N93/02362 [1995] RRTA 369 (27 February 1995)

REFUGEE REVIEW TRIBUNAL
DECISION AND REASONS FOR DECISION

RRT Reference: N93/02362

Tribunal: Dr Judith Winternitz, Member

Date: 27 February 1995

Place: Sydney

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

DECISION UNDER REVIEW

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

The Applicant sought protection as a refugee by applications lodged with the Department of Immigration and Ethnic Affairs (the Department) on 8 January 1993. The decisions were made on 30 November 1993 and the Applicant was notified by letter of the same date. He applied for review of the decisions on 24 December 1993.

BACKGROUND

The Applicant, who was born in 1968 in Belgrade in the Republic of Serbia within the former Socialist Federal Republic of Yugoslavia, holds a passport from the former Yugoslavia, is of Serbian background and lived most of his life in Serbia in the former Yugoslavia. He arrived in Australia on 8 October 1992 as a visitor and following the expiry of his visitor visa was granted temporary entry permits current until the present under the Government's humanitarian stay arrangements for people from the former Yugoslavia. The Applicant has not been assisted by an adviser at either primary or review stages of his application.

JURISDICTION AND STANDING

Section 414 of the Act provides that if a valid application is made under s.412 of the Act for review of an RRT-reviewable decision the Tribunal must review the decision. The decisions under review satisfy the definition of "RRT-reviewable decision" contained in s.411(1)(a) and (b) of the Act.

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

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

LEGISLATIVE FRAMEWORK

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

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

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

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

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

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

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

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

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

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

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

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

Thirdly, an applicant must fear "persecution". The term "persecution" is not defined by the Convention, but not every form of harm will constitute persecution for Convention purposes. The Court, in Chan's case spoke of "some serious punishment or penalty or some significant detriment or disadvantage" if the applicant returns to his or her country of nationality (at 388). Likewise, it stated that the "notion of persecution involves selective harassment" whether "directed against a person as an individual" or "because he or she is a member of a group which is the subject of systematic harassment", although the applicant need not be the victim of a series of acts since a single act of oppression may suffice (at 429-430). The harm threatened may be less than a loss of life or liberty and includes, in appropriate cases, measures "'in disregard' of human dignity" or serious violations of core or fundamental human rights. Indeed Hathaway defines persecution as "the sustained or systemic violation of basic human rights demonstrative of a failure of state protection": see Hathaway, *The Law of Refugee Status* (Butterworths Canada Ltd, 1991), pp. 104-105.

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

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

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

The phrase "particular social group" means "a recognisable or cognisable group within a society that shares some interest or experience in common" (see *Morato v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 39 FCR 401 at 416), such as "the nobility, land owners, lawyers, novelists, farmers, members of a linguistic or other minority, even members of some associations, clubs or societies" (ibid). However, to establish persecution for reason of membership of a particular social group, it must be shown "that persecution is feared for reasons of membership of that group" (at 405, see also 416). "The social group referrred to in the Convention and Protocol is intended to encompass groups of people who share common social characteristics and might be the target of persecution but who do not fit into classifications of race, religion or political opinion" (at 416).

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

CLAIMS AND EVIDENCE

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

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

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

The disintegration of the former Yugoslavia and the lack of formal recognition of the self-proclaimed "Federal Republic of Yugoslavia" poses some technical questions of

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

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

The Tribunal notes that the Applicant was born and lived most of his life in Belgrade. He was educated in that city, completing his school leaving certificate in June 1987. He then undertook his approximately 12-months compulsory military service in the then Yugoslav National Army (1987/8). During this period, apart from 3-months' military training, he served as a librarian and a cook. He thereafter returned to Belgrade to study at the Belgrade University of Laws from October 1988, but broke off his studies in September 1991 in order to flee Yugoslavia (see below). His parents and brother are Australian residents, and the Applicant himself visited them in Australia for a short period in late 1990/early 1991; his married sister remains in Belgrade.

The Applicant's claims have been stated in a simple and consistent fashion at all stages of the refugee determination process, from the time of his primary application in January 1993. As there have been no variations, the Tribunal will proceed to summarise his claims only once, as a whole.

The Applicant has consistently stated that he identifies with the former "Yugoslav" federation, is a pacifist and fundamentally disagrees with the war policy of the disintegrating Serbian-dominated ex-Yugoslav Government in the final days of the old federation. As this Government decided to mass mobilise men into the Yugoslav National Army and send them to war first against the breakaway Croatian Republic, and then against Bosnia and Herzegovina, starting in the second half of 1991, the Applicant states that he realised that he was highly likely to be forced into the conflict. He decided to flee the country before he could be conscripted, leaving for Rome at the end of September 1991. He remained in Rome for almost a year, having found casual work in a theatre, and then came to Australia to visit his relatives,

arriving on 8 October 1992. During this period his sister, still resident in Belgrade, received three sets of military call up papers for him, the first set arriving shortly after his departure.

The Applicant believes that if he returned to Serbia, he would be arrested by the authorities for draft avoidance, would either be forced into military service or be punished for evading the draft. He fears being forced to fight in the wars of the Yugoslav succession, a conflict to which he has fundamental objections of conscience and of political views. He also disagrees politically with the current regime in Serbia : he considers that it is a country in anarchy, at the mercy of political machinations by its leadership. He believes that tensions are so heightened and the situation is so chaotic in Serbia that previous provisions relating to the treatment of conscientious objectors are not upheld and therefore, if conscripted, he would not have his views recognised or respected and might be forced into combat or combat-related activities.

FINDINGS

The Tribunal's overall impression was that the Applicant was credible and genuine in his claims. He has presented his case simply and consistently, without exaggeration at all times. His case in itself is a very simple one: for political/ethical reasons he fundamentally objects to becoming involved in the conflicts in the region of the former Yugoslavia, he fled Serbia just before the first of three conscription notices were served on him and he fears that if he returns to Serbia he will be prosecuted for draft evasion, or that he will be forcibly recruited into the armed forces.

Assessing and ultimately refusing this claim at primary level, the primary decision-maker had reservations about whether the Applicant had genuine or valid reasons of conscience for refusing to undertake military service, citing the fact that he had undertaken his period of compulsory military service in the Yugoslav National Army in 1987/8.

The Tribunal does not consider that the Applicant's participation in his compulsory military service in 1987/8 allows any significant conclusions with regard to the genuineness or validity of the Applicant's objections to military service in 1991 and after.

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

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

Thirdly, the highly limited provisions for conscientious objectors available to conscripts into the Yugoslav National Army, as outlined above, cannot of course be considered to have been relevant to the Applicant, whose objection to military service was not and is not on religious grounds. The Applicant himself indicated to the Tribunal that he considered his compulsory military service period to be simply something he could not escape; he pointed out that after three months in formal training, he worked as a cook and a librarian and spent much of his time in his barracks library preparing for the university course he would later undertake. There appears to the Tribunal, therefore, to be little justification for inferring from his simply having served his compulsory time in the army (a service to which there was effectively no alternative for him except jail) that he did not have politically-based conscientious objections at the time. On the contrary, something of his views about military service might even be inferred from his statements above about what he actually did in the army.

Fourthly, there appears to the Tribunal to be no justification for inferring from the Applicant's peacetime army service of the above kind (in the face of no real alternative) anything at all about his objections to forced service under the unprecedented war and state disintegration conditions of 1991 to the present. The civil-war situation in the region of the former Yugoslavia, from mid-1991 to the present, has involved a tearing apart of the fabric of society in the region. It has involved members of the armed forces of all sides in violence and human rights abuses, based on nationality and religious differences, against civilians who were previous fellow-citizens and even neighbours. These conditions are entirely different from those the Applicant experienced in peacetime compulsory military service in 1987/8. It appears to the Tribunal perfectly logical and credible that "normal" peacetime circumstances might not cause such difficulties for the Applicant that he felt the need to assert his conscientious objector stance and political views publicly, but that the extreme circumstances of the brutal wars of the Yugoslav succession made it imperative that he take action and put his views into practice.

In the light of the above considerations, therefore, and by contrast with the primary decision-maker, the Tribunal is willing to accept that the Applicant holds genuine objections of conscience, based on his political beliefs, to participating in active military service in the context of the wars of the Yugoslav succession.

In further assessing and ultimately refusing the Applicant's claims, the primary decision-maker relied on a Department of Foreign Affairs cable describing the normal process of serving a call-up notice in peace time, to conclude that the Applicant would not be considered a deserter and would not be prosecuted on his return to Serbia. The primary decision-maker was also of the view that if he were conscripted into the

armed forces, the Applicant could claim conscientious objector status and would be likely to be placed in a non-combat role.

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

Equally by contrast with the views expressed by the primary decision-maker, there is extensive information available to prove that the Applicant, if conscripted, cannot claim conscientious objector status and be given a non-combat role in practice. This is because the previous situation (explained above) under which there were no formal provisions for conscientious objector status still pertain in practice. Although there is a relevant theoretical provision for conscientious objector status in the FRY Constitution, the required regulations and procedures allowing this theoretical provision to be implemented have not been enacted (UN Special Rapporteur's Sixth Periodic Report, February 1994, cited above, paragraph 132). In his Report of 21 February 1994, the Special Rapporteur for the UN Commission on Human Rights noted with concern reports received from Serbia

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

The Tribunal concludes therefore, in contrast to the primary decision-maker, that the Applicant is indeed liable to prosecution for draft evasion if he were to return to Serbia, and, in addition, if he were to be forcibly recruited into the military, he would not have his conscientious objector status recognised or provided for by special allocation of non-combat-related tasks.

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

"Under the Yugoslav Constitution, which is still in force in Serbia and Montenegro, there has never been a right to conscientious objector status, except on religious grounds; and even then, as in Croatia, conscientious objectors must perform service within the army itself. The only other alternative to serving in the army is desertion, the penalty for which is a maximum of twenty years' imprisonment if the country has been declared to be in "immediate danger of war".
A formal declaration of an immediate danger of war was made by the Belgrade government on 18 October 1991 and was in effect until 22 May 1992....and the courts assume the existence of a state of "immediate danger of war" when dealing with those who avoided military service during that period.

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

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

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

The Tribunal concludes from the above that the information used by the primary decision-maker was not accurate and that the Applicant's fears about what might happen to him (prosecution for draft evasion/forced conscription into military forces regardless of his political objection to the current conflict) are indeed supported by objective evidence.

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

The Tribunal notes the growing body of international opinion in support of the right of individuals to refuse to undertake compulsory military service in some exceptional circumstances. Common examples of such circumstances are "absolute" objections to

military service based on strong convictions of conscience or religious belief (such as religious-based or secular/philosophically based pacifism) and "selective" objections to military service based on a refusal to become involved in a type of military action which is condemned by the international community or which would be likely to involve violations of basic standards of human conduct.

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

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

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

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

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

The conflict into which the Applicant was to be forced by conscription notices, which he avoided by fleeing, and in the context of which he is likely to be prosecuted for draft evasion, was the beginning of the wars of the Yugoslav succession (see Refugee Board of Canada Responses to Information Requests no. YUG 9688, 6 November 1991; YUG 10630, 8 April 1992, for the process and purpose of mobilisation of the Yugoslav National Army at this time). These wars have, virtually from the start been condemned internationally and the fact that atrocities and war crimes against civilians were being perpetrated by and/or facilitated by the Yugoslav National Army at that time was well-known. The international community has repeatedly expressed its

dismay and disapproval of the warfare in the former Yugoslavia in a series of Resolutions of the UN Security Council. They began with Resolution 713 of 25 September 1991 in which "The Council fully supports the collective efforts for peace and dialogue in Yugoslavia, and decides that all States immediately implement a general and complete embargo on all deliveries of weapons and military equiment to Yugoslavia". International condemnation continued through Resolutions 721, 724, 727,740,743,749 and at least 48 further Resolutions until the present time, including the establishment of the United Nations Peace-keeping Forces (Resolution 724, 15 December 1991) in various parts of the country, which are still present, and the demand for the withdrawal of the Yugoslav National Army from hostilities in Croatia and Bosnia (see The United Nations and the situation in the former Yugoslavia, United Nations Department of Public Information Reference Paper 15 March 1994).

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

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

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

The Tribunal notes as background context for the Applicant's fears if he were to return to Serbia that the war in Bosnia is continuing, and that the situation in Croatia remains unsettled. At the time of writing this decision, there are indications that warfare in Croatia may resume later in 1995 after an uneasy truce from April 1994. There have also been public statements from the Serbian leadership to the effect that if the Serbian cause in Bosnia and Croatia is threatened, Serbia itself was willing to intervene militarily (see report of 19 January 1995 from The Guardian newspaper,

entitled "Serbia threatens war over Krajina"; and report of February 22, 1995 in the Sydney Morning Herald, p. 9 entitled "Serbs in pact for next round of war").

If the Applicant returns to Serbia, it is possible that he will be subject to forced conscription, regardless of his objections, and without special provision being made for non-combat activities for him, into the above looming conflicts. This would in itself constitute persecution of the Applicant by the Serbian authorities for reason of political opinion. It is also possible that he will find himself prosecuted for having evaded conscription since late 1991. The information cited above indicates that the punishment for draft evasion ranges between 1 and 10 years imprisonment, but the actual extent of the sentence is beside the point in the Applicant's case. This is because any prosecution or punishment of the Applicant for reasons of his draft evasion would in itself constitute a serious abuse of basic human rights in the context of an internationally condemed conflict.

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

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

DECISION

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

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