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Ottawa, Ontario, July 9th 2007

PRESENT: The Honourable Mr. Justice de Montigny

BETWEEN:

VADIM LEBEDEV

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER AND ORDER

[1] Vadim Lebedev fled the army and his native Russia because he did not want to serve as a soldier in Chechnya. He claims he does not believe in violence, and that he will be forced to engage in international crimes if he resumes his military service. When his refugee claim failed, he applied for a Pre-Removal Risk Assessment (PRRA), arguing that he feared detention, torture and death at the hands of the Russian army. Terri-Lynn Steffler, a PRRA officer, rejected his application on March 29, 2006. Mr. Lebedev has applied for judicial review of that decision.

[2] I am allowing his application, and quashing the PRRA officer's decision, for two reasons. First, the officer's analysis about whether the war in Chechnya had been internationally condemned was flawed. These errors undermine her decision under s. 96 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the IRPA). Second, the officer's risk assessment under s. 97 of the IRPA contains fatal errors of fact and law. In addition, I have dedicated a good portion of my reasons to the issue of conscientious objection. This issue has been the subject of confusion and inconsistent treatment over the years. Thus, while it raises largely hypothetical questions in the context of Mr. Lebedev's case, in my view those questions are important enough to warrant the Court's attention.

FACTS

[3] Mr. Lebedev was born May 21, 1976. In June 1994, he received a mobilisation order to which he responded. In his PRRA application, he said he had requested alternative service because he did not believe in violence. Nevertheless, he was sent to the regular army. Once in the army, he says he was subjected to extreme hazing, which included abuse, beatings, starvation, and sexual assaults.

[4] When he found out that he was being sent to Chechnya in December 1994, he managed to tell his mother. She tried to stop his deployment, even bribing some military official, to no avail. When he received his relocation order, his mother managed to bring him home under the pretext of taking him out for a short farewell visit.

[5] Mr. Lebedev returned to the army in January 1995, relying on the military's promise that it would not send him to Chechnya. He says that promise was broken, and he was instead jailed for eleven days. While in jail, he received new orders to go to Chechnya. He managed to escape – again – as he was escorted to do prison work. He stayed at his aunt's house, fearing he would be found and redrafted if he went home.

[6] He then moved to Argentina with his mother, apparently because it was the only country for which they could arrange travel visas. In June 1997, his mother left for Canada, where she was eventually granted citizenship. Mr. Lebedev, on the other hand, decided to stay in Argentina because he was already working and dating a Russian girl. When he had first arrived in Argentina he claimed refugee status. However, his claim was automatically withdrawn once he was able to secure a work visa there.

[7] Eventually, Mr. Lebedev's work visa in Argentina expired. So did his Russian passport. Once this happened, he applied for permanent residence at the Canadian embassy in Buenos Aires, under the humanitarian and compassionate category (H&C). That application was turned down in June 2003.

[8] Having learned he could not restore his refugee claim or reapply for refugee status in Argentina, Mr. Lebedev fled to Canada. He arrived here in June 2004 using a fake Swiss passport.

THE BOARD'S DECISION

[9] The Immigration and Refugee Board's Refugee Protection Division (the Board) dismissed Mr. Lebedev's refugee claim in a decision dated June 10, 2005. It concluded Mr. Lebedev was afraid of prosecution, not persecution, and found no evidence he had tried to arrange for alternative service.

[10] The Board emphasized its concerns with Mr. Lebedev's credibility. For example, he testified that he enlisted in the army voluntarily, which the Board found inconsistent with the story of a man who did not want to serve in Chechnya. It also found it implausible that Mr. Lebedev would have enrolled in the army when he could have received an education deferment. There was inconsistent evidence about his alleged escape from the Russian prison in January 1995, and no proof of his residence between February 1995 and June 1997.

[11] Finally, the Board found it implausible that Mr. Lebedev's mother would have returned her son to the army on the mere promise that he would not be sent to Chechnya. She had already tried to bribe officials to somehow exempt Mr. Lebedev from serving in Chechnya, and that agreement had not been honoured. The Board found it unreasonable that she would trust a similar promise again.

THE IMPUGNED DECISION (PRRA)

[12] The PRRA officer refused to consider documentary evidence that predated Mr. Lebedev's Board hearing. However, she did accept a Russian arrest warrant issued July 17, 2004, showing Mr. Lebedev would be detained upon his return to Russia. She also noted the Board's negative

conclusions about Mr. Lebedev's credibility and trustworthiness, and wrote that the PRRA was not meant to be a rehearing of his original refugee claim.

[13] The PRRA officer relied on James Hathaway's book *The Law of Refugee Status* (Markham: Butterworths, 1991) [Hathaway], and its discussion about whether a claimant can successfully claim refugee status by objecting to military service. She also turned to the United Nations Handbook on Procedures and Criteria for Determining Refugee Status (the UNHCR Handbook) for the general rules on military service objection. At page 179 of his book, Hathaway cites paragraph 168 of the UNHCR Handbook and writes:

> Persons who claim refugee status on the basis of a refusal to perform military service are neither refugees *per se* nor excluded from protection. In general terms:
>
> 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.

[14] Thus, an applicant generally cannot claim refugee status under the *United Nations Convention Relating to the Status of Refugees* (the Convention) – and accordingly, under s. 96 of the IRPA, just because he does not want to serve in his country's army. According to Hathaway, however, there are three exceptions to the general rule above. First, military evasion might have a nexus to a Convention ground if conscription for a legitimate and lawful purpose is conducted in a discriminatory way, or if the punishment for desertion is biased in relation to a Convention ground. Second, evasion might lead to Convention refugee status if it reflects an implied political opinion

that the military service is fundamentally illegitimate under international law. Hathaway describes this as "military action intended to violate basic human rights, ventures in breach of the Geneva Convention standards for the conduct of war, and non-defensive incursions into foreign territory" (Hathaway, above, at pages 180-181). The third and final exception applies to those with "principled objections" to military service, more widely known as "conscientious objectors".

[15] The PRRA officer agreed with the Board's conclusion that Russia's compulsory military service and penalties for desertion were laws of general application. Looking at Hathaway's first exception, she also maintained the Board's finding that the law was not applied in a discriminatory way.

[16] Turning to the second of Hathaway's exceptions, the PRRA officer acknowledged reports of human rights violations by the Russian army. She concluded, however, that these were isolated incidents that did not amount to large-scale and systematic violations. She wrote, at page 4 of her decision:

> The applicant vaguely suggests that at least part of his motivation for avoiding military service was because the conflict in Chechnya violates international standards. He makes reference in his submissions that he would be forced into being part of crimes against humanity. While I acknowledge that there are credible reports that some members of the state's forces have committed human rights violations in the course of this conflict, I find the applicant's evidence insufficient to establish that it is the Russian military's intention to engage in planned and systemic human rights abuses or that the international community has deemed the military action in Chechnya contrary to the basic rules of human conduct. [Hathaway; UNHCR Handbook]. I am not persuaded that the circumstances of the case at hand meet the second scenario.

[17] Finally, the PRRA officer found Mr. Lebedev was not a conscientious objector – and thus did not fit within Hathaway’s third exception. She wrote, at page 5 of her decision:

> Conscientious objector status is distinguishable from being a mere draft evader or deserter. What differentiates one from the other is whether the refusal is based on deep seated scruples and/or sincerely held opinions. After carefully considering all the evidence I am not persuaded that the applicant is a conscientious objector. He demonstrated a willingness to be part of the Russian military anywhere but in Chechnya. I find there is insufficient evidence that this decision was based on deeply held scruples or core beliefs and instead was based on his reluctance to endure the conditions present in the Chechnya area.

[18] Because he did not fit within any of the three exceptions, the officer rejected Mr. Lebedev’s claims based on s. 96 of the IRPA. She then analyzed whether he was at risk under s. 97. Mr. Lebedev argued the detention conditions in Russia would put him in danger. He submitted evidence showing prison conditions were extremely harsh and even life threatening, especially in pre-trial detention facilities known as investigation isolation facilities.

[19] The PRRA officer acknowledged the shortcomings of penal facilities, and accepted that Mr. Lebedev would face court action upon his return. But she was also of the view that he might be subject to lesser penalties, finding the Russian judge had only authorized a prison sentence because it was required to secure Mr. Lebedev’s extradition. She wrote, at pages 6-7 of her decision, that “pursuant to article 460 of the Russian Code of Criminal Procedure the Russian Federation may request extradition in relation to a person *only upon selection of a measure of restriction in the form of custodial placement*.” She noted that defendants are presumed innocent in Russia, and are

provided with legal rights consistent with the *Universal Declaration of Human Rights*. She also described Mr. Lebedev in the following way, at page 7 of her decision:

> The applicant has demonstrated that he is a sophisticated individual by his travels and resourcefulness in securing identification documents; he is not unaccustomed to criminal proceedings or detention facilities; he is a reasonably well educated, mature, and healthy 30 year old man. When his personal circumstances are weighed against an undetermined sentence that could be imposed in a range of facilities offering a variety of conditions I find there is insufficient evidence to lead me to believe that the applicant will likely face a risk of cruel and unusual treatment or punishment, a risk to life, or torture.

[20] Mr. Lebedev had also argued that once he satisfied his prison sentence, he would be forced to complete his military service where he would be at risk of physical abuse, mistreatment and possibly torture by members of the army. While the PRRA officer accepted that hazing is a major problem in the Russian army, she did not believe Mr. Lebedev had established he would personally be at risk of such practices. She concluded there was no objective basis to believe he would be subject to the risks outlined in s. 97, writing at page 8 of her reasons:

> Given his age (over conscription age), the reduced operations in Chechnya, and the number of new conscripts that come of age annually, I find on the balance of probabilities that the applicant will not likely be required to serve and therefore is unlikely to experience cruel and unusual treatment, punishment, a risk to life, or torture.

ISSUES

[21] Counsel for Mr. Lebedev raised a host of issues, both legal and factual, in his written submissions, but subsumed them under two arguments at the hearing:

1) Did the PRRA officer err in finding Mr. Lebedev was not a Convention refugee? More particularly, did the officer misinterpret the scope and

frequency of human rights violations in Chechnya, and mistakenly fail to conclude the conflict breaches international standards?

2) Did the PRRA officer err in finding that Mr. Lebedev will not be personally subjected to a risk to life or of cruel and unusual treatment or punishment? In other words, did she err in finding he was unlikely to suffer mistreatment in prison because of his resourcefulness, and that he will not likely be required to serve the remainder of his term in the military?

Of course, the appropriate standard of review will have to be canvassed for each of these issues.

ANALYSIS

A) Did the PRRA officer err in finding Mr. Lebedev was not a Convention refugee?

[22] In the last 10 or 15 years, both in Canada and other western countries, there has been a growing body of jurisprudence on military service evasion as a ground for refugee protection. While there are still contentious issues, which I will discuss shortly, a consensus is also emerging that if freedom of conscience and opinion is to be taken seriously, it must inform the way we deal with refugee claimants who have fled their countries of origin because they object to military service.

[23] Most recently, Justice Anne Mactavish canvassed these issues in *Hinzman v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 420, aff'd 2007 FCA 171. She aptly summarized the applicable principles after dealing with the relevant Canadian and foreign case law most comprehensively, as well as the leading textbooks on the subject. As will become evident throughout these reasons, I am much indebted to her analysis and I share most of her views.

[24] Having said this, the Federal Court of Appeal recently declined to answer the certified question in *Hinzman*, above. It affirmed Justice Mactavish's decision on the narrow basis that the

applicant had not made enough of an attempt to access potential protective mechanisms in the U.S. As a result, there is still no definitive pronouncement on how to properly interpret paragraph 171 of the UNHCR Handbook - and particularly, whether the unlawfulness of a given conflict is relevant to the refugee claim of an ordinary foot soldier.

[25] Before proceeding any further, it is important to go back to the basics. Section 96 of the IRPA states that a Convention refugee must have a "well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion." It is not at all clear from reading s. 96 of the IRPA - and for that matter, the definition of "Convention Refugee" at s. 2(1) of the former *Immigration Act*, what a "well-founded fear of persecution" means. But the Supreme Court of Canada stated, in *Chan v. Canada* (*Minister of Employment and Immigration*), [1995] 3 S.C.R. 593 [*Chan*] at paragraph 70, that "[t]he essential question is whether the persecution alleged by the claimant threatens his or her basic human rights in a fundamental way". A decision-maker must therefore consider whether forced military service *per se*, without any possibility for alternative service, constitutes a denial of a core human right. Of course, the punishment for the individual who evades compulsory military service will have to be severe enough to amount to persecution. Moreover, the persecution must be based on one of the five enumerated grounds in s. 96 of the IRPA, and state protection must be unavailable.

[26] Generally speaking, punishment for violating a law of general application amounts to prosecution, not persecution. In *Musial v. Minister of Employment and Immigration*, [1982] 1 F.C. 290 [*Musial*], the Federal Court of Appeal held that a claimant's reasons for refusing military

service were irrelevant. Fear of prosecution and punishment for one's offence, even if based on political beliefs, could not transform the punishment for draft evasion into persecution.

[27] As we shall see, the Federal Court of Appeal later distinguished and qualified its reasons in *Musial*, above, in a number of ways. It is now accepted that compulsory military service may, in some circumstances, support a claim of persecution under s. 96 of the IRPA. Indeed, the UNHCR Handbook explicitly provides for that possibility. First, paragraph 167 of the Handbook says that "[f]ear of prosecution and punishment for desertion or draft-evasion does not in itself constitute well-founded fear of persecution under the definition." Paragraph 168 then says:

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

[28] While not binding on this Court, the UNHCR Handbook is a useful starting point in trying to interpret the Convention. As Justice Gérard La Forest stated in *Chan*, above, at paragraph 46, it "must be treated as a highly relevant authority in considering refugee admission practices." Paragraphs 167-174 of the UNHCR Handbook are reproduced in the Appendix to these reasons, under the heading "Deserters and persons avoiding military service."

[29] If a refugee claimant wants to rebut the presumption that compulsory military service is a law of general application (and that punishment for evasion is merely prosecution), he must fit himself within one of Hathaway's three exceptions, which are also reflected in the UNHCR

Handbook. Paragraph 169 of that Handbook outlines the least contentious exception, letting applicants claim persecution where they can establish some form of discriminatory mistreatment before, during or even after compulsory military service. It says:

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

[30] Mr. Lebedev does not claim that he was or would be treated in a discriminatory way in the army, nor that his prosecution or punishment for desertion would be biased in relation to one of the five enumerated grounds in. 96 of the IRPA. As the PRRA officer indicated, the Board found insufficient evidence of discrimination, and Mr. Lebedev did not submit compelling new evidence to the contrary. Accordingly, there is no point dwelling on this first exception.

[31] The next exception relates to conscientious objectors. Paragraph 170 of the UNHCR Handbook introduces the exception, while paragraphs 172-174 flesh out the general provision in further detail. This exception has been the subject of much debate. Because the concept does not lend itself to easily identifiable parameters, this may at least partially explain why refugee claims by self-proclaimed conscientious objectors are often rejected outright.

[32] Relying on Hathaway, above, and Guy Goodwin-Gill's *The Refugee in International Law* (Oxford: Clarendon Press, 1996) [Goodwin-Gill], the PRRA officer was apparently prepared to accept that conscientious objectors can be considered Convention refugees. She nevertheless found,

on the evidence before her, that Mr. Lebedev was not opposed to war for principled reasons. Rather, he simply did not want to face the harsh conditions on the battleground in Chechnya. As such, she found he was a "mere draft evader" and not a conscientious objector.

[33] Mr. Lebedev, of course, challenges this finding. He claims that when he was conscripted, there was no way to formally request alternative service. He says he made an oral request, and tried to make his views as a conscientious objector known, to no effect. Yet in oral submissions, counsel for Mr. Lebedev somewhat recanted from that position and stated his client was not claiming to be a conscientious objector. Rather, he objected to serving in a war that was internationally condemned and contrary to principles of international humanitarian law. This relates to the third exception, found at paragraph 171 of the UNHCR Handbook.

[34] It is well established that the appropriate standard of review for a PRRA officer's decision, when considered as a whole, is reasonableness: see *Figurado v. Canada (Solicitor General)*, 2005 FC 347. That being said, the standard may shift depending on the nature of the questions raised in a particular case. After going through a pragmatic and functional analysis, Justice Richard Mosley wrote in *Kim v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 437 at paragraph 9, that "the appropriate standard of review for questions of fact should generally be patent unreasonableness, for questions of mixed law and fact, reasonableness *simpliciter*, and for questions of law, correctness."

[35] Whether a conscientious objector can claim to be persecuted because of the punishment for his conduct is clearly a question of law, as is defining what it means to be a conscientious objector. Both questions should thus be reviewed on the correctness standard. On the other hand, the officer's conclusion that Mr. Lebedev's conduct was not based on deep-seated scruples was essentially a finding of fact, reviewable against a standard of patent unreasonableness.

Conscientious Objection Versus Objecting to a Particular War

[36] In *Hinzman*, above, Justice Mactavish had to decide whether there was an internationally recognized right to conscientious objection. After an exhaustive analysis, she found there was not. Furthermore, she found there was no recognized right of "partial" conscientious objection, which refers to an applicant who objects to a particular war. A "total" conscientious objector opposes war in general. Consequently, Justice Mactavish rejected the argument that Mr. Hinzman could legitimately object to the war in Iraq and be considered a conscientious objector.

[37] For the most part, I agree with my colleague's analysis in *Hinzman*, above. Accordingly, I also agree with the PRRA officer's conclusion that Mr. Lebedev's refusal to serve in Chechnya was not an act of conscientious objection. However, even if it was, Mr. Lebedev would not be entitled to refugee status solely because of his genuine beliefs. Establishing oneself as a conscientious objector is not enough to be found a Convention refugee. This is what the Federal Court of Appeal found in *Ates v. Canada (Minister of Citizenship and Immigration)*, 2005 FCA 322 [*Ates*]. In a short oral decision, the Court held that a sincere conscientious objector from Turkey was not a Convention

refugee, though he had been repeatedly charged and imprisoned for avoiding compulsory military service.

[38] Having said that, I would venture to make the following comments. First of all, *Ates*, above, does not seem to sit well with the Federal Court of Appeal's previous decisions, most particularly *Zolfagharkhani v. Canada (Minister of Employment and Immigration)*, [1993] 3 F.C. 540. In that case, an Iranian citizen was found to be a conscientious objector even though he had no principled objection to military service *per se*. Indeed, he had served more than two years as a gunner in a tank crew during the war between Iran and Iraq. Further, he was not even opposed to the particular conflict between the two countries. His opposition was extremely specific – he objected to the Iranian military's plans to fight the Kurds with chemical weapons.

[39] In *Zolfagharkhani*, above, the Federal Court of Appeal took another look at its earlier reasons in *Musial*, above, and tried to clarify their true meaning. The Board deciding Mr. Zolfagharkhani's application had relied on *Musial*, above, to conclude that where a government enforces an ordinary law of general application, it is merely engaging in prosecution – not persecution. The Court took issue with this conclusion. According to Justice Mark MacGuigan, the Court in *Musial*, above, was merely establishing that "a claimant's political motivation cannot alone govern any decision as to refugee status" (*Zolfagharkhani*, above, at paragraph 15).

[40] He then went on to characterize Mr. Zolfagharkhani's case in the following way:

> [24] In the view I take of the case, no issue is raised as to conscientious objection in relation to war in general, since the

> appellant had no objection to serving in an active capacity in the Iranian military in the Iran/Iraq War. Moreover, I have already accepted the Board's finding that the appellant had no conscientious objection to military service against the Kurds.
>
> [25] The issue as to conscientious objection relates solely to participation in chemical warfare. This was the specific objective which the Board did not find "to be either reasonable or valid", essentially for the reason that, as a paramedic, he would not be fighting with chemical weapons but merely acting in a humanitarian capacity.

[41] The Court's decision in *Zolfagharkhani*, above, was certainly cast in terms of conscientious objection. Justice MacGuigan even started his reasons by writing that "[t]his case concerns the status of conscientious objectors in relation to the definition of "Convention refugee" found in subsection 2(1) of the Immigration Act, R.S.C. 1985, c. I-2." Nevertheless, the substance of the Court's reasoning appears to have revolved around a different exception in the UNHCR Handbook – participating in military activity that breaches international standards. After finding chemical warfare was contrary to customary international law, and referring to paragraph 171 of the UNHCR Handbook, Justice MacGuigan wrote the following:

> [30] In my view, that is precisely the situation in the case at bar. The probable use of chemical weapons, which the Board accepts as a fact, is clearly judged by the international community to be contrary to basic rules of human conduct, and consequently the ordinary Iranian conscription law of general application, as applied to a conflict in which Iran intended to use chemical weapons, amounts to persecution for political opinion.

[42] There is therefore some ambiguity as to the precise ground on which *Zolfagharkhani*, above, was actually decided. I would personally be inclined to think that, as a matter of principle and of precedent, conscientious objection can only be global and with respect to participation in all armed

conflicts. When a claimant objects to a specific war, it is not because he rejects war on philosophical, ethical or religious grounds. Rather, he is objecting to the military's goals or strategies in a particular conflict. As we shall see, his objection is not driven by his conscience, but in an objective assessment about whether military action in a particular situation is valid. That is not the same thing as conscientious objection.

[43] The facts underlying the *Zolfagharkhani* decision bear witness to that dichotomy. In that case, the claimant's objection to the war against the Kurds had nothing to do with his dislike of war but stemmed from his belief that the use of chemical weapons was contrary to the most fundamental rules of human conduct. And yet, in many cases on this issue, the Court has blended the subjective inquiry into an applicant's beliefs with the objective inquiry into the nature of a specific war. This blending of subjective and objective elements is nowhere more evident than in the following passage from *Bakir v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 70:

> [30] The Federal Court of Appeal in *Zolfagharkhani*, *supra*, established that an individual need not be an absolute pacifist or express opposition to all armed services in order to warrant recognition as a conscientious objector to military service. Where the military action at issue has been condemned by the international legal community as contrary to basic human rights, the Court has reasoned that selective objection to military service in a particular conflict or military operation, for reasons of conscience or profound conviction, should be recognized as conscientious objection.

[44] In my view, the phrase "partial conscientious objection" implies a nonexistent link between two different exceptions from Hathaway and the UNHCR Handbook. As I see it, conscientious objection applies to those who are totally opposed to war because of their politics, ethics or religion.

Selective objection really refers to cases in which an applicant opposes a war he feels violates international standards of law and human rights.

[45] The first type of claim, conscientious objection, raises subjective issues. Decision-makers must evaluate the applicant's personal beliefs and conduct to see if his claim is genuine. The second type of claim requires both a subjective and objective assessment of the facts. Along with evaluating the sincerity of an applicant's beliefs, a decision-maker must look at whether the conflict objectively violates international standards. The two types of objections should be treated as distinct categories – just as they are distinguished in paragraphs 171 and 172 of the UNHCR Handbook.

[46] What, then shall we make of the foregoing discussion? First, I think it is better to restrict the notion of conscientious objection to those cases where a claimant refuses to take part in any military action because of his genuine convictions grounded in religious beliefs, philosophical tenets or ethical considerations. I am mindful of the fact that paragraph 172 of the UNHCR Handbook speaks of "religious" convictions. But it seems to me this notion should be expanded, to recognize that moral principles may also be, for a number of people, sufficiently compelling to ground and organize their lives. This is also consistent with the interpretation that has been given to the right to freedom of religion by the Supreme Court of Canada: see, for example, *Syndicat Northcrest v. Amselem*, [2004] 2 S.C.R. 551; *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 and *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713. The U.S. Supreme Court captured this idea admirably in *Welsh v. United States*, 398 U.S. 333 at 339-340:

> What is necessary…for a registrant's conscientious objection to all war to be "religious"…is that this opposition to war stems from the

> registrant's moral, ethical, or religious beliefs about what is right and wrong and that these beliefs be held with the strength of traditional religious convictions…If an individual deeply and sincerely holds beliefs that are purely ethical or moral in source and content but that nevertheless impose upon him a duty of conscience to refrain from participating in any war at any time, those beliefs certainly occupy in the life of that individual "a place parallel to that filled by …God" in traditionally religious persons.

International Approaches to Conscientious Objection

[47] In this case, the issue of conscientious objection was more academic than real, as the Board was not persuaded that Mr. Lebedev fled from military service because of deeply held beliefs. Because this was a finding of fact, I must defer to the Board's conclusion unless patently unreasonable. After carefully reviewing the record, I am of the view the Board could reasonably come to that conclusion. It is true that when Mr. Lebedev was conscripted in 1990, he could not make a formal claim for alternative service. Russia's *Federal Bill on Alternative Civilian Service*, which governs the procedure for requesting alternative service, only entered into force on January 1, 2004. However, in my view, Mr. Lebedev's behaviour was not consistent with that of a conscientious objector. Not only did he only object to military service when informed he would be sent to Chechnya, but he returned to the army on the mere promise that he would not be posted to Chechnya. The military had made the same promise, and broken it, before. Mr. Lebedev's counsel was therefore well advised to build his case on the exception from paragraph 171 of the UNHCR Handbook, to which I shall turn shortly. Nevertheless, the question of whether to recognize a right of conscientious objection is gathering attention both in Canada and internationally. Given its importance, there is a surprising lack of jurisprudence on the issue. For that reason, I offer the following observations.

[48] Justice Mactavish was most certainly correct when she wrote that, "at the present time, there is no internationally recognized right to conscientious objection" (*Hinzman*, above, at paragraph 207). This holding is consistent with the recent House of Lords decision *Sepet v. Secretary of State for the Home Department*, [2003] UKHL 15, [2003] 3 All ER 304 [*Sepet*]. These decisions are sending the message that punishing people who refuse military service on conscientious grounds does not amount to persecution. Courts are obviously reluctant to meddle with one of the state's most sacred prerogatives: raising an army for the defence of the realm and to participate in military operations considered crucial by the government of the day.

[49] Yet equally clearly, countries are starting to give voice to conscientious objectors in different ways. For example, some countries exempt genuine conscientious objectors from conscription. This gives weight to their freedom of thought, conscience and religion in a balancing act between individual rights and the interests of their state governments. As previously noted, paragraph 172 of the UNHCR Handbook explicitly refers to conscientious objection, and the UN Commission on Human Rights and the Council of Europe have encouraged member states to recognize such a right. Some of the most respected authorities on refugee law also believe the international community is moving towards accepting a right of conscientious objection (see Hathaway, above, at page 182 and Goodwin-Gill, above, at page 55). But maybe more importantly for our immediate purposes, a number of recent cases from this Court have given credence to that claim and have explicitly or implicitly accepted the premise that fear of reprisal for objecting to military service on principled grounds could amount to persecution: see, for example, *Bakir*, above;

Atagun v. Canada (Minister of Citizenship and Immigration), 2005 FC 612; *Ozunal v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 560.

[50] Until the Federal Court of Appeal provides further clarification, I feel bound to follow its most recent decision on the subject in *Ates*, above. However, in my view, the issue of conscientious objection still raises a host of outstanding questions, begging for resolution. For Mr. Lebedev, however, the most relevant exception is the one I will discuss below: refusing to serve in wars condemned by the international community.

Condemnation by the International Community

[51] The case law and academic scholars recognize that a person who refuses to undertake compulsory military service can be considered a refugee if such service would involve acts contrary to the basis rules of human conduct, as defined by international law. There is, however, a lack of consensus on some of the key aspects of this exception to the general principle that says those who refuse to perform military service do not have a nexus to a Convention refugee ground under s. 96 of the IRPA.

[52] Relying once more on Hathaway, the PRRA officer acknowledged this exception, but nevertheless found that Mr. Lebedev did not meet its requirements. She wrote, at page 4 of her decision:

> The applicant vaguely suggests that at least part of his motivation for avoiding military service was because the conflict in Chechnya violates international standards. He makes reference in his submissions that he would be forced into being part of crimes against

> humanity. While I acknowledge that there are credible reports that some members of the state's forces have committed human rights violations in the course of this conflict, I find the applicant's evidence insufficient to establish that it is the Russian military's intention to engage in planned and systemic human rights abuses or that the international community has deemed the military action in Chechnya contrary to the basic rules of human conduct.

[53] Mr. Lebedev disputes this finding, and claims the documentary evidence does establish continuous human rights violations contrary to international norms and standards. He submits the PRRA officer should have found that the Russian military intends to and has engaged in systematic human rights abuses in Chechnya.

[54] Those submissions raise both legal and factual questions. First, the Court must address whether the officer applied the proper test to determine if Mr. Lebedev would be forced to violate international law by serving in the Russian army. To answer this question, the Court must turn its mind to a number of questions, like: is the applicant's state of mind relevant? What sorts of military acts would the applicant be involved in? Must those acts be sufficient to exclude the applicant from refugee status under Article 1F of the Convention? What is the applicant's required degree of participation in those reprehensible actions? All of these are questions of law, reviewable on the standard of correctness: *Mugesera v. Canada (Minister of Citizenship and Immigration)*, 2005 SCC 40 at paragraph 37.

[55] On the other hand, evidence about the conflict in Chechnya, the gravity and seriousness of the Russian army's alleged human rights abuses there and the international community's reaction raise issues of a factual nature. The PRRA officer's findings on these grounds must be reviewed

against the standard of patent unreasonableness: *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982 at paragraph 40; *Dr. Q v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226 at paragraph 34.

[56] Paragraph 171 of the UNHCR Handbook provides a useful starting point for a better understanding of this exception. It states:

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

[57] This principle has been upheld by academics and courts on a number of occasions. Hathaway, for one, writes that “there is a range of military activity which is simply never permissible, in that it violates basic international standards. This includes military action intended to violate basic human rights, ventures in breach of the Geneva Convention standards for the conduct of war, and non-defensive incursions into foreign territory” (Hathaway, above, at 180-181). See also: Goodwin-Gill, above; Mark R. von Sternberg, *The Grounds of Protection in the Context of International Human Rights and Humanitarian Law: Canadian and United States Case Law Compared* (New York: Martinus Nijhoff, 2002) 126-143; Martin Jones, “Beyond Conscientious Objection: Canadian Refugee Jurisprudence on Military Service Evasion”, Centre for Refugee Studies Working Paper Series No. 2 (Toronto: York University, 2005) 8-13 [Jones]; Edward

Corrigan, "Refusal to Perform Military Service as a Basis for Refugee Claims in Canada," (2000) 8 Imm. L.R. (3d) 272.

[58] But the leading authority for this proposition in Canada is the Federal Court of Appeal's decision in *Zolfagharkhani*, above. That was the case in which the Iranian applicant fled his country upon learning his government intended to engage in chemical warfare against the Kurdish people. While unable to state authoritatively, on the basis of the evidence in the record, that the gases used by the Iranian army were included in the various Conventions prohibiting the use of asphyxiating, poisonous or other gases, the Court nevertheless considered that there was evidence "of the total revulsion of the international community to all forms of chemical warfare" and that the use of chemical weapons "should now be considered to be against international customary law" (*Zolfagharkhani*, above, at paragraph 29). It then relied on paragraph 171 of the UNHCR Handbook to conclude that the Iranian conscription law amounted to persecution for political opinion, when applied to a conflict where the army intended to use chemical weapons (*Zolfagharkhani*, above, at paragraph 30, quoted at paragraph 41 of these reasons).

[59] In *Hinzman*, above, Justice Mactavish opined that paragraph 171 of the UNHCR Handbook could not be evaluated in isolation, but had to be read in conjunction with paragraph 170. This contextual construction led her to conclude that paragraph 171 has both objective and subjective components. Because I find her reasoning unassailable, it is worth quoting it in full:

> [108] Paragraph 170 speaks to the nature and genuineness of the personal, subjective beliefs of the individual, whereas paragraph 171 refers to the objective status of the "military action" in issue. That is, to come within paragraph 170 of the *Handbook*, the claimant must

> object to serving the military because of his or her political, religious or moral convictions, or for sincere reasons of conscience. In this case, the Board accepted that Mr. Hinzman's objections to the war in Iraq were indeed sincere and deeply-held, and no issue is taken with respect to that finding.
>
> [109] Mr. Hinzman has therefore brought himself within the provisions of paragraph 170 of the *Handbook*. This is not enough, however, to entitle him to seek refugee protection, as paragraph 171 is clear that a genuine moral or political objection to serving will not necessarily provide a sufficient basis for claiming refugee status. Paragraph 171 requires that there also be objective evidence to demonstrate that "the type of military action, with which an individual does not wish to be associated, is condemned by the international community as contrary to the basic rules of human conduct".

[60] There is another reason to come to that conclusion. If a claimant refuses to serve in the military because of fear, or even inconvenience, the nexus to a Convention ground under s. 96 of the IRPA will simply be lost. People who resist the draft or evade the army on a principled basis are assumed to fear persecution on the basis of political or religious reasons. If their motives are more mundane, the fear of persecution will not rest upon these grounds and a claimant could not be considered a Convention refugee.

[61] For all these reasons, I would have been prepared to defer to the PRRA officer had her conclusion been based on Mr. Lebedev's credibility and the lack of evidence showing he refused to serve in Chechnya for principled reasons. But this is not how I read her decision. In the extract quoted at paragraph 49 of my reasons, it appears that the applicant made such a claim, and nowhere did the PRRA officer question the credibility or the sincerity of that claim. Perhaps his motives were mixed, as one could expect in this sort of situation, but that would not be sufficient to disqualify him

from raising this ground to seek refugee status. As I read her reasons, the PRRA officer focused mainly on the lack of objective evidence regarding the Russian army's conduct. That leads me to an assessment of the second requirement, as *per* paragraph 171 of the UNHCR Handbook.

[62] The PRRA officer concluded the conflict in Chechnya had not been condemned by the international community as being contrary to basic rules of human conduct. This finding raises two issues – one of law, the other of fact. The legal issue is whether the officer applied the proper test to determine if Mr. Lebedev fell within the exception at paragraph 171 of the UNHCR Handbook. The issue of fact is whether the Russian military's action in Chechnya has indeed been internationally condemned.

[63] Based on the case law and academic commentaries dealing with paragraph 171 of the UNHCR Handbook, I think it is fair to say the phrase "international condemnation" has not been consistently defined. The confusion probably stems from the paragraph's ambiguous language, which can be interpreted as referring both to a legal standard ("basic rules of human conduct") and a political assessment ("condemned by the international community").

[64] It is therefore no surprise to see the same kind of ambiguity in the jurisprudence, and most notably in the decisions emanating from this Court. The decision in *Bakir*, above, provides a good illustration of such an attempt to reconcile these various tests. In that case, the Court opined that selective objection to military service should be recognized as conscientious objection if that service has been "condemned by the <u>international legal community</u>" (at paragraph 30; emphasis added).

[65] Justice Bud Cullen also analyzed the notion of international condemnation in *Ciric v. Canada (Minister of Employment and Immigration)*, [1994] 2 F.C. 65, finding that documentary evidence from Helsinki Watch, Amnesty International, and the International Committee of the Red Cross was enough to constitute "international condemnation". He wrote:

> [18] I believe the applicants are correct in asserting that the Board erred in ignoring evidence of international condemnation of the situation in Yugoslavia. The Board's conclusion that there was insufficient evidence that the on-going military action in Yugoslavia was one that was condemned by the international community such as to justify the applicants' avoidance of military service flies in the face of the evidence it had before it to consider. This evidence included reports from Helsinki Watch, Amnesty International, ICRC and the applicant's own, uncontradicted testimony. Thus, their conclusion cannot be said to have been made in regard to the totality of the evidence and amounts to an error of law.
> [Emphasis added]

[66] Justice Cullen made further comments about the sort of activity subject to said condemnation, writing:

> [22] The Board may take some comfort in the fact that the United Nations was not quick off the mark in condemning the violations by all sides. It must be remembered that this world organization, intent on maintaining peace, must act of necessity slowly and carefully if it is to remain the honest broker in any conflict. Fortunately, respected organizations like Amnesty International, Helsinki Watch and ICRC, are able to move quickly, study sufficiently and make pronouncements. And all did so here which surely the Board should have seen as condemnation by the world community. The atrocities committed were immediately abhorrent to the world community, eventually leading to a more public position by the United Nations. Basic human rights were violated through woundings, killings, torture, imprisonment and all clearly condemned by the world community.

[67] While the Federal Court of Appeal did not deal with the issue in any great detail in *Zolfagharkhani*, above, it did conclude that the use of chemical weapons violated "international customary law" at paragraph 29. The Court referred to the *Hague Convention* and various Geneva Conventions, including one prohibiting the development and use of biological and toxic weapons.

[68] In *Al-Maisri v. Canada (Minister of Employment and Immigration)*, [1995] F.C.J. No. 642 (QL) [*Al Maisri*], an applicant from Yemen deserted the army because he did not want to contribute to its support of Saddam Hussein's invasion of Kuwait. He lost his refugee hearing before the Board. The Board acknowledged that the UN had condemned the invasion, and also condemned the many ways in which the Kuwaiti population was being mistreated. However, it held this was not enough to be considered international condemnation, because the UN "…did not condemn the Iraqi's actions as being contrary to the basic rules of human conduct" (*Al Maisri*, above, at paragraph 4). After describing the Board's logic as "cryptic", the Federal Court of Appeal allowed Mr. Al-Maisri's appeal, concluding the Board erred by finding Iraq's actions were not contrary to the basic rules of human conduct (*Al Maisri*, above, at paragraph 6).

[69] In *Ozunal*, above, Justice Michel Shore refused an application for judicial review, finding the Turkish applicant would not be forced to participate in any condemned military activities. In evaluating whether Mr. Ozunal was a conscientious objector, Justice Shore wrote:

> [17] As a conscientious objector, Mr. Ozunal was required to demonstrate not only the possession of such conviction but also the existence of a reasonable chance that he, if conscripted, would be required to participate in military activities considered illegitimate under existing international standards… [Emphasis added]

[70] On the basis of the foregoing, I think it is fair to say that international condemnation will not always be required, and may also take different forms. An isolated breach of the basic rules of human conduct will clearly not be sufficient to fall within the purview of paragraph 171 of the UNHCR Handbook. Conversely, there will also be instances where political expediency will prevent the UN or its member states from condemning massive violations of international humanitarian law. This is why reports from credible non-governmental organizations, especially when they are converging and hinge on ground staff, should be accorded credit. Such reports may be sufficient evidence of unacceptable and illegal practices. But at the end of the day, condemnation by the international community can only be one indication of human rights violations. It should never be, in and of itself, an absolute requirement.

[71] I find comfort for that position in *Krotov v. Secretary of State for the Home Department*, [2004] EWCA Civ 69, [2004] 1 WLR 1825 [*Krotov*], a recent decision by the United Kingdom Court of Appeal cited in *Hinzman*, above. That case is particularly interesting in the context of Mr. Lebedev's application, not only for its thorough analysis of paragraph 171 but because it also involved an asylum seeker who deserted the Russian army just before being sent to fight in Chechnya.

[72] The Court in *Krotov*, above, relied heavily on U.K. tribunal decisions dealing with the issue of international condemnation. At paragraph 10, the Court cited the following excerpt from one of

those tribunal decisions, entitled *Foughali v. Secretary of State for the Home Department*, 2 June 2000 [00/TH/01513]:

> [28] The question whether a conflict is or is not internationally condemned may cast light on the Convention issue, but it is not the underlying issue. To make it so would be to interpolate into the text of the Refugee Convention definition of refugee an additional requirement of international condemnation. When assessing risk on the basis of serious human rights violations outside the context of military service cases, decision-makers do not hinge their decisions on whether or not these violations have also been internationally condemned, although such condemnation may be part of the evidence. It would be illogical to behave differently in relation to an overlapping field of public international law governed by the same fundamental norms and values.
>
> [29] In the opinion of this Tribunal it would much improve the clarity of decision-making if issues as to whether or not a conflict is internationally condemned are raised only in the context of whether or not there exists sufficient objective evidence of violations of the basic rules of human conduct. International condemnation should not be treated as the underlying basis of exception (b). [NB Exception (b) was earlier defined as "persecution due to the repugnant nature of military duty likely to be performed." – see paragraph 9 of the judgment].

[73] The Court in *Krotov*, above, also quoted extensively from *B v. Secretary of State for the Home Department*, [2003] UKIAT 20 [*B*]. At paragraphs 44-47 of that case, the U.K. tribunal gave five reasons why formulating the test as one of "international law" was more appropriate than "condemnation by the international community":

1. International condemnation is too dependant on the vagaries of international politics, "apt to vary depending on shifting alliances and whether other countries surveying the conflict take a particular view";

2. A test based on international law is more consistent with the overall framework of the Convention, whose scheme includes a specific provision cast in terms of international law principles (Article 1F, the so-called exclusion clause);
3. The reference to "the basic rules of human conduct" has a distinct meaning in international law;
4. Interpreting the Convention should be based on fundamental norms and values drawn from international law sources;
5. The Convention must be given a contemporary definition based on the developments in international humanitarian law. As a result, "international condemnation is only one indicator – albeit a highly relevant one – of whether the armed conflict involved is/would be contrary to international law" (*B*, above, at paragraph 48).

[74] In *Krotov*, above, the Court reviewed the main international instruments setting out humanitarian norms to protect individuals, particularly civilians, the wounded and prisoners of war in armed conflicts. It looked at the sorts of crimes committed in such conflicts, such as the deliberate killing and targeting of civilians, rape, torture, execution and ill-treatment of prisoners, and the taking of civilian hostages, writing the following:

> [37] …the crimes listed above, if committed on a systemic basis as an aspect of deliberate policy, or as a result of official indifference to the widespread actions of a brutal military, qualify as acts contrary to the basic rules of human conduct in respect of which punishment for a refusal to participate will constitute persecution within the ambit of the 1951 Convention.

[75] In reaching that conclusion, the Court in *Krotov*, above, took note of *Sepet*, above, in which the House of Lords wrote the following after citing Canadian jurisprudence on the issue:

> [8] There is compelling support for the view that refugee status should be accorded to one who has refused to undertake compulsory military service on the grounds that such service would or might require him to commit atrocities or gross human rights abuses or participate in a conflict condemned by the international community, or where refusal to serve would earn grossly excessive or disproportionate punishment…

[76] Commenting on that paragraph, the Court wrote the following at paragraph 20 of *Krotov*, above:

> It is to be noted that Lord Bingham treated the grounds to which he referred as being separate rather than synonymous. He certainly did not suggest in the passage quoted that condemnation of a particular conflict by the international community was an essential or additional requirement where an applicant for asylum advanced the case that the relevant military service would or might require the appellant to commit atrocities or gross human rights abuses.

[77] This Court is obviously not bound by rulings of the British courts, or any foreign courts for that matter. I nevertheless find the reasoning outlined in the previous paragraphs compelling, and entirely consistent with previous rulings from this Court and the Federal Court of Appeal.

[78] Applying these principles to the case at bar, I am troubled by the PRRA officer's comments. Quite apart from the question of whether there was sufficient evidence to establish systemic human rights abuses by the military in Chechnya, to which I will return to shortly, I believe the officer erred by focusing on the Russian military's "intention" to engage in planned and systemic human rights abuses. It would set a dangerous precedent to accept that Russia had not systemically violated

human rights solely because it had not admitted to it directly. Massive human rights violations may take place not only through deliberate policy, but also through official indifference or by being condoned by the authorities. Transgressions of international norms should always be taken into account in assessing a refugee claim, however they come about. The officer could not dismiss the issue, solely because there was no evidence that the Russian army intended to engage in human rights abuses. This does not necessarily mean I am concluding the Russian government is indeed guilty of systemic violations. Rather, the officer should have looked into the evidence more closely to determine whether Mr. Lebedev's allegations were borne out by the facts.

[79] As for the PRRA officer's conclusion that there was insufficient evidence of international condemnation, I would make the following observations. The war has been broadly and unequivocally condemned across the board. The UN Commission on Human Rights adopted two resolutions in 2000 and 2001 on the matter (Resolutions 2000/58 and 2001/24). According to the U.S. Department of State Report on Human Rights Practices for 2005 (U.S. DOS Report), there are still instances of indiscriminate use of force against civilian areas, though by that time such incidents were decreasing. The following excerpt is from the introduction to that report, where it found:

> The government's human rights record in the continuing internal conflict in and around Chechnya remained poor. Both federal forces and their Chechen government allies generally acted with legal impunity. The civilian authorities generally maintained effective control of the security forces. Pro-Moscow Chechen paramilitaries at times appeared to act independently of the Russian command structure, <u>and there were no indications that the federal authorities made any effort to rein in their extensive human rights abuses.</u>
> [Emphasis added]

[80] More damning was the War Resisters International (WRI) report from 2003, which provides explicit and detailed information about Russian warfare in Chechnya. Here is one of the more pertinent excerpts:

> Despite Russian claims that the war has now ended, there is still heavy fighting between the combatants…It is estimated that more than 100,000 Chechens have been killed in both wars, mostly civilians. As a result, the continued fighting has killed more civilians than soldiers.
>
> Russian forces in Chechnya are responsible for grave human rights abuses against the civilian population including ill-treatment of displaced persons, torture, disappearances, and extra judicial executions. Recent reports have alleged that the same pattern of abuses have spread to the neighbouring republic of Ingushetia where thousands of internally displaced persons from Chechnya have sought refuge. Whereas NGOs have documented tens of thousands of human rights violations in Chechnya, only 46 Russian servicemen had been convicted by January 2003. About half of them were convicted for either murder or rape. At the time, there were another 162 ongoing cases. However, official reports have indicated that about 79 per cent of all investigations are suspended without charges being brought against any alleged offenders, and that vital evidence and witness accounts are not secured. In addition, the 1998 anti-terrorism law grants immunity to military servicemen, who violate human rights during "anti-terrorist" operations, which has led to an atmosphere of impunity for Russian servicemen in Chechnya.

[81] The WRI report also documents instances of torture, disappearances, extra judicial executions, and mass dumping sites. It says the Russian military has detained "tens of thousands" of people, and continued to do so at the time of the report. Detainees were kept in filtration camps, and generally unregistered. They were often tortured, by beating and/or electric shock. The report suggests these tactics were designed to force detainees to confess to false allegations or name Chechen fighters. A number of detainees simply disappeared, and it was even alleged that soldiers would explode bodies to destroy evidence of extra-judicial execution or torture.

[82] As far as the Tribunal Record goes, this evidence is uncontradicted. If the PRRA officer felt this evidence did not establish the military action in Chechnya breached international standards, she was at least obliged to substantiate her finding. Perhaps the current situation is much improved, and Mr. Lebedev could no longer claim a fear of persecution based on his refusal to serve in Chechnya. In other words, perhaps the war in Chechnya has subsided and military actions there no longer breach international standards. But since the PRRA officer did not explain why Mr. Lebedev did not fit within the scope of paragraph 171 of the UNHCR Handbook, we are left to speculate. For all those reasons, I therefore find the PRRA officer erred both in fact and in law.

Paragraph 171 of the UNHCR Handbook and Exclusion from Convention Refugee Status

[83] As a final note on this issue, there appears to be some controversy about how involved a claimant's participation in atrocities would have to be to fit within paragraph 171 of the UNHCR Handbook. Justice Mactavish discussed this issue at length in *Hinzman*, above. While I generally agree with her analysis and reasoning, I would nevertheless be inclined to nuance her conclusion slightly.

[84] There are compelling reasons to interpret paragraph 171 of the UNHCR Handbook in conjunction with the Convention's exclusion provisions. It is only appropriate to grant refugee status to a person who objects to participating in human rights violations if that person's involvement with those violations could result in his exclusion from Convention refugee status. This is indeed what the U.K. Court stated in *Krotov*, above:

> [39] It can well be argued that just as an applicant for asylum will not be accorded refugee status if he has committed international crimes

> as defined in [the Convention], so he should not be denied refugee status if return to his home country would give him no choice other than to participate in the commission of such international crimes, contrary to his genuine convictions and true conscience.

[85] This finding echoes the Council of the European Union's Joint Position on the harmonized application of the term "refugee", and it certainly accords with logic and canons of interpretation. It is because of that logic, espoused by Justice Mactavish, that a foot soldier's mere participation in an illegal war was found insufficient to ground a refugee claim. While the legality of a particular military action might be relevant to the refugee claim of an individual involved in triggering or monitoring the conflict, more will be required of an ordinary soldier. Because the soldier's personal conduct would not breach accepted international norms, he could not be excluded from Convention refugee status under Article 1F of the Convention. Accordingly, his mere participation would also fail to bring him within the fold of paragraph 171 of the UNHCR Handbook (*Hinzman*, above, at paragraphs 159 and 166).

[86] That being said, the extent of "on the ground" participation in the violations of international humanitarian law does not lend itself to an easy definition and is still subject to much debate. In *Krotov*, above, the U.K. Court suggested the test should not be whether one may be "associated" with acts contrary to basic rules of human conduct as defined by international law, but rather whether he may be required to "participate" in those acts. While this may be consistent with the jurisprudence that has developed in the context of exclusion, it obviously raises the bar in a way that may not be warranted in the context of inclusion.

[87] As Martin Jones notes, the test for complicity in exclusion jurisprudence has developed in a restrictive manner, given the gravity of a finding that one is excluded from claiming Convention refugee status (Jones, above, at pages 9-10). In that spirit, it is perfectly understandable to limit complicity findings to cases where an applicant knew of an organization's crimes and shared its purpose in committing them (at least in cases where the organization was not principally dedicated to a limited, brutal purpose): *Zazai v. Canada (Minister of Citizenship and Immigration)*, 2005 FCA 303; *Ramirez v. Canada (Minister of Employment and Immigration)* (1992), 89 D.L.R. (4th) 173; *Baqri v. Canada (Minister of Citizenship and Immigration)*, 2001 FCT 1096.

[88] But the purpose of applying the complicity test in claims of persecution resulting from refusing military service is quite different and, indeed, opposite. The more restrictive we are in defining what it means to be complicit in this context, the more difficult it will be for such claimants to claim refugee status. Obviously, sporadic occurrences of prohibited actions should not be sufficient for a deserter or draft evader to claim refugee status. On the other hand, the notion of direct participation may well be too narrow if we are to take into account the language of paragraph 171 of the UNHCR Handbook, which says "…the type of military action, with which an individual does not wish to be associated…" Of course, this whole discussion will sometimes be of an academic nature, when the pervasiveness and scale of the violations of international humanitarian law are such that virtually any soldier will likely be required to be involved in those violations.

[89] All of this to say that the Board should pay attention to this dimension of the problem if it finds, on reconsideration, that the Russian military's actions in Chechnya breach international

standards. There is obviously no hard and fast rule in assessing the degree of potential involvement a particular soldier is likely to have in specific military actions. But in keeping with the spirit and intent of the Convention, the Board would be well advised to look at these claims with some measure of flexibility. After all, the Federal Court of Appeal was able to find that a paramedic's role in treating injured soldiers was sufficient to bring him within the purview of paragraph 171 of the UNHCR Handbook in *Zolfagharkhani*, above. That case clearly stands as an indication of how we should approach the difficult moral dilemma confronted by those called to serve in wars of dubious legitimacy.

B) Did the PRRA officer err in finding that the applicant would not be personally subjected to a risk to life or to a risk of cruel and unusual treatment or punishment?

[90] Mr. Lebedev submits the PRRA officer made several unsupported findings of fact regarding s. 97 of the IRPA. These alleged errors relate to the likelihood that Mr. Lebedev will go to prison in Russia, the attendant risks of imprisonment, and the likelihood of conscription and military hazing.

[91] Mr. Lebedev says the PRRA officer drew unwarranted inferences and highlighted irrelevant considerations in concluding he would not face a risk to his life or torture once incarcerated in a Russian prison. Not only does he claim that he faces imprisonment for desertion if returned to Russia, but he submits prison conditions there are so severe that they amount to persecution and present a serious risk to his health. I must confess the PRRA officer's reasons on this issue are, at best, problematic.

[92] The PRRA officer considered documentary evidence on Russian prison conditions, including the contents of the 2005 U.S. DOS Report, which found prison conditions were "extremely harsh and frequently life-threatening." She also noted that Mr. Lebedev would face court action in Russia for "unauthorized leave from a unit or place of service for the purpose of evading performance of military service." Finally, she accepted that pre-trial detention facilities (also known as investigation isolation facilities, or SIZOs) were considered "extremely harsh" and could pose "a serious threat to health and life."

[93] Against this background, the PRRA officer mentioned – again relying on the same U.S. DOS Report – positive developments in Russia's criminal justice system despite shortcomings in certain areas, and that the process was generally consistent with the *Universal Declaration of Human Rights*. But in the end, Mr. Lebedev's "personal circumstances" seemed to carry the most weight. She simply placed too much emphasis on his alleged "resourcefulness" in concluding there was insufficient evidence to find he would likely face the enumerated risks in s. 97 of the IRPA (see the passage previously quoted at paragraph 19 of my reasons).

[94] In my opinion, the PRRA officer disregarded documentary evidence asserting terrible conditions in Russian penitentiaries by importing a "thick skull" theory and using it against Mr. Lebedev. She appears to have concluded he would not suffer to the same degree as a prisoner without a history of previous incarceration. She focused less on whether Mr. Lebedev had objectively established a risk of harm in Russian prison facilities, and more on how that risk would affect him relative to other prisoners. This is an issue of mixed fact and law, as she purported to

apply a legal standard to her findings in this particular case. As such, her reasoning must withstand a "somewhat probing examination" (*Canada (Director of Investigation and Research) v. Southam Inc*., [1997] 1 S.C.R. 748 at paragraph 56). In light of my earlier comments, I am of the view that the PRRA officer's findings do not meet that standard.

[95] I also think the officer mishandled the fact that Mr. Lebedev faces an uncertain sentence for military evasion. While she correctly stated that we do not know "what penalty will be imposed or what duration in custody he would be subjected to," the documentary evidence indicates he will most likely be sent to a SIZO, at least for some time, while the investigation is completed and his trial takes place. Accordingly, the PRRA officer erred by failing to conduct a thorough analysis of whether he faces a risk of harm if sent to such a pre-trial detention facility. While we cannot pinpoint the exact sentence Mr. Lebedev faces in Russia, the arrest warrant is probative evidence that he will face some sort of penalty for desertion. In my view, this placed an obligation on the PRRA officer to conduct a stronger analysis about how he would be treated once arrested – whether or not she considered him a Convention refugee.

[96] The Minister tried to rely on *Ates v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1316, aff'd 2005 FCA 322 for the proposition that the Court should not interfere with the officer's conclusion about prison conditions. In that case, Justice Sean Harrington held that an officer's decision that prison conditions in Turkey met international standards was not patently unreasonable. Having carefully read that decision, however, I believe that decision is of little help to the Minister and does not lend credence to his position. First, it was based on the particular facts of

that case. It is a truism to say that different sets of facts lead to different legal resolutions. But more importantly, the PRRA officer decided Mr. Lebedev's application actually accepted that Russian prison conditions did not meet government standards. While she noted they are improving, that was a comparative analysis – evaluating conditions compared with previous years. The analysis ought to have been normative, and the officer should have therefore asked whether conditions met objective standards.

[97] That brings me to Mr. Lebedev's second argument regarding s. 97 of the IRPA. Towards the end of her analysis, the PRRA officer concluded that abuses in the armed forces were a serious problem. Indeed, she referred to government figures according to which approximately 25 per cent of the 11,500 crimes committed in the army related to hazing. But once again, she dismissed that risk because it was unlikely, in her view, that Mr. Lebedev would be forced to serve out the remainder of his term in the military. Relying on a superficial analysis, she concluded "on a balance of probabilities" that Mr. Lebedev would not likely be required to serve and was thus unlikely to experience harm (see the passage quoted at paragraph 20 of my reasons). She based that conclusion on the Russian government's stated intention to scale back its military operations in Chechnya, on his age and on the number of new conscripts being drafted every year.

[98] This analysis rests on speculations, not facts. While the Russian Minister of Defence may have announced that conscripts would not be sent to Chechnya from 2005 onwards, there is no evidence in the record that this policy was actually implemented. As Mr. Lebedev contended, the PRRA officer was considering his PRRA application in 2006, two years after that announcement

was reported. Yet, the military operations in Chechnya were apparently still ongoing. The PRRA officer was not provided with any evidence of concrete recent steps to reduce the term of military service or that conscripts would no longer be sent to Chechnya.

[99] Further, the Minister's statement provided no insight into how the Russian army would treat deserters like Mr. Lebedev. It was simply devoted to conscripts in a general sense. Of course, there was no evidence that Mr. Lebedev would in fact be forced to finish his military term. But if he is required to serve out the rest of his military term, it appears he will most likely have no access to any opportunity for substitute service. The Russian Constitution of 1993 does enshrine the right to make a conscientious objection to military service. However, it was only in 2002 that the State Duma passed the Federal Bill on Alternative Civilian Service, governing the procedure for requesting alternative service. It entered into force on January 1, 2004. Mr. Lebedev could thus not have made a formal claim for alternative service in Russia in the 1990s. Moreover, this new legislative measure makes it clear that claiming conscientious objection status is still quite restricted, as applications for alternative service must be made at least six months before receiving one's call-up papers. Serving conscripts and reservists cannot make such applications.

[100] For all of the above reasons, I believe the PRRA officer made a number of questionable conclusions of fact and of mixed fact and law. I acknowledge, as the Board noted, that Mr. Lebedev's story has many gaps that could rightly entitle a decision-maker to question his credibility. But this is no excuse for not assessing the risks he would be facing upon his return to Russia. Any problems with his overall credibility had nothing to do with his chances of going to prison. The

Russian warrant for his arrest made it clear that he would likely face some sort of incarceration if returned to Russia. The officer's reasons regarding both sections 96 and 97 of the IRPA simply cannot pass muster. Accordingly, I would quash her decision and remit the matter to a different PRRA officer for redetermination.

[101] In light of the many pressing issues raised by this application, I am also certifying the following questions:

1. What is the difference between claiming Convention refugee status as a conscientious objector, and claiming Convention refugee status on the basis that one does not want to participate in an internationally condemned conflict? What are the different requirements to prove each?
2. Is there such a thing as "partial" conscientious objection, or does that phrase merely indicate that an applicant's claim really relates to the "international condemnation" exception at paragraph 171 of the UNHCR Handbook?
3. How should decision-makers define "international condemnation"? Does it refer to breaches of international law only? Must it come from an official body that claims to speak with an international voice, like the United Nations? Or would a consensus of reputable international sources, like non-government organizations, be sufficient?

ORDER

THIS COURT ORDERS that the PRRA officer's decision is quashed, and the PRRA application should be remitted to a different officer for redetermination. In addition, the Court certifies the following questions:

1. What is the difference between claiming Convention refugee status as a conscientious objector, and claiming Convention refugee status on the basis that one does not want to participate in an internationally condemned conflict? What are the different requirements to prove each?
2. Is there such a thing as "partial" conscientious objection, or does that phrase merely indicate that an applicant's claim really relates to the "international condemnation" exception at paragraph 171 of the UNHCR Handbook?
3. How should decision-makers define "international condemnation"? Does it refer to breaches of international law only? Must it come from an official body that claims to speak with an international voice, like the United Nations? Or would a consensus of reputable international sources, like non-government organizations, be sufficient?

"Yves de Montigny"
Judge

APPENDIX

<u>United Nations Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees</u>

B. Deserters and persons avoiding military service

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

168. 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.

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

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

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

172. Refusal to perform military service may also be based on religious convictions. If an applicant is able to show that his religious convictions are genuine, and that such convictions are not taken into account by the authorities of his country in requiring him to perform military

service, he may be able to establish a claim to refugee status. Such a claim would, of course, be supported by any additional indications that the applicant or his family may have encountered difficulties due to their religious convictions.

173. The question as to whether objection to performing military service for reasons of conscience can give rise to a valid claim to refugee status should also be considered in the light of more recent developments in this field. An increasing number of States have introduced legislation or administrative regulations whereby persons who can invoke genuine reasons of conscience are exempted from military service, either entirely or subject to their performing alternative (i.e. civilian) service. The introduction of such legislation or administrative regulations has also been the subject of recommendations by international agencies.24 In the light of these developments, it would be open to Contracting States, to grant refugee status to persons who object to performing military service for genuine reasons of conscience.

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

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

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