Courts. Accordingly, one of the central issues in conscientious objection law remains unsettled.

In *Colby v. Canada (Minister of Citizenship & Immigration)*,[21] the Court also ruled against the U.S. refugee claimant. Colby's primary reasons for deserting the U.S. Army had to do with being forced to participate in and witness what he called "atrocities".[22]

In *Colby*, the Federal Court considered paragraph 171 of the *UNHCR Handbook*, however, following the Federal Court of Appeal decision in *Hinzman*, it made the finding that, "[o]n this issue (state protection), I am of the opinion that the Board's determination is reasonable."[23]

As noted above, there have been several decisions where the Federal Court has ruled in favour of U.S. war resisters. On July 4th, 2008, the Federal Court overturned a decision of the Immigration and Refugee Board in *Key v. Canada (Minister of Citizenship & Immigration)*. Mr. Key had served an extensive tour of duty and participated in as many as 70 house invasions in Iraq and witnessed many human rights violations.[24] The Federal Court's conclusion in *Key* was "that the Board erred by imposing a too restrictive legal standard upon Mr. Key".[25]

The Federal Court also rendered a second decision in favour of another U.S. soldier who made a claim for protection of Canada as a war resister. This case is *Glass v. Canada (Minister of Citizenship & Immigration)*.[26] In this case, the Federal Court granted a Stay of Deportation and prevented the removal of Mr. Glass to the United States on the basis of his winning leave for a judicial review of his Pre-Removal Risk Assessment (PRRA). Glass had served six months in Iraq where he testified he observed "gross human rights violations and gross misconduct by U.S. soldiers against Iraqi civilians including children". During this service, he observed many Iraqi civilians who were killed "for no good reason". When he deserted the U.S. Army, Glass "publicly denounced the conditions in Iraq and publicized his opposition to that war".[27]

17 *Ibid.*
18 *Ibid.* at para 240.
19 2007 FCA 171 at paras. 41-52.
20 *Ibid.* at para 62.
21 2008 FC 805.
22 *Ibid.* at para. 8.
23 *Ibid.* at paras. 21 to 23.
24 See Convention (IV) relative to the "Protection of Civilian Persons in Time of War", Geneva, 12 August 1949. Part III. Status and Treatment of Protected Persons at paras. 27, 31, 32, 33.
25 *Supra* note 5 at para 29.
26 *Supra* note 13.
27 *Ibid.* at paras. 5-8.

There were a number of issues raised in the *Glass* decision, including whether the evidence submitted for the PRRA was new evidence and the fact that U.S. soldiers that went public with their objection to the "undeclared war" in Iraq and Afghanistan were given harsher punishment than those that kept their opposition private and would also be denied due process.[28] The Federal Court judge in *Glass* relied on the decision in *Key*, issued only thirteen days earlier, in their decision to grant the judicial review and to stay the Deportation Order.[29]

The Federal Court judge in *Glass* did acknowledge that the Federal Court was split on these issues.[30]

On April 24, 2009, the Federal Court rendered an entirely different conclusion in its judicial review of the negative H&C Decision in *Hinzman*.[31] The Court noted that "the [PRRA] Officer was not unconvinced that the principal Applicant would not be afforded due process or that accessing due process and state protection would be a hardship."[32] Accordingly, Mr. Justice Russell upheld the finding of the Immigration officer and rejected the application for judicial review.

In August 2009, the Federal Court ruled in favour of the U.S. War resister in *Rivera v. Canada (Minister of Citizenship & Immigration)*.[33] The presiding judge, Mr. Justice Russell, had previously ruled against *Hinzman's* judicial review of his H&C Decision. However, Justice Russell in *Rivera* overturned the decision of a PRRA officer on the basis of failure to consider evidence of differential treatment of war resisters who have publicly expressed political opinions opposing the war in Iraq. Most deserters received administrative punishment only, but deserters who spoke out against the war were targeted and given prison sentences. The Court ruled that the "officer's failure to fully address the targeting issue, and the evidence that supports the Applicants' position, renders the Decision unreasonable and it must be returned for reconsideration".[34]

It is certainly clear that the Federal Court of Canada is of a divided opinion when it comes to the law on conscientious objection and U.S. soldiers who have refused to serve in the Iraq war and have come to Canada seeking protection as Convention refugees.

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28 *Ibid.* at para. 10.
29 *Ibid.* at para. 22.
30 *Ibid.* at paras. 38-41.
31 2009 FC 415 at paras. 17-19.
32 *Ibid.* at paras. 23-24.
33 *Supra* note 14.
34 *Ibid.* at paras. 101-102.

Case Tracker: Cases You Should Know!

Mario D. Bellissimo

Spousal/Criminality

Case: *Enabulele v. Canada (Minister of Public Safety & Emergency Preparedness)*
Decider: Mr. Justice Blanchard;
Court: FC;
Citation: 2009 FC 641
Judgment: June 15, 2009;
Docket: IMM-3486-08

[35] In my view, it is open to the Minister to adopt policies which facilitate and expedite the processing of certain classes of applicants. The Minister may also establish conditions under which applicants within that class are rendered ineligible under the policy. As mentioned above, ineligibility by virtue of pending criminal charges does not violate the presumption of innocence nor does it result in an impermissible differential treatment.

2. The following question is certified:

> "Does the Minister's policy on administrative deferral of removal found under IP8 offend the Applicant's sections 7 and 11(d) rights of the *Canadian Charter of Rights and Freedoms*?"