Refusal to Perform Military Service as a Basis for Refugee Claims in Canada[1]

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There is no specific provision in the 1951 Geneva Convention for recognition as a Convention refugee for draft evaders, deserters and conscientious objectors. In Canada a body of jurisprudence has grown out of the five Convention grounds, which allow them to be applied so as to embrace conscientious objectors in some circumstances.

As James Hathaway argues, "Persons who claim refugee status on the basis of a refusal to perform military service are neither refugees per se nor excluded from protection."[2] The United Nations High Commissioner for Refugees (UNHCR) gives the following as a general rule:

> A 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.[3]

The crucial question is whether the claimant can show that desertion or evasion is grounded on civil or political status, thus having a nexus or connection to one of the five grounds enumerated in the 1951 Geneva Convention, failing which the claim cannot succeed.

The position that draft evaders who are no more than draft evaders, should be excluded from the definition of Convention refugee derives from the premise that: "[t]he Convention does not contain any sections dealing [specifically] with army deserters or conscientious objectors." There is no nexus between the harm feared and civil or political standing of the evader. A desire to avoid military

[1]Revised version of a paper presented at The Refugee Lawyers Association Seminar, Toronto, on March 19, 1999.

[2]James C. Hathaway, *The Law of Refugee Status*, (Toronto: Butterworths, 1991), p. 179.

[3]*UNHCR Handbook*, para. 168, p. 40.

service is not, *prima facie*, grounds for claiming refugee status under the Geneva Convention.[4]

An early example of this restrictive approach is found in the case of a refugee claimant who was a draft evader from Poland. The Immigration Appeal Board, supported the proposition that "[t]o serve in the armed forces is a duty of all Polish citizens and, therefore, the board cannot consider Mr. Adamusik to be a refugee just for this reason."[5]

The note of caution which runs through immigration law jurisprudence dealing with conscientious objectors to military service, stems from the natural bias of tribunals to uphold the authority of the state. There is broad recognition for a government's basic right to press citizens into military service in the national interest. When military conscription existed in Canada, courts in this country were generally unsympathetic to conscientious objectors, and interpreted legal exemptions strictly, even when objection stemmed from sincerely held pacifistic or religious beliefs.[6]

Professor Hathaway's academic treatise, *The Law of Refugee Status*, traces the development of refugee law on conscientious objectors in Canada up to 1991, and describes how a number of exceptions to the exclusion of evaders of military service and desertion were incorporated into Canadian law.

In Canada, historically, the treatment of the conscientious objectors had a somewhat varied treatment by the Immigration Appeal Board and the Federal Court of Appeal. In *Musial v. Canda (Minister of Employment & Immigration)* (1981), 38 N.R. 55 (Fed. C.A.), which involved a citizen of Poland who wished to "avoid military service which [was] abhorrent to him on moral grounds" because it involved "subjugating the Afghan people to communist domination," Mr. Justice Pratt writing for the majority of the court ignored the issue of conscientious objection.

> . . . the board was right in assuming that a person who has violated the laws of his country by evading ordinary military service . . . cannot be said to fear

[4]Immigration Appeal Board Decision 79-1104, C.L.I.C. Notes 15.11, August 1, 1979 cited in Hathaway, p. 180.

[5]*Adamusik v. Canada (Minister of Manpower & Immigration)*, [1976] 2 F.C. 63, 12 N.R. 262 (Fed. C.A.).

[6]For example see: *Greenless v. Canada (Attorney General)*, [1946] O.R. 90, [1946] 1 D.L.R. 550 (Ont. C.A.) and *R. v. Held* (1946), 87 C.C.C. 378 (Ont. C.A.), upholding draft orders on Jehovah's Witnesses. In both cases, leave to appeal to the Supreme Court of Canada was refused: [1946] S.C.R. 462, 87 C.C.C. 388 (S.C.C.). Canadian courts have also refused to recognize conscientious objection to military spending expressed by withholding tax payments: *Hertzog v. Minister of National Revenue*, [1991] 1 C.T.C. 2529 (T.C.C.).

> persecution for his political opinions even if he was prompted to commit that offence by his political beliefs.[7]

In *Musial*, Chief Justice Thurlow left open the possibility that conscientious objection could be recognized as a valid base for making a refugee claim.

> While the boards's reasons ... are perhaps ineptly expressed and give the impression that in the board's view army deserters and conscientious objectors are not, as such, within the definition. That is, as I see it, far from saying that because a person is an army deserter or a conscientious objector he cannot be a Convention refugee and I do not think the board had made any such ruling. What the board appears to me to have pointed out that army deserters and conscientious objectors are not dealt with as such by the definition...[8]

The majority view in *Musial*, prevailed for a number of years until "questioned by a trilogy of Immigration Board decisions in 1987."[9] These decisions commenced with the case of Salvadoran *Luis Alberto Mena Ramirez*. The claimant was a Jehovah's Witness who opposed military service on religious grounds. In this claim there was no opportunity for alternative service and as a result he was suspected by the military of being a guerilla sympathizer for refusing to serve. The Immigration Appeal Board recognized the claimant as a Convention refugee. The board noted:

> ... a person with such deep seated scruples may very well have a subjective fear of persecution for no other reason than the possibility of being required to take part in military activities. It matters little that he is subjected to the same conscription laws and practices as other young men of military age who are without such scruples; the issue is not equal treatment, but fear of persecution. ... [T]he board finds a systematic persecution by reason of religion. It is the failure of the recruiting system to make allowances for the convictions of the conscientious objector that forms the basis of the fear. Such a failure amounts to fear of persecution within the meaning of the Act.[10]

This case represented a move away from the absolutist stance adopted by the majority in *Musial*. A similar break occurred in *Basir Ahmad Ahmaddy*. This case involved a man who objected on principle to preforming compulsory military service on behalf of the claimant government of Afghanistan. The Immigration Appeals Board accepted a claim for protection under the Geneva Conven-

[7]*Musial v. Canada (Minister of Employment & Immigration)* (1981), 38 N.R. 55 (Fed. C.A.) at p. 60.

[8]*Musial* at p. 59.

[9]Hathaway at p. 183.

[10]Immigration Appeal Board Decision V86-6161, C.L.I.C. Notes 110.15, May 5, 1987 at pp. 4-5, cited in Hathaway, p. 184.

tion based on conscientious objection and relying on the judgment of Chief Justice Thurlow in *Musial*:

> He has a conscientious objection, both personally and due to his Islamic beliefs, to killing his brothers in a war in which he does not believe, a war which seems to be using mere children to systematically kill innocent civilians. His act of refusing to serve is one, which could not be allowed to go "unpunished" by the authorities. They would interpret it as an expression of political opinion contrary to their own. ... This thereby brings him within the definition of Convention refugee as a conscientious objector. ...[11]

At the present time the leading case on conscientious objection and refusal to perform military service is *Zolfagharkhani v. Canada (Minister of Employment & Immigration)*.[12] In *Zolfagharkhani* the refugee claimant was a deserter from the Iranian military. The claimant had already served two years military service in the Iranian army in the war against Iraq. The Revolutionary Guards assigned the claimant, to be a paramedic in a war against the Kurds in Iran and he willingly complied. However, when he learned that the Iranians were planning to use poison gas against the Kurds he had a crisis in conscience since he did not want to be a party to the use of poison gas against his fellow countrymen. As a result of this crisis he deserted from the Iranian army.

The Immigration and Refugee Board panel which heard this claim ruled that since the claimant was only to serve as a paramedic and to help "his brothers on both sides of the camp" and found that there was not good grounds to "substantiate the claimant's fear of persecution on the basis of his political opinion, namely his objection to serving as a paramedic in the Iranian military in a war against the Kurdish movement." On the basis of this finding the Panel found that the claimant was fleeing prosecution based on a general law of application on compulsory military service and desertion from the Iranian army,[13] and rejected his claim for Convention refugee status.

In *Zolfagharkhani*, MacGuigan J.A., reviewed the decision in *Musial v. Canada (Minister of Employment & Immigration)* (1981), [1982] 1 F.C. 290 (Fed. C.A.). which was then the leading authority on the question of conscientious objection and persecution versus prosecution for violating "an ordinary law of general application." Mr. Justice MacGuigan's comment on *Musial* is instructive:

> This decision has, I think, often been taken by the board to establish the proposition that, where a government is merely enforcing "an ordinary law

[11]*Basir Ahmad Ahmaddy* Immigration Appeal Board Decision T86-10392, December 1, 1987, at p. 41, cited in Hathaway, pp. 184-185.

[12]*Zolfagharkhani v. Canada (Minister of Employment & Immigration)* (1993), 20 Imm. L.R. (2d) 1 (Fed. C.A.).

[13]*Zolfagharkhani* at pp. 4-5.

> of general application," it cannot be guilty of persecution but is merely engaging in prosecution. With respect, I believe that to be only a half-proposition, and in any event one not asserted by Pratte J.A. Since any given ordinary law of general application in a dictatorial or totalitarian state may well be an act of political oppression, I believe it is self-evident that such an absolute proposition of prosecution, not persecution, could not be supported in relation to the majority of countries from which refugee cases arise.[14]

Accordingly, the Federal Court of Appeal, in *Zolfagharkhani*, adopted a restrictive interpretation of prosecution for violating "a law of general application." Also, as Mr. Justice MacGuigan writes that "the mental element which is decisive for the existence of persecution is that of the government, not that of the refugee:"

> In the statutory definition of a Convention refugee as a person who 'by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,' the key words in this context are "persecution for," which have reference to the state of mind of the active party, the persecutor, rather than to that of the "persecuted."[15]

In the hope of clarifying the situation with respect to the law on persecution versus prosecution as it relates to an ordinary law of general application the Federal Court of Appeal set out four propositions:

> (1) The statutory definition of Convention refugee makes the intent (or any principal effect) of an ordinary law of general application, rather than the motivation of the claimant, relevant to the existence of persecution.
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> (2) But the neutrality of an ordinary law of general application, vis-a-vis the five grounds for refugee status, must be judged objectively by Canadian tribunals and courts when required.
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> (3) In such consideration, an ordinary law of general application, even in non-democratic societies, should, I believe, be given a presumption of validity and neutrality, and the onus should be on a claimant, as is generally the case in refugee cases, to show that the laws are either inherently or for some other reason persecutory.
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> (4) It will not be enough for the claimant to show that a particular regime is generally oppressive but rather that the law in question is persecutory in relation to a Convention ground.[16]

The Federal Court of Appeal in *Mohamed v. Canada (Minister of Employment & Immigration)* ruled that for a general law of application to be valid and prosecution found instead of persecution the law must be a valid law. In this claim a Police Chief in the Sudan refused to carry out arrest orders for political opponents of the new military regime. There can be no prosecution for violating a law that is itself illegal. The Federal Court of Appeal ruled:

[14] *Zolfagharkhani* at pp. 7-8.

[15] *Zolfagharkhani* at p. 8.

[16] *Zolfagharkhani* at pp. 9-10.

> We are all of the view that the board erred it concluded that the appellant's fear was of "prosecution" rather than "persecution." Simply stated the refusal to carry out military orders, which have no legal foundation, cannot give rise to a fear of prosecution-which implies that one is dealing with a valid law of general application. Rather, such inaction on the part of the appellant could well be regarded as giving rise to persecution for perceived political opinion. Having regard to this error and the abysmal human rights record of the new regime, which is fully documented, the board's decision cannot stand. Accordingly, the appeal will be allowed, the decision of the board set aside and the matter remitted for determination by a differently constituted panel.[17]

Similarly, in *Moslim v. Canada (Secretary of State)* the Federal Court reviewed the human rights situation in Iraq and also considered the punishment for breaching a general law of application in Iraq governing compulsory military service. The court held that:

> the board acted in a patently unreasonable fashion in determining on the facts of this case that the applicant would face punishment in Iraq solely to his violation of a law of general application. The uncontradicted evidence of the applicant established that his absence from Iraq was unauthorized, he evaded military service in two wars and expressed political opinions contrary to the governing regime. In reaching its conclusion that the applicant would only be punished for breaching a law of general application, the board has ignored cogent documentary and oral evidence that the applicant would risk severe extra-judicial treatment at the hands of one of the most repressive, abusive regimes in the world. Furthermore, its finding that the Iraqi authorities would be unlikely to take persecutory action against the applicant on his return is unsupported by the evidence.[18]

The Federal Court of Appeal cited with favour in *Zolfagharkhani* the *U.N.H.R.C. Handbook on Procedures and Criteria for Determining Refugee Status*, (Geneva, 1988), para. 171, which states:

> Where . . . the type of military action with which an individual does not wish to be associated is condemned by the international community as contrary to basic rules of human conduct, punishment for desertion or draft-evasion . . . in itself be regarded as persecution.[19]

[17] *Mohamed v. Canada (Minister of Employment & Immigration)* (1994), 176 N.R. 60 (Fed. C.A.) at p. 61.

[18] *Moslim v. Canada (Secretary of State)* (1994), 75 F.T.R. 243 (Fed. T.D.) at p. 244.

[19] *Zolfagharkhani* at p. 12.

It is also noted that the *Zolfagharkhani* decision endorsed Professor Guy Goodwin-Gill's view of the political dimension to avoiding compulsory military service.

> Military service and objection thereto, seen from the point of view of the state, are issues which go to the heart of the body politic. Refusal to bear arms, however motivated, reflects an essentially political opinion regarding the permissible limits of state authority: it is a political act.[20]

A review of recently published decisions shows that the principles set out in *Zolfagharkhani* have been well relied on, in rulings of the Federal Court Trial Division and findings of the Immigration and Refugee Board. Even where *Zolfagharkhani* is not cited directly as an authority, decisions have generally conformed to its principles.

The gradual evolution of refugee law with respect to conscientious objection and refusal to perform military service was consistent with the developments in International law in the post-World War II world. These developments still required a nexus to the grounds for obtaining protection under the 1951 Convention based on conscientious objection, while simultaneously respecting the internal structure of the Convention by linking conscientious objection to an implied political challenge to the authority of the state.

Specific examples of grounds for acceptance as a Convention refugee on the basis of conscientious objection to compulsory military service are as follows:

Discriminatory Conscription

When a claim is based on the fact that a conscript will be treated in a discriminatory manner, or that prosecution or punishment for evasion or desertion is biased against one of the five Convention-based grounds of protection. For example, if members of a particular racial group are subject to conscription, where the military service obligation is enforced more rigorously against persons of a particular political perspective, or where the penalty for evasion or desertion is applied differently to members of a given social group, the refugee claim should be examined on its merits.

A clear example of a successful refugee claim on the grounds of a conscription law applied in a discriminatory way was the case of a brother and sister from Djibouti. The claimants were conscripted into a form of military service, but

[20]Guy Goodwin-Gill, *The Refugee in International Law* (1983) at 33-34, cited with favour in *Zolfagharkhani* at pp. 12-13.

found that conscripts from their tribal group were treated differently from members of the dominant tribal group of the ruling elite:

> From the beginning, the Afar conscripts were separated from the other recruits, who were Isse and were treated differently. They were not given guns, rank or military training. Instead they were forced to do manual labour such as cleaning latrines. They were given inadequate food and insulted by commanders for their Afar identity. Any objection or disobedience met with severe punishment, specifically, being put in a black box all day with temperatures around 42 degrees centigrade. . . . [The sister was] forced into service as a kitchen worker in a military camp. . . . All of the conscripted workers were Afar women. The soldiers were Isse.[21]

Due to the harmful and discriminatory intent behind the application of the law on conscription to the claimants, the Immigration and Refugee Board, citing *Zolfagharkhani*, held that the enforcement of this conscription law was "in itself a form of persecution, and was not the enforcement of a law of general application."[22]

Political Opinion

A second situation, in which claimants who wish to avoid military service, "arises when desertion or evasion reflects an implied political opinion as to the fundamental illegitimacy in international law of the form of military service avoided."[23] To quote Gilbert Jaeger:

> . . . a broad perception in democratic countries is that there is considerable difference between military service by consent, instituted according to democratic legislative process and called upon to defend the life of a democratic society, on the one hand, and on the other hand, military service in a dictatorial or quasi-dictatorial regime called upon to defend institutions and policies unrelated to accepted human rights standards or, even worse, utilized for internal or external aggression. . . . [T]he right to refuse military service on account of its illegitimate political purpose . . . is formally acknowledged by the UN General Assembly; such refusal qualifies an individual for the grant of asylum and refugee status.[24]

As Hathaway notes:

> . . . there is a range of military activity which is simply never permissible, in that it violates basic international standards. This includes military action in-

[21]*X.D.V. (Re)*, [1996] C.R.D.D. No. 70 (A94-01191, A94-01192) at paras. 10-15, 34-45.

[22]*X.V.D. (Re)* at para. 35.

[23]Hathaway, p. 180.

[24]Gilbert Jaeger, "The Definition of 'Refugee': Restrictive versus Expanding Trends," [1983] *World of Refugee Survey* 5 at p. 7, cited in Hathaway, p. 180.

> tended 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 the light of all other requirements of the definition, in itself be regarded as persecution.[25]

One such example is when the General Assembly of the United Nations urged members of the international community to grant asylum or safe transit to persons refusing in military or police forces in South Africa and who were being forced to uphold apartheid because such service is in itself violates basic human rights. International condemnation for the conduct of the armed forces, which are seeking to conscript the claimant, was also a factor in the *Ciric* ruling. The Federal Court Trial Division found that the Immigration and Refugee Board erred when it ignored the international condemnation of the conduct of the Yugoslav (Serbian) army during the war in the former Yugoslavia. The court found that the board downplayed and ignored the atrocities committed by Serbian troops, which the claimant said he objected to participating in for reasons of conscientious objection to killing and mistreating his own countrymen, friends and family.[26]

The third exception to the exclusion of claims based on refusal to comply with conscription to engage in military action relates to persons who raise principled objections to military service.[27] As Guy Goodwin-Gill argues;

> Objectors may be motivated by reasons of conscience or convictions of a religious, ethical, moral, humanitarian, philosophical, or other nature ... Military service and objection thereto, seen from the point of view of the state, are issues which go to the heart of the body politic. Refusal to bear arms, however motivated, reflects an essentially political opinion regarding the permissible limits of state authority: it is a political act. The "law of universal application" can thus be seen as singling out or discriminating against those who hold certain political views.[28]

In contrast to a claim based on a refusal to participate in military activity contrary to international law, the notion of conscientious objection to military service speaks to the predicament of individuals whose own beliefs conflict with participation in legally permissible military activities.

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[25]Hathaway, pp. 180-181, citing *UNHCR*, note 42 and 40.

[26]U.N.G.A. Res. 33/165, December 20, 1978, cited in Hathaway, p. 181.

[27]*Ciric v. Canada (Minister of Employment & Immigration)* (1993), 23 Imm. L.R. (2d) 210, [1994] 2 F.C. 65 (Fed. T.D.) at pp. 213-215.

[28]G. Goodwin-Gill, *The Refugee in International Law* (Oxford: Clarendon Press, 1983), pp. 33-34.

Alternative Service

Some countries offer conscientious objectors to military service jobs that do not involve requiring the conscript to fight and kill. In those countries a conscript can work as an ambulance driver or stretcher-bearer or in some other non-military capacity. The Immigration and Refugee Board made an issue of this type of military service for the refugee claimant in *Zolfagharkhani*. He was working as an army paramedic when he deserted the Iranian forces. Mr. Justice MacGuigan was critical of the "Florence Nightingale" role the panel depicted for the claimant. He found the board's "reasoning untenable, because the distinction it drew between participation and non-participation in military activity is unrealistic and even naive ..."[29]

The Federal Court of Canada noted that:

> Indeed, it is open to question whether participation even as a paramedic in such an operation, if chemical weapons were actually used, might not have led to the appellant's exclusion from Convention refugee status for having committed "a crime against peace, a war crime, or a crime against humanity," as analyzed in *Ramirez v. Canada (Minister of Employment & Immigration)*, [1992] 2 F.C. 306, 89 D.L.R. (4th) 173, 135 N.R. 390 (C.A.).[30]

There can be situations where all three grounds apply. A conscientious objector may fear or have experienced discriminatory treatment in the army on account of the claimant's ethnicity, religious convictions, or other grounds, object to the army in question's conduct, and for both reasons be perceived as a political dissident and persecuted on that account. If the military laws of the claimant's country may not allow any form of alternative service, or service in certain parts of the country only, the claimant's case for refugee status is stronger still.

A case involving all three grounds is described in *I.Y.R. (Re)*,[31] a 1997 decision of the Immigration and Refugee Board, dealing with a Russian Orthodox Christian who was conscripted in the Israeli army. The male claimant had already done military service in the Russian army, and had done so without objection. So, this claimant was not opposed to military service as such. Upon being called up for military service, the claimant was subjected to scrutiny and numerous interviews, and discriminatory treatment by officers, at least partly on account of his foreign military service and non-Jewish ethnicity. The claimant says he was questioned at length about his Arab associates and friends. The board found that "... the Israeli military law, while neutral on its face, was enforced in a differential way against the claimant because of his perceived political dissidence."

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[29]*Zolfagharkhani* at pp. 10-11.

[30]*Zolfagharkhani* at p. 6.

[31]*I.Y.R. (Re)*, [1997] C.R.D.D. No. 228 (T95-06356).

The claimant also objected in conscience to the conduct of the Israeli army and in particular to its well documented practice of torturing detainees.[32] Finally, this conscientious objector's situation was all the more persecutory because Israeli conscription law did not offer him the choice of a non-combative form of national service, nor would he have any choice about where he was to be posted, and could well have found himself in Lebanon or the Occupied Territories. The board found that this claimant was in danger of persecution on a Convention ground, political opinion, because of his perceived political dissidence expressed through conscientious objection.[33]

Positive Decisions

Examples of claimants recognized as convention refugees on the strength of their conscientious objections to military service include a young male Kurd avoiding conscription in Turkey,[34] two young males who objected to the methods of Guatemala's armed forces,[35] and young males from Algeria[36] and Lebanon.[37] Although not as common as claims by young men, the Immigration and Refugee Board has also found female claimants to be Convention refugees on account of persecutory forcible conscription into military service.[38] In one Federal Court Trial Division case, an Immigration and Refugee Board decision was quashed because it dismissed out of hand the assertion of a minor claimant, nine years old, that he feared being drafted by Sri Lanka's Tamil guerrilla army. The documentary evidence showed that even younger children were sometimes recruited.[39]

These successful claims were characterized by findings that the claimants were credible, in particular, that their objections truly were the product of sincere moral disagreement with an army's conduct, or because of real fear of persecution under military service. Another common feature of these claims was that

[32] *I.Y.R. (Re)* at para 25.

[33] *I.Y.R. (Re)* at paras 26-40.

[34] *O.A.B. (Re)*, [1998] C.R.D.D. No. 108 (T97-02924).

[35] *Z.U.Q. (Re)*, [1996] C.R.D.D. No. 95 (U94-05151); *B.B.E. (Re)*, [1997] C.R.D.D. No. 126 (U96-02921).

[36] *A.J.H. (Re)*, [1997] C.R.D.D. No. 223 (V96-01788).

[37] *W.D.F. (Re)*, [1997] C.R.D.D. No. 19 (A95-01130).

[38] *X.D.V. (Re)*, [1996] C.R.D.D. No. 70 (A94-01191, A94-01192); *E.S.O. (Re)*, [1997] C.R.D.D. No. 27 (U96-04191).

[39] *Poologanathan v. Canada (Minister of Citizenship & Immigration)* (March 26, 1996), Doc. IMM-2045-95 (Fed. T.D.).

counsel provided strong documentary evidence on the country in question for the claimant.

Negative Decisions

By contrast, in many of the negative decisions following *Zolfagharkhani*, objection to military service has often been seen as little more than an embellishment to weak refugee claims. Serious problems with the credibility of claimants, such as not telling a consistent story, claimants using fake documents and telling lies, derailed claims relying on conscientious objection, despite the claims being against dangerous countries where conscription laws had grounded successful claims, such as Guatemala, Nicaragua, Lebanon, Sri Lanka and Israel.[40] In one Federal Court Trial Division ruling, the conscientious objection element to the claimant's case was ruled unworthy of belief on the simple grounds that the claimant was forty years old, and well above the age for military conscription in Israel.[41]

An accurate knowledge of country conditions also matters. One claim based on conscientious objection was turned down for the very simple reason that with the end of the civil war, the government of Guatemala had ceased to enforce military conscription.[42]

In deciding against some claimants, the Immigration and Refugee Board noted that they were not convinced that the claimant's objection was a *conscientious* objection to military service. In one case the board noted that:

> Neither claimant testified to any genuine convictions that preclude military service per se. Both of them told us that, if they remained in Canada and Canada imposed compulsory military service, they would serve in the military.[43]

And, with regard to a claimant from Sudan, the board found that: "the claimant's objections [to military service] were motivated by opportunism and not by genuine conviction", and went on to deny refugee status.[44]

[40] *F.D.Z. (Re)*, [1996] C.R.D.D. No. 249 (A95-00642), Guatemala; *E.H.I. (Re)*, [1997] C.R.D.D. No. 123 (V94-00384), Nicaragua; *Y.J.U. (Re)*, [1996] C.R.D.D. No. 296 (T95-03265), Lebanon; *T.F.L. (Re)*, [1996] C.R.D.D. No. 195 (U95-03470, U95-03471), Sri Lanka; *H.E.K. (Re)*, [1997] C.R.D.D. No. 41 (T94-01148, T94-01150, T94-01152), Israel.

[41] *Kudriavstev v. Canada (Minister of Employment & Immigration)*, [1997] F.C.J. No. 1373 (DRS 98-00527) (F.C.T.D.) at para 11.

[42] *N.F.G. (Re)*, [1996] C.R.D.D. No. 117 (U95-04027).

[43] *H.Q.T. (Re)*, [1997] C.R.D.D. No. 149 (T96-03054, T96-03055) at para 36.

[44] *D.M.B. (Re)*, [1997] C.R.D.D. No. 214 (U96-02568) at para 17.

Refugee claimants who are deserters can fail because their involvement in a military organization went on too long, with unused opportunities to desert, so that the claim to be a conscientious objector is suspect and the possibility that the claimant was a willing participant in violations of human rights and therefore does not qualify for protection arises.[45] For those refugee claimants who have committed war crimes, crimes against humanity or crimes against peace exclusion under Articles 1F (a) and (c) of the 1951 Geneva Convention is another possible outcome for deserters who then thereby do not deserve protection as a Convention refugee.[46]

The right to conscientious objection is an emerging part of international human rights law, based on the notion that "[f]reedom of belief cannot be truly recognized as a basic human right if people are compelled to act in ways that absolutely contradict and violate their core beliefs."[47] Drawing on this right to freedom of thought, conscience, and religion contained in both the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, the United Nations Commission on Human Rights has expressly recognized the right to conscientious objection as "a legitimate exercise of the right of freedom of thought, conscience and religion."[48]

The United Nations High Commission on Human Rights urged states to provide an alternative service of the civilians and non-combatants' nature to such individuals who had conscientious objection to military service. The Council of Europe supported the position that an alternative to army duty should be available for individuals who express compelling reasons of conscience against military service.[49] As Hathaway argues, ainsofar as a state fails to make provisions for

[45]*F.D.Z. (Re)*, [1996] C.R.D.D. No. 249 (A95-00642). The claimant, from Guatemala, did nothing to avoid conscription, and did not use opportunities to desert. The board suspected that the claimant's involvement in activities of the security forces was greater than he was letting on (para 16).

[46]*D.Y.I. (Re)*, [1996] C.R.D.D. No. 290 (T93-13420). The claimant, a Macedonian, had been a conscript in the Yugoslav (Serb) army. The leading case on exclusion is *Ramirez v. Canada (Minister of Employment & Immigration)*, [1992] 2 F.C. 306, 135 N.R. 390 (Fed. C.A.) and the law on Exclusion is examined by Joseph Rikhof, in three articles, "The Treatment of Exclusion Clauses in Canadian Refugee Law." 24 Imm. L.R. (2d) at 31-72, Exclusion Update: Three Years of Federal Court Decisions at 27 Imm. L.R. (2d) 29-55 and Exclusion Clauses: The First Hundred Cases in the Federal Court at 34 Imm. L.R. (2d) pp. 137-161.

[47]B. Frelick, "Conscientious Objectors as Refugees," in V. Hamilton, ed., *World Refugee Survey: 1986 in Review*, p. 31 (1987) cited in Hathaway at p. 182.

[48]U.N. Doc. E/CN.4/1989/L.10/Add. 15, March 9, 1989, cited in Hathaway, p. 183.

[49]Hathaway, p. 183.

the accommodation of the conscientious objectors, a principled claim to refugee status may be established."[50]

Accordingly, the United Nations Sub-Commission on Prevention of Discrimination of Minorities adopted the following recommendation:

> [a] Right to conscientious objection to wars or to a particular war and military service. "This right applies to any person subject to compulsory military service who, for reasons of conscience or deep conviction based on religious, moral, humanitarian, philosophical or similar motives, such as on ecological grounds refuses to carry out armed military service or other participation, direct, in wars or armed conflict.[51]

Summary

In conclusion, refugee claims, which involve failure to perform military service, while not explicitly within the scope of the Convention definition, may nevertheless lead to a recognition of refugee status in three circumstances. Hathaway summarizes the law as follows:

> First, discrimination in the application or administration of a military service making it biased thereby undercutting its political legitimacy and consideration as a valid law of general application.
>
> Second, the specific form of military service objected to might be fundamentally illegitimate, as when it contemplates violation of basic precepts of human rights law, humanitarian law, or general principles of public international law. Where the service is itself politically illegitimate, refusal to enlist or remain in service cannot be construed as a bar to obtaining refugee protection.
>
> Third, the failure to recognize the legitimacy of conscientious objection, and to provide for an appropriate and proportionate non-combatant alternative, may in and of itself constitute a sufficient threat to human rights to ground a claim to refugee status based on implied political opinion.[52]

There are specific criteria for a person to object to military service. These grounds include objections based on moral and philosophical principles in that the person is opposed to actions taken by the army both in terms of human rights violation and also in terms where military actions fall below the standard required by International law. Strong documentary evidence is required in support of such a claim. Here the claimant is expressing political opinion where the ob-

[50]Hathaway, p. 183.

[51]"Conscientious Objection to Military Service" (New York: United Nations, 1985), p. 10.

[52]Hathaway, p. 185.

jector opposes the actions of the army and the government based on political grounds. As a result this objection would lead to a persecution by the authorities as with a person hostile to the state.

The failure to recognize the legitimacy of conscientious objections could in itself constitute a sufficient threat to human rights to ground a claim to refugee status based on implied political opinion. This method would be especially valid if there were a serious risk of extrajudicial punishment. However the last ground as a basis for claiming refugee status is more difficult to sustain and frequently the immigration and Refugee Board will view the punishment as enforcing a general law of application and enforcing a legitimate state interest, i.e. conscription, and not view such punishment as persecutory in nature.

It is clear then according to established Canadian refugee law and the recognized authority of the UNHCR Handbook, Hathaway's *The Law of Refugee Status* and other authorities conscientious objection to military service is recognized as grounds for a Convention refugee claim.

[Indexed as: **Kular v. Canada (Minister of Citizenship & Immigration)**]

Jasmail Kular, Applicant and The Minister of Citizenship and Immigration, Respondent

Federal Court of Canada, Trial Division

Nadon J.

Heard: August 21, 2000

Judgment: August 30, 2000

Docket: IMM-4990-99

Barbara Jackman, for Applicant.
Kevin Lunney, for Respondent.

Aliens, immigration and citizenship — Admission — Immigrants — Family class — Marriage for immigration purposes — Wife submitted sponsorship application for husband which was refused on basis that husband entered into marriage primarily for purpose of gaining admission to Canada — Wife submitted second sponsorship application for husband which visa officer refused to consider — Wife appealed to Immigration Appeal Divison (IAD) which dismissed appeal on basis of res judicata — Wife brought application for judicial review — Application granted — Matter remitted for redetermination — IAD committed reviewable error in dismissing appeal without allowing wife to present her evidence — Applicant may bring second application based on new evidence which demonstrates intent of sponsored spouse at time of marriage — If evidence adduced does not constitute new evidence, IAD may dismiss application as abuse of process — If evidence adduced is new evidence, IAD may decide whether issues raised are res judicata.

Aliens, immigration and citizenship — Admission — Appeals and judicial review — Appeal Division — Powers and duties of Board — Wife submitted sponsorship application for husband which was refused on basis that husband entered into marriage primarily for purpose of gaining admission to Canada — Wife submitted second sponsorship application for husband which visa officer refused to consider — Wife appealed to Immigration Appeal Divison (IAD) which dismissed appeal on basis of res judicata — Wife brought application for judicial review — Application granted — Matter remitted for redetermination — IAD committed reviewable error in dismissing appeal without allowing wife to present her evidence — Applicant may bring second application based on new evidence which demonstrates intent of sponsored spouse at time of marriage — If evidence adduced does not constitute new evidence, IAD may dismiss application as abuse of process — If evidence adduced is new evidence, IAD may decide whether issues raised are res judicata.