Federal Court  Cour fédérale

**Date: 20110405**

**Dockets: IMM-5527-08**
**IMM-5528-08**

**Citation: 2011 FC 415**

**Ottawa, Ontario, April 5, 2011**

**PRESENT: The Honourable Mr. Justice de Montigny**

**BETWEEN:**

**DEAN WILLIAM WALCOTT**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION**

**Respondent**

## REASONS FOR JUDGMENT AND JUDGMENT

[1] These are two different applications for judicial review made by the same Applicant with regard to two decisions made by PRRA Officer J. Zucarelli, both dated November 3, 2008. In the first decision, the Officer rejected the Applicant's application for Pre-Removal Risk Assessment ("PRRA"). In the second decision, the Officer denied the Applicant's request to have his application for permanent residence processed from within Canada on humanitarian and compassionate grounds ("H&C").

[2] These two applications for judicial review raise the same facts, and the assessment of the risk/hardship that the Applicant would experience if returned to the United States is based on the same arguments. While these applications were not consolidated under Rule 105 of the *Federal Courts Rules* (SOR/98-106), they were scheduled for hearing on the same day and were argued together. Accordingly, these reasons will address both applications and shall be placed in each of the files.

**1. Facts**

[3] The Applicant is a 28-year-old male. He is a citizen of the United States and a member of the U.S. Marine Corps. He voluntarily enlisted in the Marine Corps on August 21, 2000 and remained in the military until 2006. He completed two tours of duty in Iraq and Kuwait. In November 2004, he was deployed to Stuttgart, Germany, where he assisted wounded personnel in attending appointments, taking medication and other personal chores. These experiences led him to develop moral and political objections to the war in Iraq and the conduct of the U.S. military in conflict. They also caused him to develop post-traumatic stress disorder (PTSD). He was eventually posted to a non-deployable position in the U.S., training other soldiers; at this point in time, he determined that he could not in good conscience continue doing such training.

[4] After researching the possibility of seeking a discharge from the army and consulting approximately 20 lawyers, he went absent from his unit without authorization. He came to Canada and claimed refugee status in December 2006. His refugee claim was denied and he was not granted leave for judicial review. He then made PRRA and H&C applications, which were refused.

[5] In support of his PRRA application, the Applicant submitted that he would experience persecution and cruel and unusual treatment if returned to the U.S., because of his status as a public objector to the Iraq war who has been absent from his unit since December 2006.

[6] For his H&C application, he also claimed that numerous negative legal, physical, psychological and financial ramifications would stem from this status upon return to the U.S. and would amount to undue hardship. In particular, he asserted that he would be charged with unauthorized absence, or desertion, and subjected to a court-martial proceeding; he does not believe that he will receive a fair trial. He also states that he will receive disproportionately harsh non-judicial punishment because of his stance opposing the war in Iraq.

## 2. The impugned decisions

### - The PRRA decision

[7] The Officer first summarized the Refugee Protection Division (RPD) decision, which concluded that the Applicant had made insufficient attempts to seek protection in the U.S.A. before coming to Canada. She explained that the RPD was not satisfied that he would indeed face the dangers he claimed to risk if he is returned home, since his desertion would have been, in all probability, dealt with through administrative means and also because adequate legal recourse and due process was available to the Applicant in his country.

[8] The Officer then critiqued the Applicant's PRRA application for its resemblance to a re-argument of the same submissions he had made at the RPD stage, and emphasized that the PRRA is not meant to be a rehearing of the refugee claim hearing.

[9] She then explored the evidence pertaining to the judicial punishment that the Applicant would likely face if returned. First, she noted that it was more likely that he would be reprimanded only administratively, as determined by the Federal Court of Appeal in *Hinzman v Canada (Minister of Citizenship and Immigration)*, 2007 FCA 171. Commenting on the affidavits and letters from U.S. military personnel who believe that they were treated differently and subjected to harsher treatment because of their public opposition to the war in Iraq, she stated the following:

> These submissions demonstrate that these individuals were convicted of various offences, including: unauthorized absence, desertion and missing movement. They received prison sentences ranging from 6 to 15 months, demotions, forfeiture of pay, fines, and bad conduct discharges. I accept that these documents recount first-hand experiences for certain U.S. military personnel, and that the U.S. military does, in some circumstances, prosecute personnel for being AWOL (absent without leave), for desertion, and form missing movement. However, these documents also demonstrate that where military personnel were charged with an offence, they were afforded due process in the form of a court-martial proceeding. I find that these affidavits and letters do not support that the applicant would be unable to access state protection in the United States or to receive due process in a military and/or civilian court system in the United States.

[10] She also found that the possibility of persecution under a law of general application is not, in and of itself, sufficient evidence that an applicant faces persecution or harm under sections 96 and 97 of the *Immigration and Refugee Protection Act* ("IRPA"). She wrote the following:

> While the applicant asserts that if he returns to the United States he will suffer persecution and harm as a result of his political opinion and public involvement against the war in Iraq, the evidence before me does not support that punishment under a law of general application amounts to persecution under section 96 of the IRPA or torture, or a risk to life or cruel and unusual treatment or punishment under section 97 of the IRPA. The Federal Court of Appeal in Hinzman stated "*Although the United States, like other countries, has enacted provisions to punish*

> *deserters, it has also established a comprehensive scheme complete with abundant procedural safeguards for administering these provisions justly.*" (Federal Court of Appeal, *Hinzman v. Minister of Citizenship and Immigration*, 2007 FCA 171, 30 April 2007). While sentences imposed for offences in democratic countries vary depending on the individual circumstances of each case, it is recognized that public opinion on these differing outcomes will also vary. The discretion afforded to judges, including in a court-martial proceeding, is an inherent component of an independent judiciary, unless it can be demonstrated that the discretion was applied in violation of the principles of natural justice, or imposed in disregard of accepted international standards. The evidence before me does not support that the sentences imposed on the individuals referred to in the applicant's submissions were disproportionately harsh because of their public opposition to the war in Iraq. Similarly, the evidence before me does not support that the UCMJ will be applied in a disproportionately harsh manner against the applicant as a result of his personal circumstances.

[11] The Applicant had also submitted that he had not applied for conscientious objector status for fear that he would receive reprisals and negative reactions from his colleagues, that his application would not be properly processed, and that he would not meet the criteria for conscientious objector status under U.S. military law. In response, the Officer pointed to the clear guidelines for making such applications, and found that this option of claiming conscientious objector status had been and remained open to the Applicant.

[12] The Officer pointed out the procedural safeguards associated with the court-martialing process, suggesting that the Applicant would be fairly treated if court-martialed. With respect to evidence regarding another Iraq deserter who was badly treated after having been court-martialed, the Officer noted that this man had not pursued all of the avenues of redress available to him.

[13] The Officer then considered non-judicial punishment, which is a discipline system within the U.S. military whereby soldiers are punished for misconduct. The punishments are determined by

military authorities through a system of hearings, but no courts are involved. The Applicant claims that he risks cruel and unusual or arbitrary treatment through this system. After discussing the evidence regarding this kind of punishment, however, the Officer concluded that he faced no significant risk. She also found that the authority of military commanders to impose non-judicial punishment is a law of general application under which the Applicant would be afforded due process should it be inappropriately imposed. Furthermore, the Officer emphasized that if the Applicant was subject to cruel treatment, various avenues of redress would be available to him.

[14] Finally, the Officer discussed the Applicant's post traumatic stress disorder (PTSD), for which he is receiving treatment in Canada. While the Applicant argued that he would not receive comparable treatment in the U.S., the Officer points out that s. 97 of the IRPA aims to protect against persecution, and there is less than a mere possibility that he will be persecuted as a result of his mental health in the U.S.

**- The H&C decision**

[15] The Officer began by setting out the applicable legal test and her jurisdiction as a PRRA Officer making an H&C decision. She then noted that the risk factors cited by the Applicant were the same as those put forward for his refugee claim and his PRRA application, and stated that the risk alleged was to be considered in the context of the Applicant's degree of hardship, and not sections 96 and 97 of the IRPA.

[16] The Officer then set out the risks that the Applicant claimed he would face if returned to the U.S., beginning with the Applicant's account of his experience in the Marine Corps up until he left

without permission and entered Canada in December 2006. Next, she summarized the RPD decision that rejected his claim for refugee status. She then turned to the evidence submitted by the Applicant with respect to the judicial and non-judicial punishment he risked facing upon return to the U.S.

[17] With respect to the judicial punishment, the Officer repeated verbatim the same discussion of judicial punishment that she offered in the PRRA decision. She describes the *Uniform Code of Military Justice* (UCMJ, 64 Stat. 109, 10 U.S.C. Chapter 47) ("UCMJ") with respect to the punishment of deserters, *Hinzman*'s finding that 94% of deserters are dealt with administratively, and the Applicant's submissions of affidavits and letters from U.S. military personnel who believe that they were treated differently and subjected to harsher treatment because of their opposition to the war in Iraq. She found that this evidence did not establish that the Applicant would suffer unusual and undeserved or disproportionate hardship if returned to the U.S.

[18] As she did in the PRRA, the Officer focused on the idea that because the Applicant would be punished for his desertion through laws of general application, he would not be subject to persecution. She also reiterated that even if he were to be sanctioned or prosecuted by the military, he would enjoy access to protective mechanisms and due process.

[19] Regarding the Applicant's failure to apply for conscientious objector status, she repeated verbatim her comments from her PRRA decision, once again dismissing the Applicant's arguments that such status was not available to him. She also repeated her PRRA discussion with respect to the availability of other state protection mechanisms.

[20] The Officer closed her discussion of judicial punishment with the conclusion that the Applicant had not, through the evidence before her, established that hardships relating to his return to the U.S. would constitute unusual and undeserved or disproportionate hardship.

[21] With respect to the non-judicial punishment that the Applicant alleges, the Officer again repeats her PRRA discussion verbatim. She found that the evidence did not support the conclusion that the Applicant would be especially severely punished because he spoke out against the Iraq war. She noted that he would have access to counsel and due process. She again repeated that he would be punished under a law of general application and therefore under a law that is not persecutory.

[22] The Officer then moved into a discussion of "other hardships" that the Applicant would allegedly face if returned to the U.S.: social ostracism, physical violence from those opposed to his political opinions, the inability to vote or work in certain occupations if convicted of desertion or other military offences, the inability to apply for the skilled worker program from outside Canada, and his psychological health problems.

[23] With respect to social ostracism and physical violence, the Officer noted that the law enforcement in the U.S. would be able to protect him from incidents of violence and that seeking this protection would not amount to undue hardship. If he receives emails or other expressions of displeasure with his choices from other Americans, such statements would be consistent with freedom of expression and exposure to them would not constitute undue hardship for the Applicant. Regarding the inability to vote or work in certain occupations if convicted of desertion or other military offences, she found that the laws causing these consequences were laws of general

application and they did not amount to hardship. Furthermore, she found these assertions speculative.

[24] As for the inability to apply under the skilled worker program in Canada, she noted that being absent without leave from the U.S. military is not a crime in Canada and that even if convicted in the U.S., he would not be inadmissible to Canada. However, if he is convicted of desertion (a much more serious offence involving a maximum term of imprisonment for life if committed while on active service or under orders for active service), he would be inadmissible to Canada pursuant to s. 36(1)(b) of the *IRPA*. That being said, she did not find that this potential inadmissibility would constitute unusual and undeserved or disproportionate hardship. She then noted that the H&C process is not intended to circumvent the ability of a democratic country to prosecute one of its citizens, so long as the prosecution is not being imposed in disregard with accepted international standards. She stated that the evidence did not support the view that the UCMJ would be imposed against the Applicant in a manner disregarding such accepted international standards, that criminality is contemplated under section 36 of the *IRPA*, and that the Applicant's failure to exhaust all available avenues of state protection prior to seeking international protection was not beyond the Applicant's control.

[25] With respect to the Applicant's Post Traumatic Stress Disorder (PTSD), the Officer summarized the treatment he received before he left the military and his assertion that if he is returned to the U.S., he would not continue to receive the same quality of treatment that he enjoys in Canada. She found this assertion to be speculative and not supported by the evidence, and noted the well-established mental health resources in the U.S. In an addendum, she considered additional

submissions consisting essentially of consultation notes from the Applicant's psychiatrist reiterating the Applicant's medical problems, the positive effects of the medication he is taking, and his belief that his forced return to the U.S. would exacerbate his problem and reduce the likelihood of getting treatment. Consistently with her prior assessment, the Officer found that there was an adequate mental health treatment system in the U.S. She stressed that the medical notes provided by the Applicant demonstrate that he has received treatment for his diagnosis in his home country in the past, and she repeated that the evidence before her does not support the view that he would be unable to obtain treatment in the U.S.

[26] As regards to the Applicant's establishment in Canada, the Officer observed that he has been here for almost two years. She noted that he was unemployed and receiving social assistance for about 10 months, but is now employed, and has been involved in the community since his arrival. She placed positive consideration on his good civil record in Canada and his employment and volunteer efforts, but she did not find that he had integrated into Canada to the extent that his departure would cause unusual and undeserved or disproportionate hardship. She noted that he should be able to re-establish himself in the U.S., his native country, and doing so would not constitute hardship.

[27] She concluded by observing that although the Applicant does not wish to return to the U.S., and that this wish may be understandable, it is an insufficient basis to allow him to remain in Canada. The evidence that he submitted did not satisfy her that he qualified for H&C status.

**3. Issues**

[28] Counsel for the Applicant raised three separate issues with respect to each of the impugned decisions. Concerning the PRRA, these issues are the following:

a) Did the Officer misconstrue the risks put forward by the Applicant?

b) Did the Officer ignore evidence and deny the Applicant procedural fairness by failing to provide adequate reasons for his decision?

c) Was the Officer's finding that the Applicant had not rebutted the presumption of state protection unreasonable and made without regard to the evidence before her?

The issues relating to the H&C decision, as presented by the Applicant, are as follows:

a) Did the Officer err in law by assessing risk in the Applicant's H&C application under thresholds applicable to ss. 96 and 97 of the *IRPA*, and by failing to assess the hardship the Applicant would face if returned to the U.S.?

b) Did the Officer err in law by failing to have regard to the totality of the evidence before her, including ignoring contradictory evidence and misconstruing evidence?

c) Did the Officer make an unreasonable decision by providing insufficient reasons for his findings, thereby rendering his decision unreasonable?

**4. Analysis**

**- The PRRA decision**

[29] It is settled law that PRRA decisions involve mixed questions of fact and law and, as such, are reviewable under the reasonableness standard. Reasonableness requires consideration of the presence of justification, transparency, and intelligibility in the decision-making process. It is also concerned with whether the decision falls within a range of acceptable outcomes, which are defensible in respect of the facts and law: see *Dunsmuir v New Brunswick*, 2008 SCC 9, at para 47; *Sounitsky v Canada (Minister of Citizenship and Immigration)*, 2008 FC 345, at paras 15-19.

[30] To the extent that the adequacy of the Officer's reasons is called into question, the applicable standard of review must be that of correctness. As the Supreme Court of Canada stated in *Canadian Union of Public Employees (C.U.P.E.) v Ontario (Minister of Labour),* [2003] 1 S.C.R. 539, at para 100, "It is for the courts, not the Minister, to provide the legal answer to procedural fairness questions".

a) Did the Officer misconstrue the risks put forward by the Applicant?

[31] The Applicant submits that the Officer failed to appreciate the nature of the risk that he raised of differential and therefore persecutory punishment on the basis of political opinion and that, as a result, the Officer's finding that state protection existed for the Applicant was unreasonable. In his submissions to the PRRA Officer, the Applicant attempted to distinguish his case from the first decision of the Federal Court of Appeal in *Hinzman* (2007 FCA 171), where it was noted that 94% of deserters are merely administratively discharged (rather than prosecuted). The Applicant submitted new evidence, which was not before the Federal Court of Appeal, indicating that the percentage of military deserters who are not discharged are those who are publicly opposed to the war in Iraq. In other words, the Applicant argued that the very fact that an individual is prosecuted for desertion through a court-martial proceeding in the United States, as opposed to being administratively discharged without prosecution, amounts to the differential application of the UCMJ through the exercise of prosecutorial discretion, based on the individual's political opinion.

[32] A similar argument was made by Mr. Hinzman in his motion to stay the execution of his removal order, and was accurately captured by Mr. Justice Mosley in the endorsement of his order granting the motion:

> There is no suggestion in the material before me that the principal male applicant will be denied due process by the U.S. military justice system. However, the evidence indicates that the laws relating to the punishment of desertion by the U.S. military are applied differently in the exercise of prosecutorial discretion based on the individual deserter's profile as an opponent or critic of the U.S. war effort. The majority of deserters are released from the military without prosecution and receive at most, a dishonourable discharge. A small number who are on public record for their criticisms abroad are prosecuted and jailed.

[33] In other words, it is the very fact that an individual is being prosecuted for desertion through a court-martial proceeding, as opposed to being discharged without prosecution, which amounts in the Applicant's view to the differential application of the UCMJ through the exercise of prosecutorial discretion, based on the individual's political opinion.

[34] The notion that differential prosecution for desertion can be persecutory is not novel. While there is a presumption that compulsory military service is a law of general application, and that punishment for evasion is merely prosecution and not persecution, the *UNHCR Handbook on Procedures and Criteria for Determining Refugee Status* outlines a few exceptions to that presumption, including that set out in section 169:

> A deserter or draft-evader may also be considered a refugee if it can be shown that he would suffer disproportionately severe punishment for the military offence on account of his race, religion, nationality, membership of a particular social group or political opinion.

[35] As the Applicant outlines in his submissions before the Officer, when a law of general application is applied in a manner that is not neutral vis-à-vis the five grounds of Convention refugee status, which includes political opinion, that law is being applied in such a way as to be

persecutory. The key question raised by the Applicant, therefore, was whether he was at risk of differential prosecution because he had publicly politically opposed the war in Iraq.

[36] The Officer, despite accepting that the Applicant would be charged and face prosecution, and despite also accepting that the majority of deserters are merely administratively discharged from the U.S. military without prosecution through court-martial, concluded that the evidence before her does not support that the UCMJ would be applied in a disproportionately harsh manner against the Applicant as a result of his personal circumstances.

[37] If the very fact that the Applicant would be subject to prosecution is a differential and, as a result, persecutory application of the law based on his political opinion, then the existence of procedural safeguards that exist within the hearing process would not alleviate the persecution of being subjected to the proceeding in the first place. The persecution comes from the fact of being prosecuted for his political opinions and not from the manner in which the prosecution is carried out. This was the issue raised by the Applicant. The Officer does not address this issue.

[38] The Officer relies on due process guarantees that would not in fact offer any protection from the Applicant being selected for prosecution based on his political opinions. Access to civilian and/or military counsel, the right to a recorded hearing, the right to present evidence in one's defence, and the right to appeal a court-martial sentence do not protect him from the discriminatory exercise of prosecutorial discretion on the basis of political opinion. The Officer has listed general procedural protections available in the military justice system, but has not discussed protections that would shield him from the risk of the differential prosecution that he will allegedly face.

[39] Similarly, the Officer mistakenly understands the risk of differential punishment put forward by the Applicant as receiving a harsher sentence administered by a military judge. She discusses the discretion afforded to judges to administer differing sentences, and concluded that the evidence does not suggest that sentences imposed on the individuals referred to in the Applicant's submissions were disproportionately harsh because of their public opposition to the war in Iraq. In doing so, the Officer fails to appreciate that the risk of differential and more severe punishment stems from the decision on whether or not to prosecute in the first place.

[40] The fact that the Officer found that the risks raised in the Applicant's PRRA application were the same as those raised before the RPD – where no evidence was adduced regarding the risk of the differential application of the UCMJ against the Applicant because of his publicly expressed political opinions – confirms that the PRRA Officer misconstrued the nature of the risk raised by the Applicant.

[41] Considering that different risks were raised by the Applicant in his PRRA application from those raised before the RPD, and from those raised at the Federal Court of Appeal in *Hinzman*, and considering that substantially different evidence was before the Officer than was before the RPD and before the Federal Court of Appeal in *Hinzman*, the Applicant was entitled to an assessment of the new risks raised in his application and an assessment of the available state protection from the new risks he put forward. This failure of the Officer to properly address the risk of differential punishment is therefore fatal to the Officer's determination that state protection would be available in his country.

[42] It is interesting to note that this Court dealt with a very similar case in *Rivera v Canada (Minister of Citizenship and Immigration)*, 2009 FC 814. In that case, the Applicant was also challenging a negative PRRA decision on the basis that the Officer had misconstrued and failed to appreciate the true nature of the risk of differential treatment that he had put forward as a result of the fact that he was more likely to be prosecuted because of his public stance against the war in Iraq. The same PRRA Officer, in reasons disturbingly similar to those she penned in the case at bar, addressed the identified risks by invoking the procedural safeguards available to the Applicant and by pointing out that the discretion afforded to judges in sentencing is an inherent component of an independent judiciary, unless it can be demonstrated that the discretion is applied in violation of the principles of natural justice, or imposed in disregard of accepted international standards.

[43] Counsel for Mr. Rivera, who also happens to be counsel for Mr. Walcott, made essentially the same arguments as she did before me. In the end, Mr. Justice Russell granted the application and accepted those submissions. It is worth quoting at length from my colleague's reasons, not only because I am in full agreement with him but also because they could easily be transposed in the case at bar:

> [96] What the Officer's analysis leaves out of account is the whole issue of whether targeting soldiers and subjecting them to court martial because of their political opinion is a neutral application of a general law and, if it is not, whether such conduct by the state can be persecution under section 96 or harm under section 97.
>
> [97] In other words, the Officer identifies the act of prosecution as a stated risk but does not analyse that aspect of the Applicants' case. He focuses on what happens after the decision to prosecute has been taken. This approach infects his whole analysis because, in looking at state protection, he never asks whether the state can, or is likely to, protect the

> Principal Applicant against targeting in the event that such targeting can be said to be section 96 prosecution or section 97 harm.
>
> (…)
>
> [99] In the end, there is no meaningful examination in the Decision of selected and targeted prosecution based upon political opinion of those deserters who have spoken out against the war in Iraq. 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, and whether this amounts to section 96 persecution or section 97 harm. In her written submissions, the Principal Applicant raised the issue, not only of disproportionate punishment, but of the improper exercise of prosecutorial discretion based upon an individual deserter's profile as an opponent or critic of the U.S. war effort. In my view, the availability of the conscientious objector process, even if it were available to the Principal Applicant, which does not appear likely or the evidence, is irrelevant to this issue.

[44] As mentioned, I am in full agreement with these reasons. The Officer was clearly aware that what the Applicant feared was not so much to be punished for having been absent from his military unit without permission, but of being treated more harshly because of the high profile of his case and his public speeches in opposition to the war in Iraq. Yet, the Officer failed to address this risk, and more particularly the risk of being court-martialed and imprisoned rather than being administratively discharged. Having mischaracterized the risk alleged by the Applicant, the Officer could not properly assess it. For that reason alone, this application for judicial review ought to be granted.

b) Did the Officer ignore evidence and deny the Applicant procedural fairness by failing to provide adequate reasons for his decision?

[45] As part of her submissions, counsel for the Applicant included numerous affidavits, letters, media reports and even the Congressional testimonies of a decorated veteran and his wife. All of these individuals, who are arguably similarly situated to the Applicant, state that they received differential prosecution under the UCMJ because of their opinions objecting to the war in Iraq. Also included was the affidavit of a U.S attorney who has been involved in the representation of military personnel and draft resisters for more than 40 years; he testified that the situation of those who have absented themselves from military service to avoid participation in the Iraq war for conscientious reasons is much worse than was the case up until 2002, and that these individuals are now given uncharacteristically harsh treatment upon their return.

[46] Indeed, there was evidence of several U.S. military personnel who were public about their objections to the war in Iraq while being absent without leave being sentenced to incarceration after returning from Canada. In the case of two of these individuals, the evidence before the Officer demonstrated that the fact that they had spoken out against the war in Iraq was argued by military prosecutors to be an aggravating factor in their offence of desertion at their court-martial proceedings.

[47] The Officer apparently considered that evidence but rejected it in the following terse paragraph:

> The submissions of the applicant include affidavits and letters from U.S. military personnel who believe that they were treated differently and subjected to harsher treatment because of their public opposition to the war in Iraq. These submissions demonstrate that these individuals were

> convicted of various offences, including: unauthorized absence, desertion and missing movement. They received prison sentences ranging from 6 to 15 months, demotions, forfeiture of pay, fines, and bad conduct discharges. I accept that these documents recount first-hand experiences of certain U.S. military personnel, and that the U.S. military does, in some circumstances, prosecute personnel for being AWOL (absent without leave), for desertion, and for missing movement. However, these documents also demonstrate that where military personnel were charged with an offence, they were afforded due process in the form of a court-martial proceeding. I find that these affidavits and letters do not support that the applicant would be unable to access state protection in the United States or to receive due process in a military and/or civilian court system in the United States.

[48] Once again, this excerpt illustrates that the Officer misses the point raised by the Applicant and does not offer any explanation as to why the evidence put forward in support of the Applicant's case did not demonstrate the differential exercise of prosecutorial discretion and the resultant differential punishment that the Applicant alleged. The absence of any applicable explanation for her conclusion – that the evidence does not support the Applicant's claim that he would receive differential prosecution and punishment based on his political opinion – is particularly glaring since the Officer, as was noted above, accepted that the majority of U.S. Army deserters are administratively discharged. Why is a period of incarceration (potentially exceeding 15 months) received by those who voice their political opinions, as opposed to no judicial punishment and an administrative discharge received by those who do not voice their opinions, not differential punishment? How, when speaking out about one's political opinion is seen as an aggravating factor by prosecutors in the offence of desertion requiring maximum punishment, does the evidence not support a finding of differential prosecution and therefore persecution on the basis of political opinion?

[49] I agree with the Applicant that the Officer failed to adequately address evidence that directly contradicted the Officer's findings on this risk, and failed to provide adequate reasons for her conclusion on the risk of differential prosecution. The rules of procedural fairness require that each applicant be provided with a reasoned explanation as to why their application was denied, and the failure to provide such an explanation constitutes an error of law: *Malveda v Canada (Minister of Citizenship and Immigration)*, 2008 FC 447; *Brandford v Canada (Minister of Citizenship and Immigration)*, 2007 FC 1113; *Singh v Canada (Minister of Citizenship and Immigration)*, 2008 FC 673; *Adu v Canada (Minister of Citizenship and Immigration)*, 2005 FC 565. It was not sufficient for the Officer to state that the evidence does not support the Applicant's assertion that he would be subjected to differential prosecution; the Officer was required to provide an explanation as to why the evidence was insufficient. This was another fatal error that calls for the quashing of her decision.

c) Was the Officer's finding that the Applicant had not rebutted the presumption of state protection unreasonable and made without regard to the evidence before her?

[50] The Applicant further submitted that the Officer was unreasonable to conclude that he had not exhausted the avenues of state protection available to him. In particular, she found that seeking conscientious objector status was an option available to the Applicant that he had not pursued. On this point, the Officer wrote: "While the applicant's submissions indicate that he would not meet the criteria for conscientious objector status under U.S. military law, this determination was not made by the U.S. Marine Corps" (at p. 6 of the PRRA Notes to File).

[51] The Department of Defence Directive 1300.06 and the Marine Corps Order 1306.16E cited by the Officer define who qualifies for conscientious objector status for the purposes of the United States military at large and more particularly for the U.S. Marine Corps. Both documents define a

conscientious objector as someone who has a “firm, fixed, and sincere objection to participation in war in any form or the bearing of arms, by reason or religious, moral or ethical training and belief”. While “religious training and belief” may include “solely moral or ethical beliefs even though the Applicant may not characterize these beliefs as “religious” in the traditional sense, or may expressly characterize them as not religious”, it is a strict requirement that an individual opposes all wars rather than a specific war in order to be eligible for consideration as conscientious objector.

[52] That being the case, it appears that the Applicant does not meet the definition of a conscientious objector under U.S. military law since he does not object to all wars but only to the war in Iraq. The Applicant’s position as a “selective objector” means that he would most likely not be able to access the protection of conscientious objector status within the U.S. Marine Corps. This argument was clearly put forward in the Applicant’s submissions before the Officer. Furthermore, there were multiple pieces of evidence before the Officer, in addition to the applicable legislation cited above, that documented his position that a conscientious objector status was not a protection available to him.

[53] I agree with the Applicant that in order for the avenues of protection cited by the Officer to form the reasonable basis for a conclusion that the Applicant did not exhaust the domestic protection available to him prior to seeking international protection, those protections must be actually applicable to the particular circumstances of the Applicant. Furthermore, the fact that the Applicant is not prohibited from filing a conscientious objector application does not mean that doing so will afford him the protection of that status, especially since he clearly does not meet the legislative requirements necessary to acquire it.

[54] The Officer's finding that the protection of conscientious objector status was available to the Applicant was also unreasonable because the Officer fails to appreciate evidence before her indicating that, even if the Applicant were eligible for conscientious objector status, this status would not actually offer him any protection from the risks cited in his PRRA application. Based on the affidavit of the U.S. attorney referred to above, persons who file conscientious objector status applications are not protected from judicial punishment, but rather are "subjected to severe punishments including lengthy periods of incarceration" and both the military and civilian communities often subject conscientious objectors to "persecution, punishment, vindictiveness, and intimidation." Yet, the Officer provides no reasons for her conclusion that applying for conscientious objector status would somehow offer the Applicant "protection", despite expert evidence to the contrary. The Officer does not express why he dismissed expert evidence that directly contradicts her conclusion on this point.

[55] Also before the Officer was evidence that individuals similarly situated to the Applicant filed conscientious objector status applications and that doing so provided them with no protection from risks similar to those raised in the Applicant's application. In some cases, the application for conscientious objector status was not admitted into evidence at the court-martial proceeding, while in others the application was not even processed. Furthermore, three other affiants indicated that identifying themselves publicly as conscientious objectors to the Iraq war was the reason for the uncharacteristically lengthy periods of incarceration for their respective periods of absence. In one case, an affiant who had not even been absent from the military at all believes that he was incarcerated because of his application for conscientious objector status.

[56] The Officer ignored that evidence and failed to properly address it. Once again, I agree with the Applicant that the Officer cited domestic avenues of protection that were either not available to him or which would not provide any protection from the risks he asserted. It is well-established that a decision maker must make reference to and provide analysis of important evidence that directly contradicts her findings. This duty to specifically reference the analysis of particular evidence by the decision-maker increases with the relevance of this evidence to the disputed finding. In the case at bar, I find that the failure of the Officer to provide any assessment of the contradictory evidence before her renders her decision unreasonable, as it does not meet the test of justification, transparency and intelligibility.

[57] For all of the foregoing reasons, I am therefore of the view that the application for judicial review of the negative PRRA decision ought to be granted.

**- The H&C decision**

[58] The applicable standard of review with respect to decisions made on H&C applications, when considered in their entirety, is reasonableness, since these decisions essentially raise questions of fact or mixed questions of fact and law. As already mentioned, reasonableness requires consideration of the existence of justification, transparency and intelligibility in the decision-making process. It is also concerned with whether the decision falls within a range of acceptable outcomes, which are defensible in respect of the facts and law: *Dunsmuir v New Brunswick*, 2008 SCC 9, at para 47. That being said, the question as to whether the Officer applied the proper test when conducting her assessment of risk is a question of law reviewable on the standard of correctness:

see, for ex., *Kim v Canada (Minister of Citizenship and Immigration)*, 2008 FC 632, at para 24; *Zambrano v Canada (Minister of Citizenship and Immigration)*, 2008 FC 481, at para 30; *Barrak v Canada (Minister of Citizenship and Immigration)*, 2008 FC 962, at para 18.

a) Did the Officer err in law by assessing risk in the Applicant's H&C application under thresholds applicable to ss. 96 and 97 of the *IRPA*, and by failing to assess the hardship the Applicant would face if returned to the U.S.?

[59] The Applicant contends that the Officer erred by limiting her analysis of hardship to a risk analysis applicable to a PRRA or a refugee claim under sections 96 and 97 of *IRPA*. In other words, it is submitted that the Officer limited her analysis to whether the Applicant would be afforded state protection in the United States if returned and whether the Applicant had exhausted all domestic avenues of state protection prior to requesting humanitarian and compassionate relief in Canada, thereby requiring the Applicant to satisfy legal tests applicable only to PRRA applications and refugee claims. By limiting her analysis to these questions, it is submitted, the Officer failed to apply the proper test for an H&C analysis by considering whether, regardless of any state protection available to the Applicant, what he would experience upon return would constitute hardship that warrants granting an exemption under section 25(1) of the *IRPA*. I fully agree with this argument.

[60] This Court has held on numerous occasions that it is an error in law to conduct an analysis applicable to a PRRA application or a refugee claim when deciding an H&C application. This has been found to be an error because H&C considerations involve a broader understanding of hardship than the risk provisions set out in sections 96 and 97 of the *IRPA*: see *Pinter v Canada (Minister of Citizenship and Immigration)*, 2005 FC 296, at paras 5-6; *Ramirez v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1404, at paras 46-47.

[61] In her submissions, the Applicant explained that he would suffer severe consequences upon return to the U.S., including incarceration, judicial punishment, non-judicial punishment, and the economic consequences of a dishonourable discharge from the U.S. military. The Applicant further explained that he would suffer psychological and physical hardship as a result of hazing from his peers and from his former commanders if returned to the United States and as a result of imprisonment under harsh conditions in a military prison without adequate recourse to medical treatment.

[62] Yet, the Officer failed to conduct any analysis of hardship when assessing these risks. She did note on page 2 of her reasons that "risk is considered in the context of the Applicant's degree of hardship, and not sections 96 and 97" of *IRPA*, but it is not sufficient for the Officer to simply state the appropriate test – the Officer must in fact apply it. Despite the language of hardship used by the Officer, her analysis actually takes the form of a risk assessment under the tests normally applied to a PRRA application or a refugee claim.

[63] The Officer limited her analysis to whether the Applicant had rebutted the presumption of state protection and had exhausted all avenues of protection prior to claiming H&C relief. In the circumstances of an H&C application, however, it is not necessary for an applicant to rebut a presumption of adequate state protection. What an applicant must show is that his or her circumstances warrant humanitarian and compassionate relief, regardless of any available state protection.

[64] While state protection may be a relevant consideration in an assessment of an H&C application, the officer erred when her analysis stopped with the consideration of state protection. In contrast to a PRRA application or a refugee claim, state protection is not a determinative factor. Deciding that state protection may exist in a country of removal does not relieve the Officer from the task of assessing whether, regardless of any available protection, the Applicant's circumstances warrant receiving an exemption from the requirements of the *IRPA* based on humanitarian and compassionate considerations.

[65] The Officer's assessment of both the judicial and non-judicial punishment to which the Applicant would be subjected if returned to the U.S. is replete with the notion that he would be afforded due process guarantees and that he has not rebutted the presumption of state protection. Indeed, a comparison of the reasons in the PRRA and H&C decisions reveals that they are identical, except for the conclusion that the hardships the Applicant would face are not unusual and undeserved or disproportionate. We are left to speculate as to why the risk of experiencing harsh judicial and non-judicial punishment, regardless of any due process available to the Applicant as recourse after experiencing such punishment, would not constitute hardship that would warrant humanitarian and compassionate relief.

[66] There is more. While it is true that judicial punishment in the form of a sentence received at the completion of a court-martial proceeding is administered under a law of general application, two of the risks specifically put forward by the Applicant in his H&C submissions are not the result of legitimate prosecution, but rather stem from experiences outside of the official military justice system in the U.S. Specifically, the Applicant raised as factors demonstrating unusual, undeserved

and disproportionate hardship; hazing; and the impact that hazing and imprisonment would have on him in light of his post-combat Post-Traumatic Stress Disorder.

[67] Hazing is not punishment administered under a law of general application, but is rather unofficial punishment administered by peers and commanders in the military. As noted by the Officer in her reasons, hazing is technically prohibited under Marine Corps regulations. Because hazing is not administered under a law of general application and is not legitimate punishment, the hardships associated with experiencing hazing are not addressed by a conclusion that punishment under a law of general application and legitimate prosecution do not amount to hardship in the H&C context. Furthermore, the ability to complain about mistreatment after it has occurred does not alleviate the hardships associated with experiencing that mistreatment in the first place.

[68] It is notable that the Officer does not find that the Applicant would not be subjected to hazing, or that there is insufficient evidence to support that the Applicant would be subjected to hazing. The Officer merely concludes that he could complain about such treatment after the fact. She fails to engage with the idea that experiencing hazing, whether or not it is officially prohibited or whether or not the perpetrators are eventually punished, could constitute hardship.

[69] Moreover, the Officer failed to adequately analyze the hardship that the Applicant would suffer in terms of stigma, mistreatment, discrimination, and potential violence at the hands of both members of the military (as a result of desertion and his mental health problems) and members of the public (who may be critical of his having left the army). The Officer does not grapple with these issues in order to examine what kind of hardship the Applicant might encounter. Rather, the Officer

blithely concludes that state protection exists to punish anyone who is violent towards the Applicant (after the fact), and that those who might harass or insult him would simply be exercising their freedom of expression.

[70] The Officer accepts that the Applicant may spend time in military custody including time in incarceration in a military prison, but she does not address the Applicant's submission that incarceration would have a disproportionate impact on him because of his mental health condition. The Officer's conclusion – that punishment under a law of general application does not amount to hardship because the H&C process should not be used to circumvent legitimate prosecutions in a democratic country – does not address several important questions, namely whether being in a military custody would have a disproportionate impact on the Applicant because of his mental health condition, whether persons with mental health conditions are stigmatized and mistreated by members of the U.S. military, and whether the Applicant would be denied proper medical care by the military for his condition. The Officer does address whether civilians in the U.S. are provided with adequate mental health treatment and whether mental health treatment is part of the primary civilian health care system in the U.S. However, the Officer does not address mental health care or the stigma attached to mental health conditions within the U.S. military, and certainly does not address what care or treatment is provided when an individual is detained or incarcerated by the U.S. military.

[71] Finally, and perhaps even more importantly, the Applicant argues that the Officer failed to consider the primary basis for his H&C application. The Applicant asserted that he would be subjected to differential and more severe punishment because of his outspoken criticisms of the war

in Iraq from within Canada; this was one of the fundamental bases of his claim for humanitarian and compassionate relief. The main reason that the Applicant even found himself in a position to be applying for permanent residence from within Canada was his reason for leaving the United States military in the first place. Despite the fact that the Applicant's strong moral and political objections to continued service in the Marine Corps permeated the entirety of his evidence and submissions, as well as being a critical component of his personal circumstances, the Officer does not address or assess these beliefs in relation to the punishment that the Applicant faces in the United States. At no point in the Officer's reasons does she consider whether punishment, even if administered under a law of general application, would constitute unusual and undeserved or disproportionate hardship in light of the sincerely held moral and political beliefs that motivated the Applicant to leave the U.S. military and his native country.

[72] It is no doubt true that conscientious objection based on political, moral, or religious grounds does not yet provide a sufficient basis on which to establish a claim for refugee protection. That being said, there is clearly a trend towards accepting that punishing people who refuse military service on conscientious grounds amounts to persecution: *Hinzman v Canada (Minister of Citizenship and Immigration)*, 2006 FC 420, at paras 232-233; *Lebedev v Canada (Minister of Citizenship and Immigration)*, 2007 FC 728, at paras 47-50. Notwithstanding the fact that punishment for refusing to serve in the military as a result of sincerely held objection to a particular war does not constitute persecution under Canadian law, the Officer was nevertheless required to determine whether the judicial and non-judicial punishments faced by the Applicant if returned to the U.S. because of his sincerely-held beliefs, as well as the hazing and the imprisonment while suffering from PTSD, amounted to unusual and undeserved or disproportionate hardship.

[73] Indeed, I am supported in this view by the recent decision of the Federal Court of Appeal in *Hinzman v Canada (Minister of Citizenship and Immigration)*, 2010 FCA 177. There, the Court found that the Officer had committed the same error as the Officer in the case at bar, in that he had failed to have regard to the evidence concerning the Applicant's sincere moral, political, and religious objections to service with the U.S. military in Irak. I find that the same can be said in the case at bar. The Officer has not properly moved beyond the question of state protection to address the hardship factors raised by the Applicant's circumstances, and could not properly address whether relief should be granted to the Applicant under section 25(1) of the *IRPA* with humanitarian and compassionate values in mind, without addressing the sincere moral and political objections that motivated the Applicant to refuse continued service in the U.S. military and come to Canada in the first place.

b) Did the Officer err in law by failing to have regard to the totality of the evidence before her, including ignoring contradictory evidence and misconstruing evidence?

[74] The Officer noted that the Applicant did not access a specific avenue of protection that she deems would have been available to him – namely, filing a conscientious objector status as "protection" from judicial and non-judicial punishment. For reasons already stated in the context of my analysis with respect to the PRRA, this finding was unreasonable in light of the evidence on the record.

[75] Not only was this option of filing a conscientious objector status not available to the Applicant, but doing so could well have increased the hardships asserted by the Applicant instead of protecting him. Based on an affidavit from an expert in U.S. military law, it appears that persons

who file conscientious objector status applications are not protected from judicial punishment but rather are subjected to severe punishments including lengthy periods of incarceration and that furthermore, both the military and civilian communities subject conscientious objectors to persecution, punishment, vindictiveness, and intimidation. The Officer does not mention this evidence in her reasons and provides no explanation for her conclusion that applying for conscientious objector status would somehow offer the Applicant protection, or more importantly, why applying for that status would reduce any of the hardships listed by the Applicant in his submissions. Since the decision maker did not make reference to and provide analysis of this important evidence which directly contradicts her findings, her decision cannot be but unreasonable: *Cepeda-Guiterrez v Canada (Minister of Citizenship and Immigration)*, [1998] F.C.J. No. 1425, at paras 15-17 (F.C.A.); *Ranji v Canada (Minister of Public Safety and Emergency Preparedness)*, 2008 FC 521, at paras 26-28.

[76] In addition to her failure to address the evidence provided by the expert on the question of conscientious objector status, the Officer also failed to address on this point evidence provided from four individuals who attempted to file conscientious objector status applications, and for whom these applications provided no protection. By failing to recognize that filing a conscientious objector status application would not in any way alleviate any of the hardships asserted by the Applicant, by failing to recognize that the Applicant does not qualify as a conscientious objector under the applicable Army regulation, and by ignoring evidence that filing such an application may in fact increase the hardship suffered by the Applicant, the Officer's decision is unreasonable in that it does not meet the standard of justification, transparency and intelligibility.

c) Did the Officer make an unreasonable decision by providing insufficient reasons for his findings, thereby rendering his decision unreasonable?

[77] The Applicant argued that the Officer failed to give reasons for many of her conclusions, and especially for her finding that the Applicant would not be subjected to disproportionate punishment based on his public opposition to the war in Iraq. This argument is essentially the same as that made by the Applicant in the context of his application for judicial review of the PRRA decision, and also mirrors much of the previous argument in this application for judicial review. For those reasons, I do not think it would be of much use to add anything to what I have already stated.

## 5. Conclusion

[78] For all of the foregoing reasons, I find that both applications for judicial review ought to be granted. At the hearing, counsel for the Respondent reserved the right to propose questions for certification purposes if my reasons were to break new ground or diverge from previous decisions of the Federal Court of Appeal. Since this is clearly not the case, there is no basis to certify a question.

**JUDGMENT**

**THIS COURT'S JUDGMENT is that** these applications for judicial review are granted. No question of general importance is certified. A copy of these reasons shall be place in both files IMM-5527-08 and IMM-5528-08.

"Yves de Montigny"

_____

Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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|---|---|
| **DOCKETS:** | IMM-5527-08 and IMM-5528-08 |
| **STYLE OF CAUSE:** | DEAN WILLIAM WALCOTT v THE MINISTER OF CITIZENSHIP AND IMMIGRATION |
| **PLACE OF HEARING:** | Toronto, Ontario |
| **DATE OF HEARING:** | December 14, 2010 |
| **REASONS FOR JUDGMENT AND JUDGMENT:** | de Montigny J. |
| **DATED:** | April 5, 2011 |

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