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U.S. War Resisters win and lose in Canada's Federal Court

by Edward C. Corrigan
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It is certainly clear that the Federal Court of Canada is divided on conscientious objection and U.S. soldiers who refuse to serve in Iraq.During the Vietnam War (1965-1973), more than 50,000 Americans came to Canada, refusing to participate in what they felt was an immoral war. Canada accepted them. At the time, Prime Minister Pierre Trudeau said: "Those who make a conscientious judgment that they must not participate in this war... have my complete sympathy, and indeed our political approach has been to give them access to Canada. Canada should be a refuge from militarism."

The Federal Court and the Federal Court of Appeal have so far considered 10 refugee cases from U.S. servicemen who deserted rather than go to fight in Iraq. Given the political views of the Conservative government in Ottawa, it's not surprising that many of these claims failed--but not all. In fact, the US deserters in three of the more recent cases have succeeded demonstrating that Canada's courts are of a divided opinion on the issue. Here is a description of the Court's findings in these cases pro and con.

DEFEATS

1. *Hinzman v. The Minister of Citizenship* (IMM-2168-05, 2006 FC 420)

Pvt. Jeremy Hinzman of the 82nd Airborne and had been willing to serve in the U.S. armed forces in Afghanistan, but not in Iraq. He objected to the war in Iraq because it did not have UN approval and in his opinion was a war of aggression against a sovereign state.

Hinzman argued that his objection to the war should fall under para. 171 of the *UNHCR Handbook on Procedures and Criteria for Determining Refugee Status*: "Where... the type of military action, with which an individual does not wish to be associated, is condemned by the international legal community as contrary to basic rules of human conduct, punishment for desertion or draft-evasion could... in itself be regarded as persecution."

He also objected that U.S. armed forces were known to engage in torture in Iraq, and that any participation in the war would associate him with acts contrary to his conscience. Again this objection relates to para. 171.

The Federal Court gave detailed consideration to the issue of the proper interpretation of para. 171; however, it found that a mere foot soldier cannot claim to fear association with human rights abuses committed by the army he serves with. This distinction confuses the test for exclusion with the test for allowing a person to refuse to be associated with a particular military action.

The Court certified the following "serious question of general importance":

"When dealing with a refugee claim advanced by a mere foot soldier, is the question whether a given conflict may be unlawful in international law relevant to the determination which must be made by the Refugee Division under paragraph 171 of the *UNHCR Handbook*"

2. *Hinzman and Hughey v. MCI* (A-185-06, 2007 FCA 171) at the Federal Court of Appeal

Although the Federal Court certified a question in *Hinzman* (2006 FC 420), the Federal Court of Appeal declined to answer it. Instead, the Court unanimously rejected the appeal on the narrow grounds that the US deserters had not made enough effort to access potential legal protective mechanisms in the United States:

"In conclusion, the appellants [Jeremy Hinzman and Brandon Hughey] have failed to satisfy the fundamental requirement in refugee law that claimants seek protection from their home state before going abroad to obtain protection through the refugee system. Several protective mechanisms are potentially available to the appellants in the United States. Because the appellants have not adequately attempted to access these protections, however, it is impossible for a Canadian court or tribunal to assess the availability of protections in the United States. Accordingly, the appellants' claims for refugee protection in Canada must fail."

The failure of the Court of Appeal to address the legal interpretation of para. 171 directly is unfortunate. The Supreme Court of Canada did not grant leave in *Hinzman* on the question of the legality of the U.S. invasion of Iraq and the application of para. 171 of the *Handbook*. Accordingly, refusal to serve in a war based on paragraph 171 of the *UNHCR Handbook* and its applicability to volunteer soldiers has not been dealt with by the higher Courts, leaving one of the central legal issues in conscientious objection and refusal to serve in a particular war unsettled.

3. In a third case involving Jeremy Hinzman, on April 24, 2009, the Federal Court rendered a Judicial Review of a negative Humanitarian and Compassionate Decision. The Court "reviewed the evidence in question and the Officer's treatment of it in the Decision, and, in my view, while it is certainly possible to disagree with the Officer's conclusions on this issue, I cannot say that relevant

evidence was overlooked or that the Officer's conclusions were unreasonable within the meaning of *Dunsmuir*. I cannot re-weigh the evidence and substitute my own opinion for that of the Officer in these circumstances." Accordingly, the Federal Court Judge upheld the finding of the decision of the Immigration Officer on the H & C Application and rejected the Application for Judicial Review.

4. *Justin Colby v. Minister of Citizenship and Immigration* (IMM-5059-07, 2008 FC 805)

Justin Colby enlisted in the Army and served as a medic in Iraq. When he realized that the people they were killing had nothing to do with the September 11 attacks, he decided to go to Canada rather than accept redeployment. His primary reasons for deserting the U.S. Army were being forced to participate in and witness what he called "atrocities."

The main issue in *Colby* was state protection. The Federal Court did not considered para. 171 of the *Handbook*; following the Federal Court of Appeal decision in *Hinzman*, made the following finding: "On this issue [state protection], I am of the opinion that the Board's determination is reasonable."

5. *Robin Long v. Canada* (MCI & MPSEP, IMM-3042-08, July 14, 2008)

Pvt. Robin Long left Ft. Carson for Canada rather than fight in what he believes to be an illegal war.

The Federal Court dismissed an application for a Stay of Removal finding no error in law. This case is not reported.

6. *Landry v. The Minister of Citizenship and Immigration* (IMM-5148-08, 2009 FC 594).

Pvt. Dale Gene Landry USAF informed his commanding officer that he would not accept deployment to Iraq. He was told that he would not be discharged but punished and sent to Iraq anyway. He then absented himself without leave and came to Canada. This case was decided on June 8, 2009. The *Landry* ruling followed the Federal Court of Appeal decision in *Hinzman* was decided on the basis a failure to access all available state protection in the United States military legal system.

7. *The Minister of Citizenship and Immigration v. Hund* (IMM-5512-07, 2009 FC 121).

The refugee claimants are four adults and three children born in the United States. They were Mennonites and opposed to war. They received a positive decision at the Immigration and Refugee Board (IRB). However, none had served in the United States Army, had not been to Iraq, or made a refugee claim in their widespread travels. While many would agree with their political sentiments in opposing the war in Iraq, it was an unusual Decision for the IRB. By basing the decision solely on political opinion it contained many errors in law and the Federal Court not surprisingly, overturned this decision.

VICTORIES

1. *Joshua Key v. The Minister of Citizenship and Immigration* (IMM-5923-06, 2008 FC 838)

PFC Joshua Key served an extensive tour of duty in Iraq and participated in as many as 70 home invasions. He testified to witnessing numerous human rights violations. In the refugee claim the decision was negative but on July 4, 2008, the Federal Court overturned it. "The Board erred by imposing a too restrictive legal standard upon Mr. Key," the Federal court ruled. To quote the Court's Reasons.

"I recognize that there is a compelling policy rationale for affording refugee protection to persons faced with the choice of either being punished for refusing to serve or being placed at risk of participating (or being complicit) in the commission of war crimes or crimes against humanity: see Tagaga v. INS 228 F.3d 1030 (9th Cir. 2000) at para. 14. Where the requirements of military service would put a person at risk of being excluded from refugee protection, the law must provide a meaningful anticipatory option. The idea that a refugee claimant in such circumstances ought to be returned to his home country to face such a dilemma is repugnant and inimical to the furtherance of humanitarian law. It does not follow from this, however, that widespread violations of international law carried out by a military force but not rising to the level of war crimes or crimes against humanity can never support a refugee claim by a conscientious objector. The caselaw I have reviewed does not support the idea that refugee protection is only available where the particulars of one's objection to military service would, if carried out, exclude a claim by that person to protection."

2. *James Cory Glass v. Minister of Citizenship and Immigration* (IMM-2552-08, 2008 FC 881).

Glass, a national guardsman called to active duty, served six months in Iraq where he testified that he observed "gross human rights violations and gross misconduct by U.S. soldiers against Iraqi civilians including children." During this service, he observed many Iraqi civilians killed "for no good reason." After he deserted from the U.S. Army, Glass publicly denounced the conditions in Iraq and publicized his opposition to that war.

The Federal Court granted a Stay of Deportation because Glass had won leave for a Judicial Review of his Pre-Removal Risk Assessment (PRRA).

The *Glass* decision raised a number of issues, such as whether the evidence submitted for the PRRA was new, and the fact that U.S. soldiers who went public with their objection to the "undeclared war" in Iraq and Afghanistan received harsher punishment than those who did not. Accordingly, those soldiers who spoke out would be denied fair due process in the U.S.

Relying on the decision in *Key* issued only thirteen days earlier, the Federal Court Judge granted the Judicial Review and to stay the deportation order. The Judge acknowledged that the Federal Court was split on these issues.

3. *Kimberly Elaine Rivera v. Minister of Citizenship and Immigration* (IMM-215-09, 2009 FC 814).

In December 2006, army reservist Kimberly Rivera who opposed the war in Iraq decided to move to Canada rather than return to active duty. Rivera is the only female U.S. resister in Canada.

In this recent case (Aug. 10, 2009), the Federal Court overturned a negative PRRA decision based on a the PRRA officer's failure to consider evidence regarding the different treatment and imprisonment of war resisters who publicly express opposition to the war in Iraq as opposed to only administrative punishment for deserters who did not speak out against the war.

"[The PRRA] Officer's failure to fully address the targeting issue, and the evidence that supports the Applicants' position, renders the Decision unreasonable and it must be returned for reconsideration," the Court ruled.

It is certainly clear that the Federal Court of Canada is divided on conscientious objection and U.S. soldiers who refuse to serve in Iraq.During the Vietnam War (1965-1973), more than 50,000 Americans came to Canada, refusing to participate in what they felt was an immoral war. Canada accepted them. At the time, Prime Minister Pierre Trudeau said: "Those who make a conscientious judgment that they must not participate in this war... have my complete sympathy, and indeed our political approach has been to give them access to Canada. Canada should be a refuge from militarism."

Again Canada is faced with the same moral and legal issue--the question of giving refuge to those who refuse to fight in a US war.

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