Federal Court  Cour fédérale

Date: 20130201

Docket: IMM-5069-12

Citation: 2013 FC 115

Ottawa, Ontario, February 1, 2013

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

JULES GUINILING TINDUNGAN

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

INTRODUCTION

[1] This is an application under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c. 27 (Act) for judicial review of the decision of the Refugee Protection Division (RPD) of the Immigration and Refugee Board, dated 18 April 2012 (Decision), which refused the Applicant's application to be deemed a Convention refugee or a person in need of protection under sections 96 and 97 of the Act.

BACKGROUND

[2] The Applicant is a 25-year-old citizen of the United States. He is from Rialto, California and is a member of the United States Army. He served a 15-month deployment in Afghanistan with the 82nd Airborne Unit between 2007 and 2008.

[3] The Applicant left his unit in the U.S. Army in 2008 after completing his full deployment tour in Afghanistan. He left the unit after attempting to be released from his duties through official channels.

[4] While in Afghanistan, the Applicant developed moral objections to the actions, practices and procedures undertaken by the U.S. military. He witnessed and participated in things such as the torturing of detainees, violent house raids on civilian homes, indiscriminate and routine firing into populated civilian areas without taking any precautions to minimize civilian casualties, and the strapping of the bodies of dead insurgents to the front of U.S. military vehicles so as to parade them around towns and villages and intimidate the local civilian populations.

[5] The Applicant came to believe that these acts were illegal and in violation of the Geneva Convention. After completing his tour and returning to the United States, he learned that his unit would soon be redeploying and that the same tactics would be used. The Applicant felt such actions were morally wrong and against international law, and after unsuccessfully attempting to have himself reassigned from infantry duty through official channels, he went absent without leave from his unit.

[6] The Applicant came to Canada and claimed refugee protection. His hearings were held in June and December 2010. The RPD made its Decision on 18 April 2012 and notified the Applicant of the outcome on 10 May 2012.

DECISION UNDER REVIEW

[7] The RPD denied the Applicant's claim because there is no a serious possibility that he would be persecuted if returned to the United States, and because adequate state protection exists there.

Review of the Applicant's Claim

[8] The Applicant joined the U.S. Army on 4 August 2005. At that time, he did not know about the tactics used on the ground by the Army, and joined due to the financial situation of his family. He completed airborne training, and then went into the Ranger Indoctrination Program (RIP) to become part of the Rangers, which is an elite group within the Army. Once he entered RIP, he refused to take part in the harsh hazing rituals and so dropped out after two or three days.

[9] After leaving the RIP, he was assigned to his unit, the 82nd airborne, 4th Brigade Combat team, 4th squadron, 73rd Cavalry Regiment at Fort Bragg. He was deployed to Afghanistan in January, 2007 and ended his deployment in April, 2008. While there, he served at nine different military bases.

[10] The Applicant's first position in Afghanistan was as an Indirect Fire Infantryman. He was involved in many firefights; two soldiers in his unit were killed and many were wounded, including himself.

[11] He was then transferred to a unit involved in active combat operations. Some of the incidents detailed by the Applicant as part of his unit's operations included:

- Joint house raid missions with the Afghan National Army (ANA) that involved zip-tying the occupants, holding them at gunpoint, and destroying most of the contents of the house;

- The placement of detainees in shipping compartments known as "hot boxes" and leaving them there for indeterminate periods in extreme temperature conditions;

- The bombarding of large areas of land where there was no enemy with mortars, destroying villages, crops and property – the Applicant knew of at least one occasion where innocent civilians were killed;

- The placement of exposed bodies on the back of a trailer, which was then driven through towns to show the locals what happened to fighters;

- The employment of a technique known as "bracketing", where mortars would be fired around a target until eventually it was hit – the Applicant learned that an innocent mother and child were killed using this technique;

- The refusal of a medic who had been called to treat enemy combatants to provide medical care, stating that he was going to let them die – the Applicant said that based on what he heard from another platoon, they all did die;

- The harassment and embarrassment of detainees, such as forcing a man to urinate outside and not allowing him to pray.

[12] The Applicant also described extreme "hazing" that he was made to endure while in the Army. This included "smoking sessions" where he had to low crawl in gravel rocks scratching his face and elbows, perform flutter kicks, push-ups, run on the spot, and other physical exercises.

[13] At one point, the Applicant suffered a foot injury and had a makeshift cast on his foot. During this time there was a rocket attack, and his sergeant ordered him to run around and check that everyone was accounted for because the sergeant had failed to check the radios and did not want to expose his mistake. The Applicant was forced to expose himself to the rocket attack.

[14] Once back in the U.S., the Applicant went to see a medic because he was depressed and having trouble going out, seeing people and sleeping. The medic discouraged him from pursuing any mental health treatment because the stigma would negatively impact his career.

[15] The Applicant tried various routes of removing himself from what was going on in Afghanistan. He said that he considered making a claim for conscientious objector status, but he knew that he would not qualify because he did not object to all fighting. He tried to apply for a non-combatant position, but learned he would have to be promoted to sergeant in order to become a civil affairs officer. He passed the exam with perfect marks but did not have enough promotion points when he returned from his deployment to be eligible.

[16] The Applicant then tried to obtain a transfer, but it was refused because of his specific job placement and experience. He told his captain that he wanted to leave the Army to become a

teacher, but the captain made fun of him and wanted him to remain in the unit. The Applicant stated that he had no legitimate options that would allow him to get out of the infantry and avoid another deployment. At this point, he decided to desert the military.

[17] The Applicant left his post at Fort Bragg on 15 May 2008 and boarded a plane to Los Angeles. The Applicant said that during his time in the Army a roommate went AWOL, but then came back within 30 days. He was stripped of all rank and forced to do very difficult physical, pointless tasks such as piling heavy rocks or repeatedly cleaning things that were already clean. He was also ridiculed by his superiors. The Applicant came across the War Resisters Support Campaign on the internet and they helped him come to Canada. He arrived in Canada on 16 June 2008 and claimed refugee protection the same day.

[18] Since then, the Applicant has spoken publicly on a number of news outlets about his opinions on the U.S. military. He states that it is plainly on record that he is someone who is politically and morally opposed to the actions of the U.S. military, and he fears he will be persecuted by his unit if returned to the U.S.

State Protection

[19] The RPD considered whether there is a serious possibility that the Applicant would be persecuted if he returned to the U.S. or whether, on a balance of probabilities, he would be subjected personally to a risk to his life or to a risk of cruel and unusual treatment if he returned to the U.S.

[20] The Applicant alleged he would suffer "persecution" for desertion if he returns to the U.S. He said he will be targeted for differential prosecution because he has spoken out against the wars in

Iraq and Afghanistan. He also says that he comes within sections 169 and 171 of the *Handbook on Procedures and Criteria for Determining Refugee Status (UNHCR Handbook)*, but that he would be unable to raise these sections in a court martial proceeding.

[21] The RPD found that there is adequate state protection in the U.S. Alternatively, it found that the military actions the Applicant objected to do not come within sections 169 and 171 of the *UNHCR Handbook*.

[22] The RPD cited much jurisprudence in assessing the issue of state protection. It reiterated that the Applicant had an onus to approach the state for protection, and that he bore the burden of proving, on a balance of probabilities, that state protection in the U.S. is not adequate. It stated that an important consideration is whether a legislative and procedural framework for protection exists, and whether the state is able and willing to implement that framework.

[23] The United States is a democracy, thus the RPD found a strong presumption of state protection. Refugee claims of U.S. military deserters have been considered by the RPD and it has been found that the U.S. is a developed democracy and there is adequate state protection. If returned to the U.S., claimants are prosecuted for military desertion under a neutral law of general application, and they have available to them a variety of legal safeguards and remedies. Any sentences a claimant may receive for desertion would not be persecutory, nor would punishment be disproportionately severe or amount to cruel and unusual punishment. Other problems that claimants may face in the U.S. as a result of their desertion would amount to discrimination and not persecution. Past RPD decisions to this effect have been upheld by the Federal Court of Appeal in *Hinzman v Canada (Minister of Citizenship and Immigration); Hughey v Canada (Minister of Citizenship and Immigration)*, 2007 FCA 171 [*Hinzman*].

[24] Christopher Marco Vassey, who served in the same unit as the Applicant and was in Afghanistan for some of the same period of time, also claimed refugee status. His refugee claim was judicially reviewed in *Vassey v Canada (Minister of Citizenship and Immigration)*, 2011 FC 899 [*Vassey*]. The RPD considered this decision in analyzing the Applicant's claim.

i) The U.S. Court Martial System

[25] The Applicant submitted that, based on the requirements set out by the Supreme Court of Canada in *R v Généreux*, [1992] 1 SCR 259 [*Généreux*], the U.S. military justice system does not meet the requirements for an independent and impartial tribunal. As a result of *Généreux*, changes were made to the Canadian military justice system. The RPD stated that a comparison to other countries is one aspect of the issue, but the relevant test is whether state protection in the U.S. is adequate.

[26] The expert opinions provided by the Applicant generally agreed that in the U.S. the military commander has a central role in the military justice system. The commander often initiates investigations, determines the charges, determines the level of court martial, adjudicates the case and selects the jurors who will hear the case. The experts, amongst other matters, examine how the U.S. military justice systems compares to the essential conditions of judicial independence set out in *Généreux*. They conclude that the U.S. system does not meet most of the conditions, and that there are problems in providing a fair trial for an accused.

[27] In his affidavit, Prof. Hansen acknowledges different checks and balances within the system to prevent unfairness towards an accused. He states that the most important protection is Article 37 of the *Unified Code of Military Justice*, which precludes any commander from censuring,

reprimanding or admonishing any military member, military judge, or counsel with respect to the findings or sentence of a court or with respect to the function of the court. It also proscribes the exercise of unauthorized influence. In addition, military appellate courts have willingly entertained allegations of Unlawful Command Influence (UCI) in the appellate review process.

[28] Prof. Hansen also says that commanders exercise their functions with full and candid advice of military lawyers, and though not required to follow that advice, a commander disregards it at his peril. The commander selects the members of a court martial, but an accused at his sole discretion may elect to have his case decided by a military judge rather than a military panel. There is also an appellate system that serves as a significant check against the potential for UCI. There is the ability to appeal a case up to the Court of Appeals of the Armed Forces – which is made up of civilian judges – as well as the right to petition the Supreme Court for review of a decision of the Court of Appeals of the Armed Forces.

[29] The affidavit of Prof. Fidel states that the U.S. system does not satisfy the security of tenure criterion set forth in *Généreux*, nor does it satisfy the criterion of institutional independence. He states that the member selection process is not independent, but is a function of command. He says that despite the safeguards in place, complaints of UCI continue but that challenges on this basis are rarely successful. He concludes that, "If the statutory and regulatory protections were effective, UCI would not be the hardy perennial it is in the garden of American military justice."

[30] Donald G. Rehkopf, Jr. provided an affidavit calling into question Prof. Hansen's qualifications as an experienced practitioner in the U.S. military justice system. He says that while Prof. Hansen may be an academic instructor, this is "not the same experience as actually defending clients charged with desertion…" He says that the system lacks rudimentary fairness if a

commander chooses to make an example of a soldier. The system is biased in favour of "discipline," and commanders are allowed to evaluate the impact of conduct on their organization. This is a significant problem in the case of deserters.

[31] Based on his 34 years of experience with the military justice system, Mr. Rehkopf vehemently disagrees with the opinion of Prof. Hansen. He says that the core of the problem is that it is not always about justice, but about the desires and objectives of the military commander, which no military lawyer can overrule. He claims that the safeguards provided look good on paper, but there are no disciplinary sanctions instituted against a person responsible for a UCI. There are also problems with the commander choosing the members of the military who will hear the case, and the Court of Criminal Appeal is primarily staffed by military judges.

[32] The declarations of Marjorie Cohn and Kathleen Gilberd, who are authors of U.S. military law, state that military courts and appellate courts have an obligation to uphold the discipline and good order of their parent organization, so that matters of guilt and innocence, or severity and leniency, are thus weighed not only by considerations of law and justice, but also by their effect on the military's smooth functioning, its discipline, morale and its mission. They state that this dual responsibility of military attorneys, judges and panel members affects the fairness of criminal cases, and that they have seen numerous cases where the needs of the service were afforded greater weight than the rights of the accused. They go on to discuss other problems, such as the role of the contravening authority and problems of UCI. They also do not believe that the institutional safeguards to prevent UCI are effective.

[33] The RPD points out that in *Canada (Minister of Employment and Immigration) v Satiacum*, [1989] FCJ No 505 [*Satiacum*], the Federal Court of Appeal stated that

> In the absence of exceptional circumstances established by the claimant, it seems to me that in a Convention refugee hearing, as in an extradition hearing, Canadian tribunals have to assume a fair and independent judicial process in the foreign country. In the case of a non-democratic State, contrary evidence might be readily forthcoming, but in relation to a democracy like the United States contrary evidence might have to go to the extent of substantially impeaching, for example, the jury selection process in the relevant part of the country, or the independence or fair-mindedness of the judiciary itself.…

[34] The Applicant submitted that all the experts, except Prof. Hansen, used Canadian and International Law as their measuring stick for what constitutes a fair system. Prof. Hansen states that the changes to the Canadian military justice system after the Supreme Court's decision in *Généreux* may have failed to take into account the doctrine of command responsibility, which holds that a commander may be criminally liable for failing to prevent war crimes committed by those under his or her command.

[35] Prof. Hansen says that the U.S. military courts have chosen not to change their system in the same manner that the Canadian and British systems have been changed based on decisions out of their respected courts. The test is not whether another country's system conforms to that of Canada, but whether the protection afforded by the system is adequate.

[36] The RPD stated that it preferred Prof. Hansen's opinion to the others. He does not believe that the U.S. system must change just because changes have occurred in other countries, and he finds that based on the factors he considered, the U.S. system is still fair. There are different models for criminal justice systems, and just because a particular system does not conform to the Canadian or international model does not mean it is not fair.

[37] The RPD concluded that the U.S. military justice system would provide adequate protection to the Applicant.

ii) Risk of Differential Prosecution

[38] The Applicant submitted that he would be at risk of targeted prosecution because he has been outspoken about his political opinions on the U.S. military. He pointed to the decision in *Rivera v Canada (Minister of Citizenship and Immigration)*, 2009 FC 814 [*Rivera*], at paragraph 101:

> In addition, the whole state protection analysis needs to be reconsidered in the light of the stated risk, and supporting evidence, that the U.S. authorities will not neutrally apply a law of general application, but will target the Principal Applicant for prosecution and punishment solely because of her political opinion in a context where other deserters, who have not spoken out against the war in Iraq, have been dealt with by way of administrative discharge.

[39] The RPD stated that the Supreme Court of Canada has recognized discretion as an integral part of any justice system, and found that though there may not be a formal mechanism in the U.S. for review of discretion, this does not lead to a conclusion that, on a balance of probabilities, there is inadequate state protection in the United States.

iii) Section 171 of the *UNHCR Handbook*

[40] The Applicant said that he would be unable to argue in an American military proceeding that he refused to continue to serve because he did not want to take part in conduct falling under section 171 of the *UNHCR Handbook*. Further, motive is irrelevant in a charge of desertion, and the defence of unlawful order only applies to conduct that would be considered a crime or war crime.

[41] In her affidavit, Prof. Marjorie Cohn says that those charged with desertion are routinely disallowed from raising the defence of the illegality of the orders they received while on duty. Attorney Bridget Wilson agrees with this statement, as does David Gespass. The Applicant also referred to the cases involving Sergeant Camilo Mejia and Sergeant Kevin Benderman who were prevented from raising these types of defences. Applicant's counsel also submitted that the above mentioned individuals were similarly-situated.

[42] Prof. Hansen also agreed that motive is an irrelevant consideration in a desertion case. He says that the "reasons for these limitations are obvious. No functioning military can allow its soldiers to pick and choose the conflicts that they agree with or they would choose to support…" He also says that this is not something unique to the U.S. military.

[43] The RPD pointed out that, in Canada, the offence of desertion sets out the intention as being the physical act of being absent. As in the U.S., defences would be available as to the physical act of being absent.

[44] Section 171 of the *UNHCR Handbook* states:

> 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.

[45] In the United Kingdom, the case of *Krotov v Secretary of State for the Home Department*, [2004] EWCA Civ 69 set out a three-part test in assessing a matter to which section 171 may apply. This decision was cited with approval in *Hinzman*. The RPD stated the test as follows:

> (a) that the level and nature of the conflict, and the attitude of the relevant governmental authority towards it, has reached a position where combatants are or may be required on a sufficiently widespread basis to act in breach of the basic rules of human conduct generally recognised by the international community,
>
> (b) that they will be punished for refusing to do so and
>
> (c) that disapproval of such methods and fear of such punishment is the genuine reason motivating the refusal of an asylum seeker to serve in the relevant conflict, then it should find that a Convention ground has been established.

[46] The RPD said that the U.S. has dealt with serious violations of international humanitarian law, and individuals have been prosecuted because of it. It also stated that cases such as *Hinzman* and *Popov v Canada (Minister of Employment and Immigration)*, [1994] FCJ No 489 (TD) at paragraph 10, establish that isolated incidents that violate international humanitarian law are an unfortunate, inevitable result of war. The RPD found that there was no evidence that the incidences put forward by the Applicant were systemic or condoned by the U.S., and thus did not come within section 171.

[47] The RPD found that the Applicant had failed to establish that the U.S. required or allowed its combatants to engage in widespread violation of humanitarian law, or that the U.S. would not allow him to raise a defence that the matter fell within section 171.

[48] The Applicant also submitted that a misuse of prosecutorial discretion may bring this matter under section 169 of the *UNHCR Handbook*, which 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 can be shown that he has well-founded fear of persecution on these grounds above and beyond the punishment for desertion.

[49] The Applicant submitted case law such as *Rivera*, above, in which U.S. prosecutions of deserters have targeted certain individuals for expressing their political opinions. The Applicant also put forward an example of one deserter who had done an interview with the CBC and who had been given a longer sentence than another deserter charged with the same serious criminal offences. The Applicant pointed out that he only had to show a seriously possibility of differential prosecution or persecution to come within section 169.

[50] The RPD noted many examples of sentences handed out, and found that there was no persuasive evidence that any of the individuals concerned publicly voiced objections to the war. It also stated that the standard of proof applicable to the demonstration of the facts underlying the Applicant's claim is a balance of probabilities. It found that any differential sentences were not disproportionately severe so as to find, on a balance of probabilities, differential prosecution or punishment. It also found that any sentence the Applicant may receive would not be so disproportionately severe as to bring his claim within section 169.

[51] The RPD further found that any consequences the Applicant may suffer as a result of a criminal conviction may amount to discrimination, but not persecution. It also stated that if the Applicant suffers "hazing" upon his return, he will have a course of action, as cruel and unusual

punishment is specifically prohibited by the U.S. Constitution. If he were to suffer hazing, the RPD found that he had not demonstrated the state protection would not reasonably be available to him. This position has been confirmed by the Federal Court.

Conclusion

[52] The RPD found that the U.S. is a strong democracy and there are avenues of appeal open to the Applicant. It found that the Applicant has not rebutted the presumption of state protection, or has not shown that there is a reasonable possibility he will be persecuted or that, on a balance of probabilities, he will be at risk to his life or a risk of cruel and unusual treatment or punishment or torture if he returns to the U.S. Therefore, the RPD rejected the Applicant's claim.

ISSUES

[53] The Applicant raises the following issues in this proceeding:

a. Did the RPD err by finding that a judicial system which fails to meet basic internationally recognized fairness and due process requirements can nonetheless provide adequate protection?

b. In regards to state protection, did the RPD err by ignoring evidence that directly contradicted its findings?

c. Did the RPD err in law when interpreting both section 171 of the *UNHCR Handbook* and foreign law related to raising a defence in the U.S. court-martial system?

d. As regards differential punishment, did the RPD make unreasonable conclusions without regard to, and not supported by, the evidence?

STANDARD OF REVIEW

[54] The Supreme Court of Canada in *Dunsmuir v New Brunswick*, 2008 SCC 9, held that a standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to a particular question before the court is well-settled by past jurisprudence, the reviewing court may adopt that standard of review. Only where this search proves fruitless must the reviewing court undertake a consideration of the four factors comprising the standard of review analysis.

[55] The first two issues involve state protection. In *Carillo v Canada (Minister of Citizenship and Immigration)*, 2008 FCA 94, the Federal Court of Appeal held at paragraph 36 that the standard of review on a state protection finding is reasonableness. Justice Leonard Mandamin followed this approach in *Lozada v Canada (Minister of Citizenship and Immigration)*, 2008 FC 397, at paragraph 17. Further, in *Chaves v Canada (Minister of Citizenship and Immigration)*, 2005 FC 193, Justice Danièle Tremblay-Lamer held at paragraph 11 that the standard of review on a state protection finding is reasonableness. Reasonableness is the standard applicable to the first two issues.

[56] The interpretation of foreign law is a matter of fact (*Canada (Minister of Citizenship and Immigration) v Saini (C.A.)*, 2001 FCA 311 at paragraph 26). In *Vassey*, above, Justice André Scott reviewed the RPD's analysis of whether the applicant would be able to raise the defence of an illegal order on the standard of reasonableness.

[57] The interpretation of statutory provisions outside of the tribunal's home statute is reviewable on a standard of correctness (*Dunsmuir*, above). In *Key v Canada (Minister of Citizenship and*

Immigration), 2008 FC 838, Justice Robert Barnes found that the RPD's interpretation of section 171 of the *UNHCR Handbook* was reviewable on a correctness standard. Based on the principles set out in *Dunsmuir*, the interpretation of the applicable sections of the *UNHCR Handbook* is reviewable on a correctness standard, but the application of those sections to the facts of the Applicant's claim is reviewable on a reasonableness standard.

[58] The issue of differential punishment relates to whether the Applicant would suffer persecution upon returning to the U.S. The issue of the RPD's interpretation of "persecution" is a question of mixed fact and law that involves a tribunal interpreting its enabling statute (see *Sow v Canada (Minister of Citizenship and Immigration*), 2011 FC 1313 at paragraphs 17-21). The Supreme Court of Canada stated in *Smith v Alliance Pipeline Ltd.*, 2011 SCC 7 at paragraphs 26-34 that such a question is to be reviewed on a reasonableness standard. Further, the RPD's persecution analysis goes to the interpretation of evidence. Therefore, the fourth issue is reviewable on a reasonableness standard (*Alhayek v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1126 at paragraph 49).

[59] When reviewing a decision on the standard of reasonableness, the analysis will be concerned with "the existence of justification, transparency and intelligibility within the decision-making process [and also with] whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law." See *Dunsmuir*, above, at paragraph 47, and *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paragraph 59. Put another way, the Court should intervene only if the Decision was unreasonable in the sense that it falls outside the "range of possible, acceptable outcomes which are defensible in respect of the facts and law."

STATUTORY PROVISIONS

[60] The following provisions of the Act are applicable in this case:

Application	**Application**
3. (3) This Act is to be construed and applied in a manner that	**3.** (3) L'interprétation et la mise en oeuvre de la présente loi doivent avoir pour effet :
(*a*) furthers the domestic and international interests of Canada;	*a*) de promouvoir les intérêts du Canada sur les plans intérieur et international;
(*b*) promotes accountability and transparency by enhancing public awareness of immigration and refugee programs;	*b*) d'encourager la responsabilisation et la transparence par une meilleure connaissance des programmes d'immigration et de ceux pour les réfugiés;
(*c*) facilitates cooperation between the Government of Canada, provincial governments, foreign states, international organizations and non-governmental organizations;	*c*) de faciliter la coopération entre le gouvernement fédéral, les gouvernements provinciaux, les États étrangers, les organisations internationales et les organismes non gouvernementaux;
(*d*) ensures that decisions taken under this Act are consistent with the *Canadian Charter of Rights and Freedoms*, including its principles of equality and freedom from discrimination and of the equality of English and French as the official languages of Canada;	*d*) d'assurer que les décisions prises en vertu de la présente loi sont conformes à la *Charte canadienne des droits et libertés*, notamment en ce qui touche les principes, d'une part, d'égalité et de protection contre la discrimination et, d'autre part, d'égalité du français et de l'anglais à titre de langues officielles du Canada;
(*e*) supports the commitment of the Government of Canada	*e*) de soutenir l'engagement du gouvernement du Canada à

to enhance the vitality of the English and French linguistic minority communities in Canada; and

favoriser l'épanouissement des minorités francophones et anglophones du Canada;

(*f*) complies with international human rights instruments to which Canada is signatory.

f) de se conformer aux instruments internationaux portant sur les droits de l'homme dont le Canada est signataire.

Convention refugee

Définition de « réfugié »

96. A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,

96. A qualité de réfugié au sens de la Convention — le réfugié — la personne qui, craignant avec raison d'être persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques :

(*a*) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themself of the protection of each of those countries; or

a) soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de chacun de ces pays;

[…]

[…]

Person in Need of Protection

Personne à protéger

97. (1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally

97. (1) A qualité de personne à protéger la personne qui se trouve au Canada et serait personnellement, par son renvoi vers tout pays dont elle a la nationalité ou, si elle n'a pas de nationalité, dans lequel elle avait sa résidence habituelle, exposée :

(*a*) to a danger, believed on

a) soit au risque, s'il y a des

substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or	motifs sérieux de le croire, d'être soumise à la torture au sens de l'article premier de la Convention contre la torture;
(*b*) to a risk to their life or to a risk of cruel and unusual treatment or punishment if	*b*) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant :
(i) the person is unable or, because of that risk, unwilling to avail themself of the protection of that country,	(i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,
(ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country,	(ii) elle y est exposée en tout lieu de ce pays alors que d'autres personnes originaires de ce pays ou qui s'y trouvent ne le sont généralement pas,
(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and	(iii) la menace ou le risque ne résulte pas de sanctions légitimes — sauf celles infligées au mépris des normes internationales — et inhérents à celles-ci ou occasionnés par elles,
(iv) the risk is not caused by the inability of that country to provide adequate health or medical care	(iv) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.
[…]	[…]

[61] Sections 169 and 171 of the *UNHCR Handbook* state as follows:

169. A deserter or draft-evader may also be considered a refugee if it can be shown that he would suffer disproportionately severe	169. Un déserteur ou un insoumis peut donc être considéré comme un réfugié s'il peut démontrer qu'il se verrait infliger pour l'infraction

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.

militaire commise une peine d'une sévérité disproportionnée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un certain groupe social ou de ses opinions politiques. Il en irait de même si l'intéressé peut démontrer qu'il craint avec raison d'être persécuté pour ces motifs, indépendamment de la peine encourue pour désertion.

…

…

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.

171. N'importe quelle conviction, aussi sincère soit-elle, ne peut justifier une demande de reconnaissance du statut de réfugié après désertion ou après insoumission. Il ne suffit pas qu'une personne soit en désaccord avec son gouvernement quant à la justification politique d'une action militaire particulière. Toutefois, lorsque le type d'action militaire auquel l'individu en question ne veut pas s'associer est condamné par la communauté internationale comme étant contraire aux règles de conduite les plus élémentaires, la peine prévue pour la désertion ou l'insoumission peut, compte tenu de toutes les autres exigences de la définition, être considérée en soi comme une persécution.

ARGUMENTS

The Applicant

[62] The Applicant points out that the circumstances of the present application are very similar to those in *Vassey*, above. In both cases, the decision-maker is the same, both applicants were members of the same unit in the 82nd Airborne Division, and similar evidence was presented by counsel in support of both claims for refugee protection. This Court granted Mr. Vassey's application for judicial review, and the Applicant submits that many of the same errors were committed by the RPD in his case.

[63] The Applicant says that, as in *Vassey*, the RPD spent a considerable amount of time summarizing portions of the evidence that was before it. Also, as in *Vassey*, the RPD's analysis falls short of being reasonable, and ignores evidence which directly contradicts its conclusions.

Section 171 of the *UNHCR Handbook*

[64] The Applicant submits that if a soldier will be punished for refusing to associate with breaches of the rules of armed conflict, then he is entitled to refugee protection according to section 171 of the *UNHCR Handbook* (*Zolfagharkhani v Canada (Minister of Employment and Immigration)*, [1993] 3 FC 540 (CA) at paragraph 30).

[65] The Applicant put forward considerable evidence detailing condemned actions routinely committed by the U.S. military, including reports from credible sources and his testimony as to the personal experiences of himself and others. The RPD found that the U.S. did not require or allow its

combatants to engage in widespread violations of humanitarian law, yet in coming to this conclusion it did not reference any of the hundreds of pages of documentary evidence indicating otherwise. The Applicant put forward significant evidence from credible third-party sources and absent any reference to this evidence in the reasons, the Applicant submits that the Decision cannot stand as reasonable.

[66] For example, the RPD's finding that there were no routine breaches of the Geneva Convention directly contradicts the evidence pertaining to violent civilian house raids. The Applicant also provided detailed testimony about these types of raids in his oral testimony. Similar evidence was before the Court in *Key*, above, where it was said at paragraph 5:

> The Board found that Mr. Key was not a conscientious objector in the usual sense of being opposed to war generally and that his objections to the conflict in Iraq were not politically or religiously motivated. Rather, what Mr. Key objected to were the systematic violations of human rights that resulted from the conduct of the United States Army in Iraq and the requirement that he participate. The Board summarized Mr. Key's evidence concerning these events and compared his experiences to the observations of the International Committee of the Red Cross (ICRC) detailed in its report from 2003. It is apparent that the Board found Mr. Key's experiences to be consistent with the ICRC findings, as can be seen from the following passages from its decision:
>
> > Mr. Key performed at least seventy raids on the homes of Iraqi citizens ostensibly looking for weapons. None of them was pleasant. In the blackness of night, doors blown in, homes ransacked, personal effects looted, residents violently roused from their beds and forced outdoors by heavily armed and uniformed soldiers hollering in a foreign language, Muslim women shamed by their exposed bodies, boys too tall for their age, and men cuffed and hauled away for interrogation in their nightclothes, regardless of weather conditions, never, at least as far as Mr. Key could ascertain, to return. Should there have been a belligerent that needed flushing out, Mr. Key had white phosphorous grenades at the ready,

> part of the standard issue for this type of job. Mr. Key indicated that the searches were largely ineffectual as his unit seldom found weapons or contraband, although they probably did work to the extent that any insurgents would soon learn to hide their guns and bomb-making paraphernalia outside their homes.

[67] The Applicant described being involved in similar types of raids in his Personal Information Form. He testified at his hearing that violent civilian house raids were routine practice for his unit in Afghanistan. He also provided photographic evidence of the "hot boxes" wherein detainees were placed indefinitely, hooded and cuffed, to await further interrogation.

[68] Also before the RPD, and referenced by the Court in *Key*, was a report titled *Report of the International Committee of the Red Cross on the treatment by the Coalition Forces of Prisoners of War and other protected persons by the Geneva Conventions in Iraq During Arrest, Internment and Interrogation*. This report condemns the practice of violent house raids utilized by the U.S. army. It describes the raids as tending to follow a pattern, and that pattern involved extreme abuse, violence and humiliation of civilians. The report specifically finds that the U.S. has not complied with international obligations associated with arrest and detention of combatants and non-combatants during conflict. Also before the RPD were letters from Amnesty International outlining how the practice of violent civilian raids has been persistently used by the U.S. forces. These actions involve breaches of the Geneva Convention and therefore amount to conduct falling under section 171 of the *UNHCR Handbook* (*Key*).

[69] The evidence that was before the RPD directly contradicts its finding that the U.S. has not, either as a matter of deliberate policy or official indifference, required or allowed its combatants to engage in widespread actions in violation of humanitarian law. The Applicant submits that absent

any reference by the RPD to the multiple pieces of documentary evidence discussing this routine practice utilized by the U.S. military, it can be reasonably inferred that the RPD ignored this evidence (*Ozdemir v Canada (Minister of Citizenship and Immigration)*, 2001 FCA 331 [*Ozdemir*]).

[70] The Applicant states that the evidence pertaining to civilian house raids is only one example of routine military practices utilized by the U.S. military that breach the Geneva Convention. Other evidence that was before the RPD includes evidence of the practice of "recon by fire," routinely engaged in by the U.S. military without precautions being taken to reduce civilian casualties, the torture of detainees, and knowingly turning detainees over for torture. The Applicant submits that there was evidence before the RPD that such practices were not isolated incidents, and the failure of the RPD to reference any of this evidence renders its finding on this point unreasonable (*Ozdemir*, above).

State protection, defences and section 171 of the *UNHCR Handbook*

[71] The Applicant submits that the RPD misunderstood the law on raising a defence against charges of desertion within the U.S. military, an error also committed by the same member's error in *Vassey*. The Court in *Vassey* said that it was an error for the RPD to find that the defence of "unlawful orders" in the U.S. is not limited to refusal to perform a war crime; the applicable case law in the United States clearly instructs that the defence of unlawful orders is limited to situations wherein a soldier is directly ordered to commit a positive act that constitutes a war crime (*United States v Yolanda M Huet-Vaughn*, 43 MJ 105, (1995 CAAF) [*Huet-Vaughn*]).

[72] The Court held at paragraphs 68, 69 and 74 of *Vassey*:

> Concerning the US Court of Appeals for the Armed Forces case *Huet-Vaughn*, the Court agrees with the applicant that the Board's interpretation of the case was unreasonable. The US Court of Appeals for the Armed Forces held that:
>
> > 43. To the extent that CPT Huet-Vaughn quit her unit because of moral or ethical reservations, her beliefs were irrelevant because they did not constitute a defence...
> >
> > 45. To the extent that CPT Huet-Vaughn's acts were a refusal to obey an order that she perceived to be unlawful, the proffered evidence was irrelevant. The so-called "Nuremberg defense" applies only to individual acts committed in wartime; it does not apply to the Government's decision to wage war. [...] The duty to disobey an unlawful order applies only to "a positive act that constitutes a crime" that is "so manifestly beyond the legal power or discretion of the commander as to admit of no rational doubt of their unlawfulness." [...] CPT Huet-Vaughn tendered no evidence that she was individually ordered to commit a "positive act" that would be a war crime.
>
> The Board concluded that this decision did not stand for the principle that "the defence of an unlawful order only applies to extreme cases such as war crimes or grave breaches of the Geneva Convention" and that the "United States Court of Appeals for the Armed Forces has not decided whether an individual could raise the question of whether he or she had been ordered to commit an unlawful act".
>
> […]
>
> Given that the applicant would not be able to present evidence of his motive for desertion nor of the illegality of the conduct that he was required to perform in Afghanistan which could demonstrate a breach of the Geneva Conventions on the rules of armed conflict, this goes directly to the availability of state protection.

[73] The Applicant submits that although the defence of unlawful orders under U.S. law applies only to positive acts to commit a war crime, conduct falling well below a war crime may

substantiate a claim for refugee protection under section 171 of the *UNHCR Handbook*. As the Court stated at paragraphs 29-30 of *Key*:

> It is clear from the above passages that officially condoned military misconduct falling well short of a war crime may support a claim to refugee protection. Indeed, the authorities indicate that military action which systematically degrades, abuses or humiliates either combatants or non-combatants is capable of supporting a refugee claim where that is the proven reason for refusing to serve. I have, therefore, concluded that the Board erred by imposing a too restrictive legal standard upon Mr. Key.
>
> I would add that the Board's assertion that Mr. Key's past combat participation would not be sufficient to support his claim to asylum unless it constituted excludable conduct cannot be correct. This would give rise to an unacceptable 'Catch-22' situation where the factual threshold for obtaining protection would necessarily exclude a claimant from that protection.

[74] Despite the above jurisprudence of the Federal Court, the RPD stated at paragraph 147 of the Decision that it could not find, on a balance of probabilities, that the Applicant would not be able to raise the defence of unlawful order or that the matter fell within section 171. The Applicant submits that the RPD made the same error as in *Vassey*; it misunderstood the definition of conduct falling under section 171 of the *UNHCR Handbook*, in direct contradiction to this Court's instructions in *Key*. The Applicant further submits that regardless of whether the RPD misunderstood section 171, or the limits of the defence of unlawful orders in the U.S., it is clear that it misapprehended the relevant law applicable to its findings.

State protection, defences, and "absences offences" vs. "orders offences"

[75] The Applicant submits that the RPD failed to appreciate the important distinction between "absence offences" and "orders offences" when addressing state protection under section 171 of the *UNHCR Handbook*.

[76] The Court stated at paragraphs 70-74 of *Vassey*:

> However, the applicant's submissions before the Board were that for the charge of desertion, not disobeying orders, there is no defence. This was corroborated with evidence before the Board from two experts and three members of the US military. While the Board summarized this evidence in the decision, it did not analyze it or provide reasons for rejecting it. Rather, the Board focused on the right of appeal within the court-martial system and found that similarly situated individuals would be able to appeal their cases to the US Supreme Court, which they have not done, and therefore avenues of state protection remain.
>
> The Court finds this to be an unreasonable conclusion. First, as the applicant noted in reply, leave to the US Supreme Court was denied in the case of *Huet-Vaughn*, making this the prevailing law. Further, the evidence of the professors, practionner, and military members in addition to the case of *Huet-Vaughn* demonstrate that the charge of desertion operates as a strict liability offence where motive for desertion is not relevant.
>
> The UNHCR Handbook acknowledges that, as a general rule, prosecution of deserters does not amount to persecution. However, paragraph 171 provides a caveat:
>
> > 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.
>
> While the Board correctly noted that Justice Zinn held in *Lowell* above, that the applicant must first show that state protection is unavailable before raising the facts under paragraph 171 of the UNHCR handbook, the applicant's argument went directly to the issue of state protection.
>
> Given that the applicant would not be able to present evidence of his motive for desertion nor of the illegality of the conduct that he was

> required to perform in Afghanistan which could demonstrate a breach of the Geneva Conventions on the rules of armed conflict, this goes directly to the availability of state protection.

[77] The Applicant explained in his submissions that soldiers in the U.S. military are unable to put forward evidence as to their reasons for deserting, regardless of what those reasons might be. He also put forward the *Huet-Vaughn* case, as well as other case law showing how the law is applied.

[78] The RPD considered the Applicant's submissions that he would be unable to put forward a defence at paragraphs 115-133 of the Decision. Considerable time is spent summarizing the evidence, and at paragraphs 130-133 the RPD seems to agree with the Applicant's statement that he would not be able to put forward these defences.

[79] Section 171 of the *UNHCR Handbook* instructs that any punishment for desertion amounts to persecution, whatever that punishment may be, when that desertion is motivated by a refusal to be associated with actions falling under section 171. Given that the RPD accepts that the Applicant would not be able to raise a defence against desertion charges based on a refusal to serve in actions falling under section 171, the Applicant submits that the RPD erred by concluding that the Applicant had failed to rebut the presumption of state protection on this point.

The U.S. court-martial system fails international standards

[80] The Applicant submits that the U.S. court-martial is not an independent and impartial tribunal, both structurally and in practice (*Généreux*, above). The Applicant argued before the RPD that adequate state protection would not be reasonably forthcoming in a justice system that does not conform to basic internationally recognized fairness requirements. In the Decision, the RPD does

not find that the U.S. court-martial system meets these standards, but says that a system which fails to meet these basic standards is nonetheless "adequate".

[81] The Applicant submits that the RPD applied the wrong legal test for what constitutes "adequate" protection. He says that it is an error to conclude that a system which fails to meet basic fairness standards internationally recognized to be fundamental to any tribunal system can nonetheless provide "adequate" protection. The Applicant submits that the RPD's interpretation of "adequate" is out of step with applicable jurisprudence, the *UNHCR Handbook*, and the Act.

[82] Section 3 of the Act provides that it is to be construed and applied in a manner that complies with international human rights instruments to which Canada is a signatory (*De Guzman v Canada (Minister of Citizenship and Immigration)*, [2005] FCJ No 2119 (CA); *Okoloubu v Canada (Minister of Citizenship and Immigration)*, [2008] FCJ No 1495 (CA)). The Applicant submits the RPD's conclusion that a system that fails to meet these standards is nonetheless adequate does not comply with paragraph 3(3)(*f*) of the Act.

[83] The Applicant further submits that the language of section 97 also conflicts with an interpretation of "adequate" state protection that would accept judicial systems that do not meet international standards for an independent and impartial tribunal system. Section 97 indicates that cruel and unusual punishment cannot include punishment that is inherent or incidental to lawful sanctions, so long as the sanctions are imposed according to accepted international standards. Presumably, then, a tribunal system that fails to be in accordance with the Charter, the *International Covenant on Civil and Political Rights*, the *European Convention on Human Rights*, and the *Universal Declaration of Human Rights* must be inadequate.

[84] In *Hinzman v Canada (Minister of Citizenship and Immigration)*, 2006 FC 420, Justice Anne Mactavish of the Federal Court said at paragraph 218:

> Finally, in considering the applicants' argument that American law is under-inclusive, in that it denies members of the military the right to assert genuine conscientious objections to specific military actions, regard must be had to paragraph 60 of the Handbook. Paragraph 60 provides that in assessing whether punishment meted out under the law of another nation is persecutory, the domestic legislation of the country being asked to grant protection may be used as a 'yardstick' in evaluating the claim.

[85] The relevant paragraphs of the *UNHCR Handbook* state as follows:

> 59. In order to determine whether prosecution amounts to persecution, it will also be necessary to refer to the laws of the country concerned, for it is possible for a law not to be in conformity with accepted human rights standards. More often, however, it may not be the law but its application that is discriminatory. Prosecution for an offence against "public order", e.g. for distribution of pamphlets, could for example be a vehicle for the persecution of the individual on the grounds of the political content of the publication.
>
> 60. In such cases, due to the obvious difficulty involved in evaluating the laws of another country, national authorities may frequently have to take decisions by using their own national legislation as a yardstick. Moreover, recourse may usefully be had to the principles set out in the various international instruments relating to human rights, in particular the International Covenants on Human Rights, which contain binding commitments for the States parties and are instruments to which many States parties to the 1951 Convention have acceded.

[86] Based on the above, the Applicant submits the UNHCR has clearly instructed that Canada may use principles outlined in international instruments such as the ICCPR, as well as have reference to its own military justice system, when measuring what constitutes "adequate" state protection. This has also been outlined in decisions such as *Généreux*, and confirmed by experts

such as Prof. Fidel. As such, the Applicant submits the RPD's finding that the U.S. military justice system is able to provide "adequate" protection is not reasonable.

[87] It addition, the Applicant submits it was unreasonable for the RPD to prefer the opinion of Prof. Hansen, given the content of that opinion. Prof. Hansen's view was essentially that the Supreme Court of Canada and the international community are misguided about what constitutes fairness. The Applicant submits that while the RPD member may be entitled to adopt this as his own personal view, an administrative tribunal in Canada is bound by the Supreme Court of Canada's interpretation of what constitutes fairness.

[88] The RPD finds at paragraph 108 of the Decision that just because a justice system is based on the inquisitorial model does not mean it is inadequate. The Applicant points out that aspects of Canadian law still incorporate the inquisitorial model, and that a tribunal operating under this system may still be independent and impartial. This highlights how the RPD misconstrued the Applicant's arguments on this point; the problem is not that the U.S. system and the Canadian system are not the same, it is that the U.S. system is not fair.

[89] The Supreme Court of Canada provided a baseline in *Généreux* for measuring fairness in an independent and impartial court-martial system. The problem is the fact that the U.S. system fails to comply with basic fairness standards set forth in domestic and international law. For example, in the U.S. a commanding officer still possesses considerable power over the entire process; in Canada and the U.K., however, amendments have been made to separate the military judicial system from the executive so as to ensure that military tribunals are independent and impartial.

[90] Further, Canada's old court-martial system that was under scrutiny in the *Généreux* decision is very similar to the system that exists in the U.S. today. It included an appellate system and JAG officers. Nevertheless, the Supreme Court of Canada found that it violated all three requirements of an independent and impartial tribunal, and that the executive maintained an unacceptable level of influence over the whole process. The European Court of Human Rights also made similar findings regarding the U.K. court-martial system, which at the time largely mirrored that which exists in the United States today (*Findlay v United Kingdom*, [1997] ECHR 8, 24 EHRR 221).

[91] There was significant evidence on this issue put before the RPD. Prof. Fidel is a professor in military law at Yale University, President of the *National Institute for Military Justice* in the United States, and a member of the "Meeting of Experts" convened in Geneva by the UN High Commissioner for Human Rights regarding the UN Draft Principles Governing the Administration of Justice through Military Tribunals. His ultimate conclusion, after considering a variety of factors, is that "it is doubtful that the United States military justice system can be sustained if it were tested against contemporary Canadian or international norms."

[92] The RPD found that it preferred the opinion of Prof. Hansen. Prof. Hansen did not contest that the U.S. systems fails to meet international standards for an independent tribunal, but in his opinion this does not make the system fundamentally unfair. The Applicant points out that there is no indication of how Prof. Hansen is measuring fairness, other than his own personal opinion. Prof. Hansen's article suggests that he thinks it is "fair" to sacrifice the individual rights of soldiers, because competing interests such as deployability, control and discipline require it. In this sense, Prof. Hansen simply disagrees with the direction the Supreme Court of Canada and the international community has taken with regard to basic fairness standards in a tribunal system.

[93] The RPD rejects the evidence of Prof. Fidel and Mr. Rehkopf, who do not just rely on their personal opinion of what is fair, but who apply the Supreme Court of Canada's directions on fairness when assessing the U.S. court-martial system. Given that Supreme Court of Canada decisions are binding on the RPD, as well as considering the role played by the standards set in the international community in the context of decision making under sections 96 and 97 of the Act, the Applicant submits it was unreasonable for the RPD to favour the opinion of Prof. Hansen. It was also unreasonable for it to reject the instruction of the Supreme Court of Canada in *Généreux* and the standards set out in international instruments.

Differential punishment

[94] The Applicant asserted that he would be disproportionately punished in the U.S. because of his publicly expressed opinions against the wars in Iraq and Afghanistan. Section 169 of the *UNHCR Handbook* says that punishment for desertion may result in persecution, if that punishment is differential.

[95] In *Hinzman*, above, the Federal Court of Appeal found that the vast majority of deserters from the U.S. military are not formally prosecuted. The Applicant put forward evidence demonstrating that the few deserters who are prosecuted include those who are on public record as opponents of the U.S. war efforts. He also put forward evidence that these soldiers' public opinions were the reasons why they were chosen to be prosecuted rather than administratively discharged.

[96] In *Rivera*, above, the Court said at paragraphs 88 and 99:

> In their PRRA application the Applicants introduced evidence and argument of a change of position by the U.S. military authorities; a cracking down on deserters who have spoken out publicly against the

> war in Iraq. Their point was that the state, or at least the military arm of the state, has now targeted for special treatment those who have gone AWOL and who have publicly expressed their opposition to the war in Iraq. This differential treatment involves a decision by the authorities to subject such people to court martial proceedings, rather than administrative discharge, and to punish them more harshly in order to make an example of them that will discourage others from taking similar action….
>
> […]
>
> … The Principal Applicant provided ample evidence of the targeting of similarly situated individuals, but this evidence is never addressed from this perspective. In addition, there was also evidence before the Officer of prosecutors seeking harsher treatment, and judges imposing harsher sentences, for deserters who have spoken out against the war. This again raises the issue of the exercise of prosecutorial and judicial discretion in a way that discriminates against those soldiers who have expressed public opposition to the war in Iraq. In turn, this calls into question the procedural and state protection safeguards available to targeted individuals who are prosecuted (instead of receiving an administrative discharge) and who are punished harshly for their political opinions…

[97] The Applicant states that in finding that adequate state protection exists the RPD did not point to mechanisms within the system that protect against the discriminatory exercise of prosecutorial discretion. Instead, the RPD suggests that differential prosecution is a necessary and beneficial part of any criminal justice system.

[98] The findings above include the same errors that were made in *Vassey* – the RPD acknowledges that there is no corrective mechanism in the U.S. system for monitoring discretion, yet dismisses this risk factor by finding that discretion benefits the justice system. Even if this is true, prosecutorial discretion must nonetheless be exercised in an unbiased, lawful fashion.

[99] In *Vassey*, the Court said at paragraphs 76-80:

… This Court recognized the disproportionate prosecution for desertion of those who have spoken out against the wars in Iraq and Afghanistan.

For example, in *Rivera v Canada (Minister of Citizenship and Immigration*), 2009 FC 814 Mr. Justice Russell reviewed a decision of the Board concerning the use of prosecutorial discretion to target individuals more severely through the court-martial process who have spoken out against the war. At paragraph 101, Justice Russell concluded of the Board's decision that:

> ...the whole state protection analysis needs to be reconsidered in the light of the stated risk, and supporting evidence, that the U.S. authorities will not neutrally apply a law of general application, but will target the Principal Applicant for prosecution and punishment solely because of her political opinion in a context where other deserters, who have not spoken out against the war in Iraq, have been dealt with by way of administrative discharge.

The Board in the case at bar largely ignored the evidence presented by the applicant about similarly situated individuals and prosecutorial discretion. The Board concluded that using prosecutorial discretion is a benefit to the justice system and is appropriate where there are aggravating factors.

Paragraph 169 of the UNCHR handbook indicates that:

> 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.

As such, the UNHCR handbook, as well as the jurisprudence above, hold that where prosecutorial discretion is used to inflict a disproportionately severe punishment on a deserter because of his or her political opinion, this may amount to persecution.

[100] The Applicant submits that it is unreasonable to find that state protection against the risk of differential prosecution exists based solely on the fact that discretion is part of a criminal justice system. He further submits that a fulsome state protection analysis requires the RPD to look at how the system would protect an individual when prosecutorial discretion is exercised inappropriately.

Evidence of risk of differential punishment

[101] The Applicant submits that the RPD's findings on the issue of differential prosecution were unreasonable. The RPD based its conclusion that the Applicant did not face a risk of differential prosecution on a brief comparison of sentences received by those who did speak out against the war and those who did not. The RPD then lists a number of individuals – namely Tony Anderson, Abdullah William Webster and Ryan Jackson – who received higher sentences, and states that "there is no persuasive evidence that these individuals publicly voiced any objections to the war." The Applicant submits this was unreasonable; there was clear evidence on record that all of these individuals were vocal opponents of U.S. war efforts.

[102] As regards Tony Anderson, there was a public article before the RPD explaining how he had been outspoken against the war in Iraq and was supported in his views by a number of organizations. He went AWOL for only 22 days, but received 14 months in a military jail as his sentence for desertion. Given that the above is directly contrary to the RPD's finding that there was no persuasive evidence before it that Tony Anderson publicly voiced any objections to the war, the Applicant submits the RPD can be reasonably inferred to have ignored this evidence when rendering its decision on this point (*Ozdemir*, above).

[103] The information that the RPD does reference regarding the cases of Webster, Jackson and Anderson, consists of a chart from the online source Wikipedia entitled "Punishments given to Iraq war deserters" that was submitted to the site by the Minister. The name of the document itself suggests that these men are on record as opponents to the Iraq war. Furthermore, the source information cited within the Wikipedia article discusses the cases of different public objectors. Abdullah William Webster is called a "prisoner of conscience," and there are statements from the group Courage to Resist in support of Ryan Jackson.

[104] Prof. Cohn and Ms. Gilberd also stated in their declaration, that it is commonplace that public statements against the war lead to heavier sentences for desertion. The statement of Eric Seitz, a military law attorney, says that since 2002 it is common that conscientious objectors are denied any leave from their military service, and have been "subjected to severe punishments including lengthy periods of incarceration" for their objections.

[105] The Applicant submits there was significant evidence before the RPD that was overlooked in its analysis of this issue. He submits that the RPD spent considerable time summarizing the information before it, but failed to engage that material in a meaningful way. This renders the Decision unreasonable.

The Respondent

State Protection

[106] The Respondent submits that the Applicant's submissions fail to appreciate that he had a very heavy burden of establishing that state protection in the U.S. was not available to him. As the Supreme Court of Canada said in *Canada (Attorney General) v Ward*, [1993] 2 SCR 689, "[i]t is

clear that the lynch-pin of the analysis is the state's inability to protect: it is a crucial element in determining whether the claimant's fear is well-founded." There is a presumption of state protection, and the Applicant must rebut it with "clear and convincing" evidence.

[107] The more democratic the country, the heavier the burden on the Applicant (*Hinzman* at paragraph 45). In *Hinzman*, the Federal Court of Appeal considered the case of a U.S. military deserter, and concluded that he was not entitled to refugee protection in Canada because state protection was available to him. The claimant had to exhaust all domestic avenues available to him without success before claiming refugee status in Canada.

Conformity with international standards

[108] As the RPD noted, comparing the home state's law to Canadian or international standards is "…not the definitive test." The Federal Court of Appeal has stated that in a free and independent country like the U.S., the claimant must establish "extraordinary circumstances" to demonstrate that state protection is ineffective (*Satiacum*, above). Examples have been circumstances that "…tended to impeach the total system of prosecution, jury selection or judging…" or the "…independence of the fair mindedness of the judiciary itself" (*Usta v Canada (Minister of Citizenship and Immigration)*, 2004 FC 1525 at paragraphs 15-16, *Tuck v Canada (Minister of Citizenship and Immigration)*, 2005 FC 138 at paragraph 14).

[109] The Respondent submits that no such evidence was adduced in the present case. In fact, the evidence suggests there are sufficient checks and balances within the military justice system; instances of unlawful command influence do not mean that the entire military justice system has

been impeached. As said in *Satiacum*, "[t]he notion of a fair trial and independent judicial system must make allowance for the self-correcting mechanisms within the system…"

[110] The Respondent submits that the RPD put forward a reasonable explanation for preferring the opinion of Prof. Hansen: he focused on whether the U.S. system was fair, and not on whether it was compliant with Canadian and U.K. law – that is not the test.

Violation of international law

[111] The Respondent points out that Article 171 of the *UNHCR Handbook* makes clear that "[n]ot every conviction…will constitute a sufficient reason for claiming refugee status after desertion or draft-evasion." Punishment for desertion may amount to persecution where the military action in question "…is condemned by the international community as contrary to basic rules of human conduct."

[112] In the Federal Court's decision in *Hinzman*, it was explained that in determining whether a government's actions fall within the scope of Article 171, the three factors listed in *Krotov*, above, must be considered. The first factor is (*Hinzman* at paragraph 139):

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

The Respondent submits that this is fatal to the Applicant's case; he has not established that the attitude of the U.S. government has met this threshold.

[113] Just because isolated incidents of breaches of international humanitarian law occurred, it does not mean that the U.S. government sanctioned this behaviour. As noted by the Federal Court in *Hinzman*, "[i]t is generally accepted that isolated breaches of international humanitarian law are an unfortunate but inevitable reality of war."

Unlawful order defense

[114] The Respondent says that the Applicant's submissions on this issue are unclear: on one hand he concedes that the RPD understood that the unlawful order defense does not apply to the charge of desertion; but he then argues that the RPD did not understand the law.

[115] In U.S. military law, the defense is available in respect of refusing an order that is unlawful but cannot be used as a defense to desertion (*Vassey*, above). The Respondent submits that the RPD understood this but it was simply not convinced that the unavailability of this defense rebutted the presumption of state protection. This finding was open to the RPD. The evidence was that the reason why someone left the military can be admitted as part of sentencing. This is similar to the state of the law in Canada.

[116] The Respondent further submits that as outlined above, the incidents described by the Applicant do not fall under section 171 of the *UNHCR Handbook*. It is therefore speculative that the Applicant would even be able to use this defense at all.

Evidence of similarly situated individuals

[117] The Applicant's arguments regarding the evidence of similarly situated people erroneously assumes that punishment for evading military service must be considered persecution for political

opinion in all cases where the refusal to perform military duties is motivated by political opinion. However, the Federal Court of Appeal made clear in *Zolfagharkhani*, above, at paragraph 15, that "… a claimant's political motivation cannot alone govern any decision as to refugee status."

[118] The Respondent submits that it was open to the RPD to find that the Applicant had not proven on a balance of probabilities that deserters with public profiles had received disproportionately severe sentences. Some of the Applicant's own evidence said that "prosecutor's discretion varies from area to area and no one matter is taken into consideration in prosecution of these matters." In *Vassey*, the Court reiterated that the onus is on the applicant to present evidence to prove this issue on a balance of probabilities. The Respondent submits that the Applicant has not done so.

The Applicant's Reply

[119] The Respondent asserts that the Applicant's argument that the U.S. military justice system must meet international standards is "untenable," yet does not reconcile this statement with the wording of section 97 of the Act, nor with the authorities set out by the Applicant. Instead, the Respondent asserts that *Satiacum* sets out a test of "extraordinary circumstances" to rebut the presumption of state protection.

[120] The Applicant submits that the Respondent has misstated the test that applies to state protection. The applicable test is the one set out in *Ward*, above. This test does not include a requirement that a claimant establish "extraordinary circumstances," regardless of their country of origin. The comments of the Federal Court of Appeal in *Satiacum* went to the nature of the evidence

that might be necessary to impeach a tribunal system in a developed democracy like the United States. This is not the legal test for rebutting the presumption of state protection.

[121] The Respondents claims that mechanisms such as JAG officers and protections against unlawful command influence are examples of self-corrective mechanisms which make the U.S. military justice system fair. The Applicant points out that similar arguments were put forward in *Vassey*, and were rejected. It was not disputed that these mechanisms exist; what was disputed is whether they make the system fair.

[122] Notwithstanding the differences in opinion as to how to measure fairness, it is uncontested that when standards that are internationally recognized as being basic features of a tribunal system are used as the measuring stick, the U.S. court-martial system falls short (*Vassey*).

[123] The Respondent claims that the mere existence of self-correcting mechanisms is enough to demonstrate the adequacy of the state protection. However, the Respondent does not provide information as to how these checks and balances actually provide adequate protection in operation and what protection is expected in an "adequate" system. The *Satiacum* decision actually supports the Applicant's argument that a system which is not independent and impartial cannot provide adequate state protection. The Court of Appeal said in *Satiacum* that:

> In the absence of exceptional circumstances established by the claimant, it seems to me that in a Convention refugee hearing, as in an extradition hearing, Canadian tribunals have to assume a fair and independent judicial process in the foreign country. In the case of a non-democratic State, contrary evidence might be readily forthcoming, but in relation to a democracy like the United States contrary evidence might have to go to the extent of substantially impeaching, for example, the jury selection process in the relevant part of the country, or the independence or fair-mindedness of the judiciary itself. [Footnote: In *U.S.A. v. Cotroni*, decided June 8, 1989, the Supreme Court of Canada allowed extradition to the United

> States for trial of Canadian citizens arrested in Canada for alleged offences which took place in Canada and for which they could have been tried in Canada. LaForest J. for the majority held that "the effective prosecution and the suppression of crime is a social objective of a pressing and substantial nature" (at p. 29) and that "It is not for this Court to pass upon the validity of the laws of other countries" (at p. 31). Wilson J. in dissent appeared to make an exception of the United States: "The system of justice in the United States, which happens to be the requesting state in this case, may be very similar to our own and the proceedings there may closely parallel the proceedings here. But this will not necessarily be so in the case of all requesting states" (at p. 14). A similar comment was made by Sopinka J. in dissent: "I cannot agree with this characterization when viewed against the spectrum of nations to which a citizen can be extradited. Our citizens may be extradited not only to the United States but to countries where systems are radically different and whose laws provide none of the traditional protections for persons charged."

[124] The Applicant points out that the decision under review in *Vassey* was very similar, and the Court found it to be unreasonable on this point.

[125] Furthermore, the Applicant submits that the standards for fairness that are enshrined in the Canadian Charter are not exceptional rights, but are basic rights from which any deviation requires express justification. The Supreme Court of Canada held in *Généreux* that it was not in the interests of a free and democratic society to deny members of the military the right to a hearing before an independent and impartial tribunal.

[126] In regards to jury selection, in *R. v J.S.K.T.*, [2008] CMAJ No 3 [*J.S.K.T.*], the Court-Martial Appeal Court of Canada said at paragraphs 95 and 103-105:

> Thus, the question becomes, as a result of section 165.14 and subsection 165.19(1) of the NDA, the following: does the fact of giving the choice of the trier of facts to the prosecution unjustifiably violate or compromise the accused's constitutional right to full answer and defence and to control that defence which is required by the principles of fundamental justice? We think so for the reasons

given by this Court in its unanimous opinion in *Nystrom*, at paragraphs 71 to 86. We have summarized them and reproduced the paragraphs in the present reasons under the heading: The obiter dictum of this Court in *R. v. Nystrom*: see paragraphs 59 to 62.

[…]

For the reasons given, we believe that section 165.14, subsection 165.19(1) and article 111.02(1) of the QR&Os violate section 7 and paragraph 11d) of the Charter. In our view, to give the prosecution, in the military justice system, the right to choose the trier of facts before whom the trial of a person charged with serious Criminal Code offences will be held, as do section 165.14 and subsection 165.19(1) of the NDA, is to deprive that person, in violation of the principles of fundamental justice, of the constitutional protection given to offenders in the criminal process to ensure the fairness of their trial. Unless a justification can be provided under section 1 of the Charter, these provisions violate section 7 and paragraph 11d) of the Charter and are of no force and no effect.

Counsel for the respondent has conceded that if the above provisions are found to be unconstitutional by this Court, they cannot be saved under section 1 of the Charter. This approach is consistent with the finding of retired Chief Justice Lamer in his Report that he has "been unable to find a military justification for disallowing an accused charged with a serious offence the opportunity to choose between a military judge alone and a military judge and panel, other than expediency". He went on to add "When it comes to a choice between expediency on the one hand and the safety of the verdict and fairness to the accused on the other, the factors favouring the accused must prevail".

As Lamer J. once said in *R. v. Brouillard*, [1985] 1 S.C.R. 39, at paragraph 24, where fairness of the process appeared to have been compromised by the judge's numerous interventions when the accused testified, it should be borne in mind that at the end of the day the accused is the only one who may be leaving the court in handcuffs. At the end of a trial before a court martial, it is also the accused, not the prosecutor, who will be escorted to his or her harsh conditions of detention or imprisonment.

[127] When discussing whether members of the military should be afforded different rights under the law merely because of their military status or rank, the Court in *J.S.K.T.* had the following to say at paragraph 113:

> At the choice of the prosecution, are junior officers in the Canadian Forces less deserving of protection with a trial by a panel of three members, or no panel at all before a judge alone, than senior officers with a panel of five senior ranking officers? Should junior officers, at the choice of the prosecution, be possibly subjected to less equality before and under the law than more senior officers? It is disturbing that in 2008 these questions can still be asked and that these possibilities still exist under the NDA when our Charter promoting equality before and under the law was enacted in 1982 and, on this particular point, came into effect in 1985, nothing less than 23 years ago.

[128] The language used by the Court in the above mentioned passages speaks of fundamental justice, not exceptional protections. The Applicant submits that the threshold for "adequate" protection cannot fall so low as to permit a justice system to fail basic fairness standards.

[129] The Applicant also submits that there was evidence before the RPD of routine breaches of the Geneva Convention, not isolated incidents. Similar conduct was at issue in *Key*. The Applicant's personal evidence was that these breaches were routine; he did not testify that they were specific incidents. The Applicant reiterates that his many examples of condemned military conduct would substantiate a claim under section 171 of the *UNHCR Handbook*.

[130] The Applicant states that the Court need not determine whether this conduct actually amounted to a breach of the Geneva Convention; what is at issue is the RPD's treatment of the evidence. The RPD did not reference any of the hundreds of pages of documentary evidence detailing the U.S. military's actions.

[131] Regarding the defense of unlawful order, the Applicant agrees that the RPD did understand that this defense is not available when an individual is charged with desertion, but it erroneously determined that the defense of unlawful order in the U.S. would encompass all of the military conduct falling under section 171, when in fact it does not. Section 171 is broader than the U.S. defense of unlawful order. This same error was committed in *Vassey*.

[132] The Respondent asserts that "no functioning military can allow its soldiers to pick and choose the conflicts that they agree with or they would choose to support." However, the Applicant submits that a state protection analysis is not concerned with the effective functioning of the military. The two issues were a) whether the Applicant was associated with conduct falling under section 171 of the *UNHCR Handbook* and b) the Applicant will be punished for refusing to participate in such actions. If the Applicant will be punished for his absence irrespective of his association with condemned military conduct under section 171, he is entitled to international protection from that punishment.

[133] The Applicant says that the Respondent has misunderstood his argument on differential persecution. He is not saying that persecution arises in every situation where a refusal to perform military service is motivated by political opinion. Persecution arises when the individual receives a more severe punishment due to his or her political opinion (*Vassey*). Furthermore, cases such as *Vassey, Hinzman*, and *Walcott* have found that outspoken critics of the U.S. war efforts are singled out for persecution.

The Respondent's Further Memorandum of Argument

[134] The Respondent submits that the Applicant did not make any meaningful efforts to seek state protection before claiming refugee status in Canada. His attempts to transfer or qualify for a noncombatant position do not rise to the level of efforts required of him as a citizen of a highly democratic country like the United States. Furthermore, the Canadian and United Kingdom military justice systems are not the tests for state protection. This is the reason the RPD preferred the affidavit of Prof. Hansen.

[135] The Applicant also did not establish that a recognized international standard exists in regards to military tribunals. Canada cannot impose its constitutional standards on other countries (*Canada v Schmidt*, [1987] 1 SCR 500). The Court has held that valid U.S. laws, such as the Uniform Code of Military Justice (UCMJ), should be given a presumption of validity and neutrality (*Tuck*, above). The onus is on the Applicant to show that these laws are persecutory.

[136] Further, the cases of *Findlay* and *Généreux* do not create a binding standard. *Findlay* dealt with the right to an independent and impartial tribunal under the European Convention of Human Rights, an instrument not binding on the U.S. or Canada. *Généreux* dealt with a system of military justice that lacked many of the safeguards that are in place in the U.S. system, including things such as three-year appointments for judges, the right of selection of judge or jury, provisions preventing a judge from being reprimanded and a separate chain of command for military judges who are senior members of the military.

[137] The Federal Court of Appeal held in *Satiacum*, above, that in the absence of proof to the contrary the RPD must assume a fair trial. It would require "extraordinary" circumstances to

impeach the justice system in the U.S. The RPD did not think the evidence adduced reached this standard; instances of unlawful command influence do not mean the entire military justice system has been impeached.

[138] The Respondent submits that the news articles and affidavits submitted by the Applicant do not establish that deserters with public profiles are specifically targeted; they show that no one factor is taken into consideration in prosecution. This evidence is speculative, and does not establish on a balance of probabilities that military deserters receive higher sentences. In *Vassey*, the Court held that the applicant could present evidence of similarly situated individuals, but he still had to show that all avenues open to him would have resulted in unfair treatment on a balance of probabilities. As stated in *Landry v Canada (Minister of Citizenship and Immigration)*, 2009 FC 594 at paragraph 29:

> The laws of the United States pertaining to desertion are supposedly neutral and general in application. It was not unreasonable for the member to hold that that presumption was not ousted by affidavits from other deserters, or even indications that over time the penalties have become harsher. In 2005, there were more than 4,000 desertions. A handful of affidavits hardly forms the basis for a statistical analysis.

[139] Secondly, the evidence adduced by the Applicant showed that sentences given to the outspoken people ranged from 6 months to 15 months, while sentences for other people ranged from 100 days to 14 months. Contrary to what the Applicant submits, the evidence does not establish that the latter group had a public profile prior to the decision to prosecute, and it is difficult to attribute this alleged difference solely to a public profile.

[140] Further, the circumstances surrounding desertion is not an irrelevant factor for a prosecutor to consider. In *Lowell v Canada (Minister of Citizenship and Immigration)*, 2009 FC 649, the Court said at paragraph 26:

> The fact that there is prosecutorial discretion involved, such that those in the applicant's circumstances may receive a jail term while others may not, does not in itself establish that he will be subject to hardship of the sort that is contemplated in a positive H&C application. The fact is that there is a range of possible sentences to which the applicant may be exposed. As the Officer noted, the evidence indicates that he is not likely to serve more than 15 months and only then after receiving due process.

[141] In addition, the Respondent submits that the RPD properly understood the availability of the defence of unlawful order, and that it is not available for a charge of desertion. However, it stated that other defenses to the physical act of being absent are available, such as in the *Huet-Vaughan* decision. The reason for desertion is also admissible during sentencing. The fact that motive is inadmissible as a defence does not render state protection in the U.S. inadequate. The Respondent also states that the decision in *Key* is of limited assistance as the Court chose not to assess the availability of state protection in that case.

[142] The incidences described by the Applicant do not amount to conduct that falls under the first part of the test for section 171 of the *UNHCR Handbook*. Thus, it is speculative that the unlawful order defence would even apply to these facts. Further, the Respondent submits that section 171 is irrelevant to the Applicant's claim. The issue here is prosecution for desertion, and not any potential charges for refusing to engage in acts that may fall under section 171.

[143] The *Vassey* decision also does not assist the Applicant in the way that he submits. That decision turned on the RPD's failure to provide adequate reasons as to why it determined that

motive was inapplicable to the charge of desertion, it did not opine on the availability of the unlawful command defence under section 171.

ANALYSIS

State Protection – Is the U.S. system of military justice impartial and independent?

[144] In *Vassey*, Justice Scott dealt with a judicial review application that had striking similarities with what is presently before me. The decision-maker was the same, Mr. Vassey was a member of the same unit in the 82nd Airborne Division as the Applicant, and similar evidence was presented by counsel.

[145] I think it is instructive to take a look at how Justice Scott assessed the situation before him at paragraphs 61 to 67 in *Vassey*:

> The Court agrees with the respondent that the findings of the Federal Court of Appeal in *Hinzman* and *Satiacum* above are binding on this Court and were so on the Board, it cannot interpret these cases as overturning the Supreme Court's decision in *Ward* above. The Supreme Court clearly stated in *Ward* that a refugee claimant can rebut the presumption of state protection with evidence of similarly situated individuals let down by the arrangement of state protection.
>
> It was therefore open to the applicant to present evidence of similarly situated individuals showing that the system of military justice in the United States was not a domestic avenue available to him in seeking state protection due to the lack of independence, impartiality or the lack of defences to the charge of desertion. But he also had to show that on a balance of probabilities that all of the avenues that were open to him would have resulted in an unfair treatment because of the US military system of justice. [emphasis added]
>
> The Board, in turn, was under a duty to consider all evidence before it. This duty did not require the Board to summarize all of the evidence in its decision so long as it properly addressed evidence which contradicted its conclusions (see *Cepeda-Gutierrez*

v Canada (Minister of Citizenship and Immigration) (1998), 157 FTR 35 (FCTD); *Florea v Canada (Minister of Employment and Immigration)*, [1993] FCJ No 598 (FCA)(QL)). The duty to assess this evidence increased with the expert nature of the affiants providing it (see *Gunes v Canada (Minister of Citizenship and Immigration)*, 2008 FC 664; *LYB v Canada (Minister of Citizenship and Immigration)*, 2009 FC 462).

The Board's duty to explain itself increases directly with the relevance of the evidence provided.

The evidence presented by the applicant on the independence and impartiality of the court-martial system in the US emanated from several individuals arguably experts in US military law. Mr. Fidel is a Professor of law at Yale University and the President of the National Institute of Military Justice since 1991. Mr. Rehkopf was a Judge Advocate in the US Air Force since 1976 and has been practicing military law for 34 years. Ms. Cohn is a law professor and has published widely on disengagement from the military in the United States.

After summarizing the evidence on for several pages, the Board's analysis of the five affiant's evidence was somewhat limited. The only conclusion drawn by the Board is that while UCI is a problem, it can be raised as a defence. This and the self-correcting mechanism of article 37 demonstrate that state protection is available. The Board did not comment specifically on all the evidence of the affiants which directly stated that these self-correcting mechanisms were ineffective. The Board did not address the findings of the affiants on the jury selection process, the lack of tenure provided to military judges and the inadequacy of appellate judges. Nor did it indicate why it preferred the evidence of Professor Hansen to that of the four other affiants. But nonetheless it concluded, at paragraph 93 of its decision, that: "Effectiveness in state protection is a consideration but I find that, on a balance of probabilities, the evidence does not substantially impeach the US military system." Was this conclusion of the Board reasonable?

As Mr. Justice de Montigny held in *Smith v Canada (Minister of Citizenship and Immigration)*, 2009 FC 1194, also commenting on the Board's assessment of Mr. Rehkopf: "...it was not sufficient to summarize the evidence presented by the applicant. The Board Member should have addressed that evidence and discussed it in his reasons...". Justice de Montigny further held at paragraph 69 that:

> ... "I am of the view that his affidavit was not just a lay opinion which the board could reject without providing reasons for doing so. Mr. Rehkopf obviously had a long experience as a military lawyer and has acted as defense counsel, prosecutor and judge for many years. It was open to the Board, of course, to prefer other evidence to that provided by Mr. Rehkopf."...
>
> The Court finds the Board's lack of analysis of the evidence before it concerning the independence and impartiality of the US court-martial system, as well as the lack of reasons for preferring contrary evidence to that of the applicant to be unreasonable since the documentary evidence ignored by the Board in its reasons goes to the one of the central issues of applicant's claim.

[146] In the present case, the same RPD member makes it clear that he has "had the opportunity to review the decision of the Federal Court in regard to Christopher Marco Vassey, who served in the same unit as the claimant in this matter and was in Afghanistan for some of the same period of time and I have taken it into consideration in analyzing this matter."

[147] With the benefit of the guidance provided by *Vassey*, the RPD then goes about assessing whether the U.S. system of military justice is impartial and independent:

> Is the US system of military justice impartial and independent? It was submitted by the claimant that the US military justice system does not meet the requirements for an independent and impartial tribunal, as set out by the Supreme Court of Canada in the *Généreux* decision. Comparing another country's laws and a system of justice to those in Canada is one aspect in analyzing this issue but it is not the definitive test. The test is whether, on a balance of probabilities, the state protection provided by the country is adequate. I set out the opinions presented in this matter in order to assess the submissions of the claimant.
>
> The Minister tendered an article and two affidavits from Professor Victor Hansen. The claimant provided two affidavits from Donald Rehkopf Jr., as well as an affidavit from Professor Eugene R. Fidel

> and an affidavit from Professor Marjorie Cohn and Kathleen Gilberd on this issue.
>
> All these individuals basically agreed that the military commander in the USA has a central role in the military justice system. The commander often initiates investigations into alleged misconduct. The commander responsible for the military suspect will determine what charges, if any, will be brought against the service member. The commander determines what level of court-martial (summary court-martial, special court-martial, or general court-martial) will adjudicate the case. The commander also selects the military panel (jurors) who will hear the case.
>
> In the *Généreux* case, the Supreme Court of Canada found that the structure and constitution of the General Court Martial, as it existed at that time, did not comply with the requirements of s. 11(d) of the *Charter of Rights and Freedoms*. The essential conditions of judicial independence were not met. The Court reviewed three essential conditions.

[148] The RPD then reviews and assesses the evidence on point. In general, the conflicts in the evidence are summarized by the RPD at paragraphs 78-79 of the Decision as follows:

> In their affidavits, Donald Rehkopf Jr. and Professor Eugene R. Fidel, among other matters, analyze how the US military justice system compares with the three areas of essential conditions of judicial independence set out in the *Généreux* case. They conclude that the US military justice system does not meet most of these conditions. The affidavit of Marjorie Cohn and Kathleen Gilberd also states that the power of the military commander in the USA military justice system is a problem for providing a fair trial for the accused.
>
> In his affidavit, Professor Hansen acknowledges the role of the military commander in the US system but he states that there are sufficient checks and balances within the system to prevent a person receiving an unfair disposition in their case. He states that the military justice is one of the primary tools a military commander has to maintain discipline within the ranks. He maintains that there are statutory protections against Unlawful Command Influence (UCI). He states that the most important protection against UCI is Article 37 of the *Unified Code of Military Justice* (UCMJ). He says that this article specifically precludes any commander from censoring, reprimanding or admonishing any military member, military judge, or counsel with respect to the findings or sentence of a court or with

> respect to the functions of the court. Article 37(a) also proscribes anyone from attempting to exercise unauthorized influence on any member of the military court or tribunal. Article 37(b) prevents anyone from commenting on or considering a person's performance of duty as a member of a court-martial in the evaluation and efficiency reports or when considering that person's suitability for promotion, assignment, chance for or retention within the military. He also states that, in addition to this statutory protection against UCI, military appellate courts have willingly entertained allegations of UCI in the appellate review process.

[149] The RPD then summarizes the evidence on both sides of the argument and the member comes to the conclusion that he prefers Prof. Hansen's evidence. Donald Rehkopf Jr., Prof. Fidel, Prof. Cohn and Kathleen Gilberd are all at odds with Prof. Hansen over whether the U.S. military justice system is fair. They say it does not accord with the principles set out by the Supreme Court of Canada in *Généreux*. As Donald Rehkopf Jr. puts it, Prof. Hansen's claims of significant checks and balances may look good on paper, but the reality of the U.S. court-martial system is that UCI continues to be a significant problem.

[150] The RPD then summarizes, at paragraphs 107-109, the arguments on both sides and comes to its conclusions on this issue:

> The test for determining whether state protection is available in reviewing a country's judicial system is not that it conforms to the Canadian system, or any other country's system, but whether the protection afforded by the system is adequate.
>
> I prefer Professor Hansen's opinion to the others. He states that he has read Professor Fidel's affidavit, and he has a great respect for him, however, this is an area where they disagree. Professor Hansen acknowledges the changes that occurred in Canada and the UK, but he does not believe that the US system has to change just because the other countries have changed their systems. He analyzed the various factors in the US system, as outlined above, and finds that the system is still fair. The fact that the foreign system of justice does not comply with the Canadian system or the systems of other countries does not mean that the protection provided by that system is

> inadequate. For example, the criminal justice system in some countries is based on the inquisitorial model and not on an adversarial model. That does not mean that the system is inadequate, simply because it does not conform to the Canadian model or any other international model.
>
> I find that the US military justice system would provide adequate protection for the claimant.

[151] The logic is difficult to follow here. Mr. Rehkopf and Prof. Fidel, supported by Prof. Cohn and Kathleen Gilberd, tell us, essentially, that the U.S. military justice system is unfair because it does not satisfy the principles of fairness set out by the Supreme Court of Canada in *Généreux*. Prof. Hansen says that there are checks and balances that render it fair, but he does not say that it complies with *Généreux*. So it is not possible to understand what Prof. Hansen means by fairness or what principles he is using to measure fairness. Prof. Hansen is clear that the U.S. system is not like the Canadian or the U.K. systems, but he does not believe that the U.S. system has to change just because other countries have changed their system. He finds that the U.S. system is still fair, but it is not clear what he means by fairness and what standards he is using to measure fairness. For example, can a system that does not conform with *Généreux* principles be fair? The RPD does not answer this question. It says that

> The test for determining whether state protection is available in reviewing a country's judicial system is not that it conforms to the Canadian system, or any other country's system, but whether the protection afforded by the system is adequate.

[152] Obviously, fairness must have something to do with adequacy, or the RPD would not need to embark upon this inquiry. So the logic is that the U.S. system is adequate because Prof. Hansen says that, even though it does not conform with Canada's system and the *Généreux* principles, it is still fair. The other witnesses say it is inadequate because it is unfair, and it is unfair because it does

not conform to *Généreux* principles. Relying upon Prof. Hansen, the RPD says that the U.S. system is adequate because it is still fair, and it is fair because…? We just do not know, unless the RPD is saying that it is fair because Prof. Hansen thinks it is fair, and that is good enough for the RPD.

[153] It seems to me that if the RPD is going to reject using Canadian and international standards as a guide to what is adequate when it comes to the fairness of a justice system, then it needs to make it very clear what standards it is using to assess fairness and adequacy.

[154] It is noteworthy that neither Prof. Hansen or the RPD dispute that the U.S. military justice system does not conform to Canadian or internationally recognized fairness standards. The evidence before the RPD is that it clearly does not comply with such standards. The RPD's position is that failure to comply with such standards does not render state protection inadequate. In my view, this results in two reviewable errors. First of all, it means the Decision lacks justification, transparency and intelligibility because it is not possible to ascertain what the RPD means by fairness in the U.S. system or why that fairness equates with adequacy when it obviously falls short of Canadian and international standards. In addition, I do not think the Decision can be said to fall within a range of possible, acceptable outcomes which are defensible in respect of the facts and law because, as the Applicant states, it is an error in law to conclude that a system which fails to meet basic fairness standards that are internationally recognized to be fundamental to any tribunal system can, nevertheless, provide adequate state protection.

[155] I also concur with and adopt as part of my reasons, the Applicant's argument that

> The legislature has expressly indicated that decisions made under the *Act* — which would include assessments of state protection under sections 96 and 97 — must be consistent with the *Charter*, and must comply with Canada's obligations under international human rights instruments. Section 3 of the *Act* provides, in part, the following:

> (3) Application — This Act is to be construed and applied in a manner that
>
> (f) complies with international human rights instruments to which Canada is signatory

While section 3(3)(f) of the *IRPA* does not incorporate into Canadian law "international human rights instruments to which Canada is a signatory", it does direct "that the *Act* must be construed and applied in a manner that complies with" these instruments.

It is submitted that an interpretation of "adequate" state protection, wherein "adequate" is permitted to fall *below* standards set out in international human rights instruments to which Canada is a signatory, is *not* an interpretation that would comply with these instruments. Therefore, the Board's conclusion that a system that fails to meet the standards is nonetheless adequate, is unreasonable and contrary to section 3(3)(f) of the *Act*.

[156] I also agree with the Applicant that the *UNHCR Handbook* itself makes it clear that in determining whether prosecution amounts to persecution "national authorities may frequently have to take decisions by using their own national legislation as a yardstick" and that "recourse may usefully be had to the principles set out in the various international instruments relating to human rights, in particular, the International Covenants on Human Rights, which contain binding commitments for the state's parties and are instruments to which many state's parties to the 1951 Convention have acceded." See UNHCR, chapter 2(d)(60). In the present case, the RPD has clearly disregarded these guidelines and principles.

[157] I further agree with the Applicant that the RPD was unreasonable in preferring Prof. Hansen's position, given that he provides no acceptable standard of fairness against which to measure adequacy, and merely thinks that the Supreme Court of Canada and the international community are wrong about what is required of a system to ensure basic fairness. I agree that there

is no problem with the U.S. system merely because it is different from Canada's; the problem is that it fails to comply with basic fairness requirements found in Canadian (*Généreux*) and international law.

[158] Prof. Fidel, on the other hand, gives a clear picture of the problem and the yardstick he is using to measure fairness and adequacy:

> [9] I have been asked to provide an affidavit that discusses structural and procedural aspects of the United States military justice system. In particular, I have been asked to address the independence and impartiality of that system, with particular reference to the independence of military justices, the selection of court-martial members, and the question of Unlawful Command Influence (UCI). […]
>
> [11] My experience as summarized above qualifies me to provide expert opinion evidence on these topics. I have been permitted to testify as an expert, either live or by affidavit, in several federal and state courts in the United States concerning issues of military law. […]
>
> [14] The independence of military judges in the United States is insufficiently protected and would not satisfy the test set out in *Généreux*. […]
>
> [24] Given the arrangements described in the preceding paragraphs, which sharply contrasted with the statutory five-year terms afforded by the *National Defense Act*, S.C. 1998, c. 35, s. 42, United States military judges and appellate military judges do not satisfy the security of tenure or criterion set forth in *Généreux* or prevailing international norms of military judicial independence. […]
>
> [26] The third *Généreux* criterion — institutional independence — also reveals a material disparity between the two countries' systems. In the United States, military judges are appointed by the JAG […]. To the extent that the JAGs ultimately report to the senior uniformed commander of their service branch, this arrangement does not provide institutional independence from the chain of command. […]
>
> [28] The selection process for court-martial members is structurally inadequate to ensure full independence and impartiality.

> [29] Under the UCMJ, the role of jurors is played by the members. There selected by the convening authority ("CA") […]. The selection is often influenced by the CA's legal advisor (known as the staff (or command) judge advocate), but ultimately the decision must be the CA's. The CA is not required to be, and typically is not, an attorney, much less a certified military judge. He or she is also responsible for deciding what charges are prosecuted and to which level of court-martial a case is referred, and for reviewing and approving or disapproving the proceedings after the trial has been conducted.
>
> [30] Far from being independent of command, the member-selection process is intrinsically a function of command. The United States arrangement may be traced back to the British Articles of War. It has been criticized repeatedly over the years.
>
> [31] Quite obviously, the United States system for the detail of court-martial members by the CA would not pass muster in light of the first aspect of the *Généreux* criterion. Nor would it satisfy the requirements of the European Convention on Human Rights as articulated in Findlay v United Kingdom, [1997] ECHR 8, 24 EHRR 221. […]
>
> [35] For the foregoing reasons, and without prejudice to the improvements it has experienced over the last half-century, it is doubtful that the United States military justice system can be sustained if it were tested against contemporary Canadian or international norms. [Emphasis added]

[159] In the end, I do not think the RPD has found a way out of the mistakes it made in *Vassey*. It has simply, in the face of a plethora of principled evidence to the contrary, grasped at the straw offered by Prof. Hansen which, in my view, offered nothing more than a personal opinion unconnected to any coherent principle of fairness and adequacy and which attempts to defend a U.S. military justice system that, on the evidence before me and the RPD, appears to be outdated and sadly at odds with Canadian and international norms.

Differential punishment

[160] In *Vassey*, at paragraphs 76 to 80, Justice Scott provided the following guidance to the RPD on disproportionate prosecution:

> The applicant argued before the (*sic*) Board that there is no state protection for the discriminatory application of prosecutorial discretion. The applicant presented evidence before the Board indicating that while the large part of deserters are administratively discharged, those who speak out publicly against the war in Iraq were selected to be court-martialled and prosecuted for desertion. This Court recognized the disproportionate prosecution for desertion of those who have spoken out against the wars in Iraq and Afghanistan.
>
> For example, in *Rivera v Canada (Minister of Citizenship and Immigration)*, 2009 FC 814 Mr. Justice Russell reviewed a decision of the Board concerning the use of prosecutorial discretion to target individuals more severely through the court-martial process who have spoken out against the war. At paragraph 101, Justice Russell concluded of the Board's decision that:
>
> > ...the whole state protection analysis needs to be reconsidered in the light of the stated risk, and supporting evidence, that the U.S. authorities will not neutrally apply a law of general application, but will target the Principal Applicant for prosecution and punishment solely because of her political opinion in a context where other deserters, who have not spoken out against the war in Iraq, have been dealt with by way of administrative discharge.
>
> The Board in the case at bar largely ignored the evidence presented by the applicant about similarly situated individuals and prosecutorial discretion. The Board concluded that using prosecutorial discretion is a benefit to the justice system and is appropriate where there are aggravating factors.
>
> Paragraph 169 of the UNCHR handbook indicates that:
>
> > 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.
>
> As such, the UNHCR handbook, as well as the jurisprudence above, hold that where prosecutorial discretion is used to inflict a disproportionately severe punishment on a deserter because of his or her political opinion, this may amount to persecution.

[161] As in *Vassey*, the Applicant in the present case asserted that he would be disproportionately punished if sent back to the US because of his publicly expressed political opinions against the wars in Iraq and Afghanistan, and he relied upon section 169 of the *UNHCR Handbook*.

[162] Essentially, the RPD's answer to this issue is found in paragraphs 112-114 of the Decision:

> In regard to prosecution, prosecutors in a criminal justice system are given discretion as to the individuals who should be charged and the crimes with which they should be charged. In reviewing prosecutorial discretion the Supreme Court of Canada stated that:
>
> > Discretion is an essential feature of the criminal justice system. A system that attempted to eliminate discretion would be unworkably complex and rigid. Police necessarily exercise discretion in deciding when to lay charges, to arrest and to conduct incidental searches, as prosecutors do in deciding whether or not to withdraw a charge, enter a stay, consent to an adjournment, proceed by way of an indictment or summary conviction, launch an appeal and so on. It is accepted that this discretion benefits the justice system. Prosecutors are not obliged to provide reasons for their decisions.
>
> I accept the evidence of Bridget Wison and a further affidavit of Donald G. Rehkopf stating that Unlawful Command Influence cannot be used as a defense against alleged differential prosecution. However, in deciding whether the presumption of state prosecution has been rebutted because of differential prosecution, the standard of proof is on a balance of probabilities. The affidavits and statements provided by various individuals who have been court-martiled (*sic*)

> for desertion offenses as well as media reports and expert reports or affidavits are referred to in submissions about persecution based on political opinion and dealt with later in this decision. The fact that there may not be a formal mechanism to review prosecutorial discretion in the US military justice system does not lead to a conclusion, on a balance of probabilities, that there is inadequate state protection. As pointed out in the above Supreme Court of Canada case, the discretion of the prosecution is part of the criminal justice system.

[163] It seems to me that this entirely misses the point of the Applicant's argument. His concern was not the use of discretion *per se*, but the fact that the U.S. military justice system has no mechanism to protect someone when prosecutorial discretion is exercised in a biased and inappropriate way because of their political opinions. The RPD appears to acknowledge in paragraph 114 of the Decision that "there may not be a formal mechanism to review prosecutorial discretion in the U.S. military justice system…." Having conceded this fact, the RPD does not address how the Applicant would be protected against the misuse of that discretion, or how a criminal justice system can be adequate if there is no review of prosecutorial discretion. In this regard, the RPD has not learned the lessons of *Vassey*.

[164] The RPD also reviews some of the evidence put forward by the Applicant regarding similarly situated persons who received a differential punishment for speaking out against the wars in Iraq and Afghanistan. The RPD's conclusion on this point, at paragraph 162 of the Decision, is as follows:

> I cannot find that, on a balance of probabilities, the differences in sentences for absence offenses between the individuals who spoke out against the wars and those who did not, are disproportionately severe. I cannot find that on a balance of probabilities, that there is inadequate state protection based on differential prosecution and/or punishment. The claimant has not rebutted the presumption of state protection. Again, on the same evidence, if I am incorrect in my decision on state protection, I find that on the same evidence, the

> claimant does not come within section 169 of the *UNHCR Handbook* since any sentence he would receive for an absence offense would not be disproportionately severe.

[165] In order to reach this conclusion, the RPD, at paragraphs 155-156 of the Decision, made a brief comparison of sentences received by those who did speak out and persons who the RPD finds did not speak out:

> Camilo Mejia was sentenced to 12 months confinement, and his actual prison time was 9 months. Stephen Funk received a sentence of 6 months confinement. Kevin Benderman was sentenced to 15 months confinement and served 13 months. Agustin Aguayo served 7 months. Ivan Brobeck was sentenced to 8 months in a Marine prison. James Burmeister was sentenced to 9 months imprisonment and he served 3 months and 10 days. Robin Long was sentenced to 15 months and he served 12 months. Cliff Cornell was sentenced to one year, but that was later reduced to 11 months.
>
> Other sentences submitted by the Minister that were given to "Iraq war resisters" are Abdullah William Webster, 14 months imprisonment and 11 months served. Ryan Jackson, 100 days imprisonment. Tony Anderson, 14 months imprisonment. There is no persuasive evidence that these individuals publicly voiced any objections to the war.

[166] As the Applicant points out, there was cogent evidence before the RPD that directly contradicted these findings:

a. There was clear evidence that Ryan Jackson and Tony Anderson were vocal opponents of the wars in Iraq and Afghanistan. There was information about the court-martial of Tony Anderson in a public article. See Applicant's Record pp. 521-524, 636-647;

b. There is the *Wikipedia* chart referred to by the RPD, which clearly states that Mr. Anderson, Mr. Jackson and Abdullah William Webster were publicly associated with objections to the wars;

c. There was the evidence of Prof. Cohn and Ms. Gilberd that deserters are more likely to be selected for prosecution if they publicly express their opposition to the war in Iraq;

d. There was also the statement from attorney Eric Seitz that even sincere conscientious objectors against the wars in Iraq and Afghanistan have been "subjected to severe punishments, including lengthy periods of incarceration."

[167] This information is directly contrary to the RPD's findings, and it should have been referenced and dealt with. It was either overlooked or ignored. Either way, it renders the RPD's conclusions on differential punishment unreasonable. Once again, the lessons of *Vassey* appeared to have been ignored by the RPD.

Section 171 of the *UNHCR Handbook*

[168] As an alternative to its adequate state protection finding, the RPD found that the "military actions the claimant objected to, do not come within sections 169 and 171 of the *UNHCR Handbook*."

[169] As regards section 171, the RPD concludes, at paragraphs 145-148 of the Decision, as follows:

> The actions of various officers and other individuals may have been isolated incidents but as in the Abu Ghraib matter there is no persuasive evidence that any acts in Afghanistan that would come within Section 171 of the *UNHCR Handbook* were condoned by the USA or were systematic or that the USA as a matter of policy or practice is indifferent to alleged violations of international human rights law in Afghanistan.
>
> I find that the claimant has failed to establish that he has been associated with or been complicit in military action, condemned by the international community as contrary to basic rules of human conduct. He has not shown that the USA has, either as a matter of deliberate policy or official indifference, required or allowed its combatants to engage in widespread actions in violation of humanitarian law.
>
> I cannot find that, on a balance of probabilities, that the United States would not allow the claimant to raise in his defense, for refusal to obey an order, that the matter fell within Section 171 of the *UNHCR Handbook*, as it would be a crime, as outlined in the Huet-Vaughn case.
>
> I find that the claimant has not rebutted the presumption of state protection on this basis and if I am incorrect in that conclusion, I cannot find, on the same evidence, that, on a balance of probabilities, the United States as a matter of deliberate policy or official indifference, required or allowed its combatants to engage in widespread actions in violation of humanitarian law that would bring the claimant within Section 171 of the *UNHCR Handbook*.

[170] One of the fundamental problems with the RPD's approach on this issue is that it assesses the Applicant's personal experiences as isolated incidents that were not condoned by the USA and were not systemic, or a matter of policy, while completely ignoring the objective documentary evidence that confirms that the opposite is true.

[171] The Applicant submitted voluminous documentary evidence from credible, third-party sources such as Amnesty International that discuss routine and authorized military practices in Iraq and Afghanistan by the U.S. Army that describe conduct falling under section 171, and which

suggest that the U.S. has not complied with its international obligations in this regard. The RPD simply ignores this evidence.

[172] Furthermore, the Applicant's personal testimony was that these were routine practices by the U.S. Army. Yet the RPD found that these were isolated occurrences, without any explanation as to why it rejected the Applicant's evidence on this point.

[173] The RPD also appears to have misunderstood the law regarding the defenses available against a desertion charge in the U.S. military:

> I cannot find that, on a balance of probabilities, that the United States would not allow the claimant to raise in his defense, for refusal to obey an order, that the matter fell within Section 171 of the *UNHCR Handbook*, as it would be a crime, as outlined in the Huet-Vaughn case.

[174] This issue was dealt with in *Vassey*, at paragraphs 68, 69, and 74, which the RPD in this case, claims to have reviewed and taken into account.

[175] The issue was also dealt with by Justice Barnes in *Key*, at paragraphs 29 and 30.

[176] In its reasons, the RPD appears to agree with the Applicant that he would not be able to put forward a defense under section 171 of the *UNHCR Handbook* against a charge of desertion. As *Vassey* teaches, this state of the law of the U.S. "goes directly to the availability of state protection." Yet the RPD concludes that the Applicant has failed to rebut the presumption of adequate state protection.

[177] The Applicant had argued – as acknowledged in paragraph 134 of the Decision – that if he was given an unlawful order, he would only be able to submit a defense if he had been ordered to commit a crime or a war crime, and not to conduct one that falls below this threshold, but comes within section 171 of the *UNHCR Handbook*. In paragraph 147 of the Decision the RPD appears to reject this position.

[178] Given the teaching in *Vassey*, at paragraph 74, this finding, and the state protection analysis based upon it seems unreasonable to me. The RPD essentially agreed with the facts that the Applicant put forward, but then opted to ignore what the Court had to say on the issue in *Vassey*.

[179] The Respondent has argued that the motive for desertion can be brought up in sentencing and so it will not undermine state protection in the way suggested by the Applicant. However, this was not a part of the RPD's analysis of the issue, so it cannot now be used to defend the Decision.

Conclusions

[180] For the reasons given above, I have to conclude that the Decision is unreasonable and must be returned for reconsideration.

[181] Both parties agree that there is no question for certification and the Court concurs.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The application is allowed. The decision is quashed and the matter is returned for reconsideration by a differently constituted RPD.
2. There is no question for certification.

"James Russell"
Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	IMM-5069-12
STYLE OF CAUSE:	**JULES GUINILING TINDUNGAN**
	- and -
	THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	Toronto, ON
DATE OF HEARING:	January 8, 2013
REASONS FOR JUDGMENT AND JUDGMENT:	HON. MR. JUSTICE RUSSELL
DATED:	February 1, 2013

APPEARANCES:

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