



IMMIGRATION AND REFUGEE BOARD  
(REFUGEE PROTECTION DIVISION)

LA COMMISSION DE L'IMMIGRATION  
ET DU STATUT DE RÉFUGIÉ  
(SECTION DE LA PROTECTION DES RÉFUGIÉS)

IN PRIVATE  
HUIS CLOS  
**TA5-05991**

CLAIMANT(S)

DEMANDEUR(S)

**XXXXXXXXXXXXXXXXXXXXX**  
**(a.k.a. XXXX XXXX XXXXXXXXXXX)**

DATE(S) OF HEARING

**22 November 2005**

DATE(S) DE L'AUDIENCE

DATE OF DECISION

**4 April 2006**

DATE DE LA DÉCISION

CORAM

**Laurel Cropley**

CORAM

FOR THE CLAIMANT(S)

**Jeffry House  
Barrister and Solicitor**

POUR LE(S) DEMANDEUR(S)

REFUGEE PROTECTION OFFICER

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CONSEIL DE LA MINISTRE

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The claimant, 20-year-old XXXXX XXXXXX, is a citizen of the United States of America (U.S.) who seeks refugee protection pursuant to sections 96 and 97(1) of the *Immigration and Refugee Protection Act (IRPA)*.

## **BACKGROUND AND ALLEGATIONS**

The claimant formally enlisted in the military in XXXXX 2003 upon completion of his last year of high school. He alleged that, while he does not object to war generally, he does object to the war in Iraq. According to his Personal Information Form (PIF),<sup>1</sup> he developed this objection by the end of XXXXX 2003, at which time he “knew that there were no weapons of mass destruction found in Iraq” and therefore believed that the invasion of Iraq was without moral basis. He stated that he does not wish to be associated with the war anymore, or with the policies which led to the deaths of so many people. He alleged further that the war is not a defensive war, but is aggressive in nature. Despite these views, the claimant went to Iraq with his unit in March 2004 where he served until XXXXX 2004. He described a number of incidents that occurred while he was serving in Iraq, including civilian deaths at checkpoints, the beating of civilians during raids and other illegal acts committed by the Marines he observed or heard about such as theft of money and handguns from the homes of civilians. He asserted that the

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<sup>1</sup> Exhibit C-1.

military had no control over the troops, that human rights abuses were occurring on a regular basis and the military's policy of shoot first and ask questions later was contrary to international human rights law. Following his return to the U.S., the claimant learned that his unit was to be redeployed to Iraq in the spring. He decided he could not return to Iraq and left his post in XXXXX 2005. He came to Canada after learning that other deserters had made refugee claims in this country. He alleged that if he were to return to the U.S., he would be arrested and put in jail for desertion, which would amount to persecution by the U.S. government and its military due to his political belief that the war in Iraq is immoral and illegal and that it is a military action that is condemned by the international community as contrary to the basic rules of human conduct.

## **PRELIMINARY MATTERS**

### **Previous Board Decisions**

At the outset of the hearing, the parties were advised that I would be looking at the decisions in two prior cases relating to U.S. deserters from military service, both of which were held before the public and for which the decision and reasons have been made publicly available,<sup>2</sup> in assessing those evidentiary and legal issues in the current claim that are similar. Both of these decisions were made by Mr. Brian Goodman (the Board

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<sup>2</sup> *Hinzman v. Canada (Minister of Citizenship and Immigration)*, R.P.D. Decision TA4-01429 (upheld *Hinzman-IMM-2168-05* 2006 F.C. 420) and *Hughey v. Canada (Minister of Citizenship and Immigration)* RPD Decision TA4-05781 (upheld *Hughey-IMM-5571-05*, 2006, F.C. 421)

Member). The parties were also given the opportunity to provide any additional evidence and argument to that provided in these earlier cases.

After considering the evidence in this case, as well as the claimant's counsel's submissions, the evidence and case law considered by the Board Member, his analysis and findings in the two decisions, I find much of the analysis of the evidence in the *Hinzman* and *Hughey* reasons relevant to the facts and evidence before me in this claim. Where relevant, therefore, I have incorporated the Board Member's analysis and conclusions into these reasons either by reference or as noted in the body of my discussion.

### **Whether the legality of the war in Iraq is a relevant consideration**

One issue to be determined before proceeding with this claim was whether the allegation that the military action by the U.S. in Iraq is illegal is a relevant consideration. Counsel for the claimant also raised this argument in the above two cases.

In the first decided case (*Hinzman*), the Board Member ruled that evidence relating to the legality of the U.S. embarking on military action in Iraq would not be admitted at the hearing. In *Hinzman*, the question the Board Member put to the parties was whether the allegation that the U.S.'s military action in Iraq is not authorized by the UN Charter and UN Resolutions is relevant to the question of whether it is the type of military action which is condemned by the international community as contrary to the

basic rules of human conduct. This question was formulated following an extensive discussion during a pre-hearing conference of paragraph 171 of the UNHCR Handbook.<sup>3</sup>

Counsel agreed with the factual circumstances under which the question was posed to the parties for which they were asked to make written submissions to be considered by the Board Member in deciding this issue. He maintained his position that the war in Iraq constitutes a violation of international law, but added that he is not aware of any further case law to support this position apart from that submitted in *Hinzman*. He reasserted his argument that the decision of the Federal Court of Appeal in *Al-Maisri*<sup>4</sup> requires the Board to consider this issue. The Minister's Representative also indicated that she is not aware of any additional case law on this issue and stated that the Minister's position on this issue remained unchanged.

In his Interlocutory Reasons dated November 12, 2004, the Board Member provided an extensive analysis of this issue. It was apparent that the issue was fully argued and researched. Taking into account Counsel's comments at the hearing, I indicated that after reviewing this decision and the documentation and case law cited therein, I agreed with the characterization of the question as it was posed by the Board Member. I also agreed with his analysis of the issue, which refers to the arguments put forth by the parties, including the argument reasserted by Counsel today, and I adopt it

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<sup>3</sup> *Handbook on Procedures and Criteria for Determining Refugee Status*, Office of the United Nations High Commissioner for Refugees, reedited, Geneva, January 1992, paragraph 171.

<sup>4</sup> *Al-Maisri v. Canada (Minister of Employment and Immigration)*, [1995] F.C.J. No. 642. (C.A.).

for the purposes of this hearing. Finally, I indicated that I agreed with the Board Member's decision with respect to his interpretation of the meaning of paragraph 171 of the UNHCR Handbook, and his decision regarding the type of evidence to be adduced, which he clarified to be "any probative evidence as to the particular military action or activity that the person refusing has been, is, or would be called to perform 'on the ground'". I indicated that I have come to the same conclusion with respect to this issue and the evidence I would consider and would therefore not admit evidence relating to the legality of the war. Accordingly, Volume 1 of Counsel's disclosure was returned to him and I indicated that I would not consider the first three tabs of the Minister's disclosure.<sup>5</sup>

## **DETERMINATION**

Based on the claimant's personal identity documents,<sup>6</sup> I am satisfied that he is a citizen of the U.S., that he is who he says he is and that he served in the U.S. military during the time period alleged, and that he was deployed to Iraq as alleged.

I find that the claimant is not a Convention refugee, as he has not established that he has a well-founded fear of persecution for a Convention ground in the U.S. I also find that he is not a person in need of protection, in that his removal to the U.S. would not subject him personally to a risk to his life or to a risk of cruel and unusual treatment or

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<sup>5</sup> Exhibit M-1 (Tabs 1, 2 and 3 only).

<sup>6</sup> Exhibits R/A-2 and C-3.

punishment, and that there are no substantial grounds to believe that his removal to the U.S. will subject him personally to a danger of torture.

## **ANALYSIS**

### **Credibility**

The claimant is a young man, not particularly sophisticated, who described himself as a person who prefers to go along with others. He explained that he is not outspoken and it is apparent from his testimony that he does not like personal confrontation and does not wish to deal face to face with someone who is angry with him. He often had difficulty during testimony in putting events that occurred in Iraq in a clear timeframe, which is understandable in the circumstances where, as the claimant noted, a couple of weeks in Iraq can seem like forever.

There were, however, numerous discrepancies in his evidence which could not be explained solely by his nature and the confusion and activity around him during his tour of duty in Iraq. These discrepancies will be discussed in further detail below. While I generally view the claimant to be sincere and genuine in his attempts to answer questions, I find that some of the discrepancies are significant enough, particularly when taken as a whole, to lead me to question the extent of the atrocities he claimed to have witnessed or be aware of in Iraq. In saying that, I do not wish to minimize the experiences he did have there, but I find that many of the allegations he wrote in his PIF are not established by virtue of the contradictory evidence he provided in oral testimony with respect to specific

events and general statements he made throughout his testimony, particularly regarding the training he received both before leaving for and during his tour of duty in Iraq.

The claimant's oral testimony at first instance was open, spontaneous and straightforward. With one exception, where the claimant's oral testimony differs from that written in his PIF narrative relating to his experiences in Iraq, I prefer the oral evidence as it appeared to be heartfelt and was generally internally consistent.

The exceptions to this finding relate to the claimant's attempts to explain certain discrepancies in his evidence pertaining to whether he knew what was going on in Iraq before or after he was deployed, as it appeared that he was looking for ways to reconcile his statements rather than offering genuine reasons that could explain why he testified that his emerging realization that the war was wrong began after his deployment whereas he wrote in his PIF that he knew this before he received his deployment orders.

In other cases, however, I accept his explanations, particularly as they pertain to his recollection of incidents that he indicated he witnessed and described in oral testimony, which were not mentioned in his PIF or *vice versa*. Nevertheless, as set out later in these reasons, based on the discrepancies for which I do not accept his explanations, and his description of events in oral testimony, I conclude that, in his PIF, the claimant has embellished his descriptions of what he saw and/or was aware of in Iraq in order to support his allegations of an emerging realization that the war in Iraq was immoral and contrary to the basic rules of human conduct.

**The claimant's enlistment and training**

The claimant indicated that he had been interested in joining the military as a marine in particular since he was a young child. His perception of the Marines as a strong and honourable division within the armed forces developed through his learning of their role in past military engagements and through their depiction in the movies. While in high school, representatives of the military would visit and give presentations to the students and he filled out cards they left behind. Sometime during the eleventh grade, a recruiter for the military contacted him and came to his house to speak to him and his mother about the military. Although it appeared his mother had some concerns about him going to war, the recruiter minimized that aspect of military life and she signed the enlistment papers. When the claimant finished his high school and upon turning 18, he re-signed these papers and went off to boot camp. It was very clear from his oral testimony that the claimant's desire to join the military was premised on a glorified perception of the role of the Marines during wartime. He anticipated taking part in firefights as a member of this venerable organization. At the time he joined in XXXXX 2003, the initial invasion of Iraq by the U.S. was mostly over and he did not anticipate being sent to Iraq to fight. According to the timeline of events, his recruitment immediately followed the UN Security Council's approval of a resolution lifting

economic sanctions against Iraq and endorsing the U.S. led occupation and administration of Iraq.<sup>7</sup>

The claimant described the training he received generally and in preparation to go to Iraq. He testified that he spent the first three months after enlistment in boot camp and then another two months undergoing infantry training. He was sent to join his unit at XXXXX XXXXX XXXXX, where he remained for another three months until his unit was deployed to Iraq.

During these last three months, his unit received training to prepare them for Iraq, such as convoy training, patrolling, rules of engagement, what to do if they are in an ambush, cultural sensitization and language courses to learn basic Arabic phrases such as “stop”, “stop or I will shoot”, “open this”, “yes”, “no”, etc. The claimant testified further that he received about a one-hour class during boot camp on the Geneva Convention and although he could not recall much of what he learned, it appeared to him that the focus of the class was on his rights and expectations if he were to be captured. It appeared from his evidence, however, that the principles enshrined in the Geneva Convention were incorporated into his classes and written materials relating to the rules of engagement.

The claimant testified that the training his unit received regarding the rules of engagement was on-going throughout his tour of duty in Iraq. He explained that they constantly had classes where their squad leader would go over the rules of engagement

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<sup>7</sup> Exhibit M-1, tab 8.

and how they should treat the Iraqi people while they were in Iraq. Specifically, they were taught not to hit the prisoners and to treat them with respect. They would also review the definitions and circumstances for the use of extreme force and deadly force, for example. He asserted that at no time during their military classes or briefings were they told to hit people or cause them pain. He reiterated several times during his testimony that it was drilled into their heads not to abuse the Iraqi people, particularly during patrols. He noted that they were told that there was often no way to know if a person they met on the street was a soldier, an insurgent or a civilian, so they were to approach people they met respectfully while at the same time being vigilant and suspicious of their identities and intentions.

The claimant also described his understanding of his right to refuse or question an illegal order and his duty to report unlawful or questionable actions committed by other soldiers. He had a vague recollection of the procedures to follow in making these reports or decisions to refuse a specific duty.

The claimant testified further that he was never directly ordered by a superior officer to violate international humanitarian law. Nor, with one exception, could he recall hearing about anyone else being told to do so. In response to a question asked by the Minister's Representative, the claimant indicated that he knew that if he witnessed the killing or abuse of innocent civilians by members of the military he had a duty to report this to a higher military authority.

**The claimant's personal experiences in Iraq**

The claimant stated in his PIF that he saw many people beaten during residential raids conducted by his platoon and other platoons operating in the area or alongside his platoon.

***Activities of the claimant's platoon***

The claimant testified that for the most part his platoon did not engage in abusive or disrespectful conduct. He did not witness mistreatment of Iraqis taken into custody by his platoon but heard about one incident involving his platoon during a raid on a day that he was not present. The claimant indicated that the raid took place the day after one member of his platoon was killed and two other soldiers seriously injured when a bomb went off near them while on patrol. The claimant testified that he heard that other members of his platoon had gone into a couple of houses and smashed windows and furniture and that they took a detainee and beat him repeatedly. His description of this incident was somewhat vague and not internally consistent. For example, although he initially stated in his testimony that soldiers in his platoon beat up residents after the bomb exploded and killed one of their friends and seriously wounded two others, when asked again about this incident he could not remember the details although he commented that sometimes members of his platoon would make disrespectful gestures as they drove by civilians. Had the incident occurred as he alleged, I would have expected

him to have been readily able to describe the physical assault in similar terms. Consequently, I find that he exaggerated the alleged abuse by his platoon in this instance.

In another situation involving his platoon, in his PIF he described an incident during a raid where an older man, who was uncomfortable kneeling, tried to lift his head and the marine “came and smashed his head down into the dirt”. In oral testimony, he described this incident somewhat differently, indicating that the man was not hit but that his head was pushed down. As he described this incident he gestured with his hand showing a gentle force applied in a downward motion. I do not find the claimant’s oral description of this incident to reflect any kind of abusive conduct or use of excessive force in the particular circumstances in which this incident occurred.

Based on his descriptions of these two incidents, I am not persuaded that the claimant personally witnessed grave breaches of human rights or systematic abuses of international human rights committed by the soldiers in his platoon. Moreover, I am not persuaded that the claimant witnessed any physical abuses or use of excessive force committed by the Marines in his own platoon while serving in Iraq.

#### *Activities of marines from other platoons*

With respect to the actions of Marines from platoons other than his own, he described one incident where a squad leader (who is not an officer) for a different platoon instructed his Marines on how they should deal with prisoners taken during a raid to ensure that they did not pass on information to friends or family members. According to

the claimant, the squad leader told them that prisoners were not to be allowed to speak and if they were caught doing so were first to be told not to speak. If they spoke again the soldiers were to yell at them to shut up and if they spoke again the soldiers were to “beat the crap out of them”. He did not report this order that was given by the squad leader for a different platoon to anyone, and he could not recall if his squad leader was present and/or aware of the order. Nevertheless, the claimant did not indicate that he witnessed or heard of any abuses committed as a result of this order. He confirmed that, apart from this incident, he could not recall hearing about anyone giving an order to harm civilians.

The claimant described only one incident in which he believed with greater certainty that the Marines involved had beaten and mistreated an Iraqi prisoner. In his PIF, the claimant stated that, after returning from a raid, he and other Marines were cleaning their guns when another platoon came in and tossed a man, bound and hooded off the truck they were in. A crowd gathered around the man, who, upon making strange noises, had his hood removed. The claimant stated further that the man was unconscious, bleeding from the nose and his eyes were swollen shut. Because no one wanted to challenge the other platoon they all just returned to their tents. Later, he heard that medical personnel eventually came in and the man was taken to Baghdad to be treated.

In oral testimony he added that when the soldiers gathered around the man, they laughed at him. He did not know the circumstances of the man’s arrest and assumed that

the Marines beat him because that would be the only way he could have attained such injuries. The claimant did not ask anyone what happened. He was not sure whether any superior officers were present, including his squad leader, although he thought the squad leader must have been around because they are required to be present when the soldiers are cleaning their rifles. He indicated that he spoke to his squad leader afterwards to ask why the Marines would do such a thing. His squad leader did not know the circumstances and he responded that there must have been some reason for it to happen.

Although he stated in his PIF that he had seen numerous people beaten during raids, in oral testimony he admitted that he did not actually see anyone beaten. Rather, as in the incident described above, he saw the aftermath of individuals who had clearly received injuries, which he assumed were a result of beatings. While I do not doubt that the claimant saw some prisoners that had not been well treated, I am not persuaded that such incidents were as prevalent as the claimant would have me believe or that they cumulatively amount to a systemic abuse of human rights. Finally, I am not persuaded that any of the mistreatment that the claimant believed occurred was condoned or encouraged by senior officers, that they were even aware of some of the incidents described by him or that they did not act appropriately if and when they did become aware. I find therefore that the claimant has failed to establish on a balance of probabilities that there was systemic abuse by soldiers of Iraqi civilians and/or prisoners

and that such behaviour when it did occur was condoned or encouraged by senior military personnel.

### *Checkpoints*

With respect to his involvement in checkpoints, again the claimant's written narrative indicated that he participated in some in which innocent civilians were killed, although he stated in oral testimony that he was not directly involved in any of these incidents. Rather, he was either at another checkpoint and heard the gunshots and/or a call over the radio regarding the incident or came upon the aftermath of the actual shooting. In one case, he was at a checkpoint about 200 metres away when the shooting occurred.

In describing the incidents that he was aware of at the checkpoints, the claimant provided a detailed description of the way in which checkpoints were set up, the procedures followed by soldiers manning them and the protocol for investigation by superior officers when guns were fired, which he maintained was routinely followed. It was apparent from this description that checkpoints were very clearly marked with dirt mounds, barbed wire and bunkers. Turnaround areas or diversionary roads were created at each checkpoint. Stop signs were placed at the beginning of the checkpoint in both English and Arabic. They indicated that drivers were to stop, explaining that the area was a U.S. Checkpoint and advising that if cars crossed the checkpoint they would be shot. If a car entered the checkpoint despite these warnings, a soldier on duty at the

bunker would flag down the driver and motion the driver to turn back. If the car continued across what was called a “Target Reference Point” (TRP) despite this second warning, the soldiers at the checkpoint were authorized to shoot. According to the claimant, the order to shoot was a direct order from superior officers.

The claimant testified, however, that if he exercised his discretion and refused to shoot, for example if he saw a family driving up in a car, he would be disobeying a direct order (which he earlier stated that he was entitled to do as per his training on the rules of engagement and the Geneva Convention), and that the likely response from his superiors would be a verbal reprimand – “they would yell at me”. He did not know what would happen if he refused such an order a second time.

With respect to the aftermath of a shooting incident, the claimant testified that the soldiers at the checkpoint were required to call the incident in to a superior officer situated nearby and an officer would go to the checkpoint to investigate the circumstances, although he noted that if it was determined that the car had crossed the TRP, no further questions would be asked and nobody would get into trouble because of U.S. policy that the safety of U.S. soldiers was paramount.

Based on the three incidents the claimant described either in oral testimony or in his PIF, I find that the checkpoints were clearly marked and designed to avoid “misunderstandings” as the claimant referred to them, with civilians, that procedures were in place to minimize the risk of civilian deaths and that a protocol was in place to

investigate any use of force at a checkpoint. It appeared that, despite the warning systems that were in place, cars crossed the TRP and shots were fired by the soldiers on duty resulting in deaths of civilians including a child. The claimant was deeply disturbed that these misunderstandings could arise and that innocent civilians could be killed as a result.

While there has been extensive criticism made regarding U.S. policy at checkpoints regarding the ultimate use of force, which I will discuss further below, I am not persuaded that such actions were arbitrary or a result of a lack of control and monitoring by U.S. officials and did not amount to a systemic abuse of human rights or willful disregard for civilian human rights at checkpoints in Iraq.

***Theft and uncontrolled behaviour***

The claimant also indicated in his PIF that, due to a lack of control, many Marines were enriching themselves in the course of their house searches. In oral testimony he indicated that he heard Marines from other platoons talking about what they had taken, although he did not think anyone from his platoon engaged in such activity. He did not know if the military had a policy regarding theft but noted that it was obvious that it should not be done. He also described an incident where a purloined handgun was found in an injured soldier's bag as he was being returned to the U.S. According to the claimant, when his commanding officer found out the officer "made a big deal about it" and a very clear message that stealing would not be tolerated was given to the soldiers

under his command. I am not persuaded that the military lacked control over its troops in Iraq based on the examples provided by the claimant of what he witnessed while serving in that country. On the contrary, the claimant's evidence demonstrated that senior officers repeatedly reinforced the rules of engagement, usually *via* the squad leaders and that senior officers were actively involved in monitoring the activities of the soldiers on duty at checkpoints and in reinforcing appropriate behaviour of the soldiers under their command.

### **Conscientious Objection/Objection to the War in Iraq**

The claimant stated emphatically that he does not object to war generally and that indeed the possibility of defending his country in an international war that he deems to be justified was his motivation in joining the military. He stated further that his views in this regard have not changed generally, even though it appears he has become somewhat disillusioned about the integrity and honourable conduct of the Marines as he witnessed conduct by certain members of the Marines that conflicted with his idealized perception of them as obtained through his understanding of history and their depiction in the movies.

The claimant's evidence relating to his emerging realization that the war in Iraq was not justified was not consistent. In his PIF narrative, he stated that at the time his unit was told that they would be deployed to Iraq, sometime around the end of XXXXX 2003, he "knew that there were no weapons of mass destruction found in Iraq, and that

the whole invasion of Iraq was without any moral basis”. Nevertheless, as he had signed up to join the military, he believed that it was his duty to go regardless of his beliefs.

In oral testimony, however, which, as I noted above, was spontaneous and guileless, he offered a different description of the development of his basic beliefs regarding the involvement of the U.S. in Iraq. He reiterated that he knew that his unit would be going to Iraq while he was still receiving his infantry training. He claimed that he did not keep up with the news at that time and did not really understand what was going on in Iraq. He noted that, for all he knew, no weapons of mass destruction had been found although he understood that there was still some trouble over there with regards to the United Nations (UN) inspectors. He was somewhat nervous about going over and excited at the same time with the prospect of seeing combat. He believed at that time that the U.S. had good reasons for going over and thought that this was a “normal” war, meaning firefights between the U.S. and enemy soldiers only. He did not know that fighting was going on in the cities, or that civilians were being killed or that U.S. soldiers were getting hurt.

In responding to questions about the discrepancy in his evidence regarding his political views prior to deployment, the claimant asserted that he formulated his political views regarding the war during infantry training and, while he was with his unit prior to deployment, as he was able to read the news, watch television and talk to others. He testified further that he realized the war was wrong when he was at XXXXX and saw in

the news that soldiers were dying. On further questioning, he clarified that he saw soldiers dying unnecessarily for something he did not believe in.

It was apparent from his initial oral testimony that he did not formulate any serious views about the immorality of the war in Iraq prior to his deployment. He believed that the U.S. had just cause to be in Iraq. Even though he had heard that no weapons of mass destruction had been found, he understood that there continued to be problems in Iraq. He was very clear that he believed that he would be engaged in what he considered conventional warfare although he was a little nervous because he knew that soldiers were being killed. His attempts to reconcile the two versions of his emerging views raised additional discrepancies such as his interest in the news stories about Iraq, whereas in his initial testimony he said that he was not much interested in the news yet in explaining how he came to his conclusions about Iraq he indicated that he became more interested in the news, in both television and print. Consequently, I am not persuaded that the claimant held any preliminary view about the war in Iraq prior to his deployment.

As noted above, while serving in Iraq, the claimant's personal experiences were for the most part consistent with his perception of the honourable actions of the Marines. While he witnessed a few exceptions, apart from asking his squad leader why those Marines involved in excesses would do such a thing given their repeated training on the rules of engagement, he did nothing to express his disagreement with such actions. It was apparent from his testimony that his perceptions of war changed over his tour of duty

once he had an opportunity to experience the reality of being on the ground and he no doubt saw and/or heard of situations that disturbed him greatly, such as the deaths of civilians at checkpoints. It is also noteworthy that he experienced firsthand the pain associated with the loss of and serious injury to friends only three weeks before his unit left Iraq. While I accept that he had serious concerns about the safety of the U.S. soldiers in Iraq and the deaths and occasional mistreatment he saw of civilians at the hands of U.S. soldiers, I do not find his attempts to turn these concerns into strong political views regarding the morality of the war to be persuasive. He was unable throughout his testimony to articulate this personal political view other than in very general terms and I find that he had not yet developed views that would fall within the meaning of conscientious objection.

Even if I were to find that his evidence established a dual motivation for deserting, that being his fear of battle and an emerging belief that the war was immoral, the claimant affirmed, throughout his testimony, his continuing belief that the military has a valid role in conventional wars that he considers just, and that he would not be averse to participating in such a war. Therefore, the claimant does not claim to be a pure conscientious objector, in the sense of being a pacifist, but rather he objects to a particular military action. I conclude that, even if the claimant's reason for deserting was based on his belief that the war was immoral, that he is not a conscientious objector within the meaning of paragraph 170 of the *Handbook*, because he is not opposed to war

in any form, or to the bearing of arms in all circumstances due to his genuine political, religious or moral convictions, or to valid reasons of conscience,<sup>8</sup> consequently, any punishment that the claimant may receive under the Uniform Code of Military Justice (UCMJ)<sup>9</sup> as a consequence of his decision to desert is not inherently persecutory.

The UNHCR *Handbook*, paragraph 171, does recognize that one can be a conscientious objector, even if one is not opposed to war in any form. The *Handbook* states in Chapter V that not every conviction, genuine though it may be, will constitute sufficient reason for claiming refugee status after desertion. It is not enough for a person to be in disagreement with his government regarding the political justification for a particular military action. The *Handbook* continues:<sup>10</sup>

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 could, in the light of all other requirements of the definition, in itself be regarded as persecution.

This then raises the questions whether the U.S. incursion into Iraq in which the claimant does not wish to participate, is the type of military action which is condemned by the international community as contrary to basic rules of human conduct, and whether punishment for desertion, therefore, should in itself be regarded as persecution.

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<sup>8</sup> *Handbook on Procedures and Criteria for Determining Refugee Status*, Office of the United Nations High Commissioner for Refugees, re-edited, Geneva 1992, Chapter V, paragraph 170

<sup>9</sup> Exhibit R/A-4. See: also Exhibit M-1, tabs 4, 5 and 6.

<sup>10</sup> UNHCR *Handbook*, paragraph 171.

The essence of the claimant's position regarding this question is that the type of military action with which he does not wish to be associated in Iraq involves the killing of innocent civilians, particularly at checkpoints and the uncontrolled and excessive use of force and disrespect shown by certain Marines that he believed occurred based on his observations of some prisoners or that he heard about.

As noted above, the claimant's oral testimony contradicts the allegations he made in his PIF that he participated in numerous checkpoints where innocent people were killed, that he saw many people beaten during residential raids and that there was no control over the troops' behaviour. Contrary to these assertions in his PIF, I find that the claimant's oral testimony overall indicates that while he witnessed certain incidents of disrespect shown towards civilians and people taken into custody, and perhaps could extrapolate that certain prisoners had had excessive force used on them, his perceptions were primarily based on what he overheard others talking about or by the injuries he saw on certain individuals when they had been brought in without having the benefit of being there to see what actually occurred.

His own personal experience demonstrated an overarching control by superiors over the troops with respect to the rules of engagement, cultural sensitization and respect for civilians in particular. Indeed, he was appalled at some of the physical injuries he saw and by some of the comments made, given the training he and his fellow soldiers had and were continuing to receive. As I noted above, he indicated that he did not believe

superior officers were present at the time any of these incidents occurred or that they knew what had happened. Yet, he made no serious effort to report the abuses he said he believed occurred. Moreover, the claimant did not participate in any violations of human rights, nor did he witness any other soldiers in his platoon engage in abuses.

With respect to his description of the operation of checkpoints, it was apparent that checkpoints are clearly marked, are designed so that soldiers actively attempt to deter innocent civilians from entering the checkpoint and shots are fired only once these initial measures fail to stop the driver of the car. Military procedures require that a senior officer investigate the circumstances of any shootings that occur at checkpoints and the claimant testified that to his knowledge, these procedures are followed.

The claimant also submitted that documentary evidence<sup>11</sup> establishes that the U.S. military has committed numerous serious violations of international humanitarian law in Iraq, and that he would be involved in some of these atrocities and crimes were he to return for a second tour of duty.

In *Hinzman*, the Board Member discussed the applicable case law from Canadian Federal Courts<sup>12</sup> and the Supreme Court of Judicature, Court of Appeal (Civil Division)

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<sup>11</sup> Exhibit C-2 which describes a number of violations in various reports of human rights organizations such as Human Rights Watch and Amnesty International and news articles as well as government reports relating to investigations into allegations of violations.

<sup>12</sup> *Zolfagharkhani v. Canada (Minister of Employment and Immigration)*[1993], 3 F.C. 540; (1993), 20 IMM. L.R. (2d) 1 (C.A.); *Popov v. Canada (Minister of Employment and Immigration)* (1994), 24 Imm.L.R. (2d) 242 (F.C.T.D.).

of the United Kingdom<sup>13</sup> in his analysis of paragraph 171. I agree with this analysis and his conclusions regarding the elements to be established in determining its applicability in the circumstances of the U.S. military activities in Iraq.

While I accept that instances of serious violations of international humanitarian law have occurred, such as the incident described by the claimant regarding the hooded prisoner and other examples of mistreatment of prisoners of war noted in the documents,<sup>14</sup> I am not persuaded that the claimant's evidence supports a conclusion that the activity of the U.S. military contravenes acceptable international standards. As noted by the Federal Court in *Popov*:

It is true that the evidence contains accounts of violations, or allegations, at least, of violations from time to time. And one would not be too surprised if the allegations were substantiated. But an isolated incident or incidents of the violation of international standards is not the kind of activity which the Federal Court of Appeal was referring to in the jurisprudence which has been cited. (*Zolfagharkhani*). One is talking about military activity which is condoned in a general way by the state, by the military forces. One thinks of places like El Salvador.<sup>15</sup>

The Board Member in *Hinzman*, referring to some of the documents which were also submitted in the current case,<sup>16</sup> noted the criticisms and recommendations made in these reports, and also noted the U.S. response to some of the illegal actions taken by U.S. soldiers. He stated, in part in paragraphs 126–131:

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<sup>13</sup> *Krotov v. Secretary of State for the Home Department* [2004] EWCA Civ. 69.

<sup>14</sup> See, for example: Exhibit C-2, Tab 15.

<sup>15</sup> *Supra*, Footnote 17.

<sup>16</sup> See, for example, Exhibit C-2, Tab (International Committee of the Red Cross – ICRC – Report; and Tab (Human Rights Watch – HRW- Report).

On October 1, 2003, the US military had acknowledged completing five investigations above the division level into alleged unlawful killings of civilians. In four of those incidents, the soldiers were found to have operated within the US military's confidential rules of engagement. In the fifth case, a helicopter pilot and his commander faced disciplinary action following an investigation. A sixth investigation was ongoing.

The author of the report determined that, although US military with responsibility for security in Baghdad was not deliberately targeting civilians, it was not doing enough to minimize harm to civilians, as required by international law.

Among the civilian deaths investigated were civilian deaths caused by US soldiers who responded disproportionately and indiscriminately after they came under attack at checkpoints, including killings at checkpoints when Iraqi civilians failed to stop.

HRW is quick to point out, among other things, that the US military with responsibility for security in Baghdad was not deliberately targeting civilians...

problematic were combat units...called upon to provide services for which they were not adequately trained or attitudinally prepared...Military officials told HRW that they recognized the problem and were providing extra training.<sup>17</sup>

With respect to this last point, it would appear that the claimant's description of his training through 2003 and 2004 is consistent with this increased training. The Board Member concluded at paragraph 133 (of *Hinzman*) that:

There is evidence before the panel that the US military has investigated instances of alleged reckless or indiscriminate use of force in Iraq, and has taken disciplinary action. There is no evidence in front of the panel that the US, as a matter of policy or practice is indifferent to alleged violation of international human rights law in Iraq. HRW acknowledged that the US military has taken steps to reduce civilian deaths. In fact, the willingness of the US government and military to allow "embedded" media representatives to report freely on US military action in Iraq, including alleged abuses, is also an important facet of a democratic government. A free and independent media is able to keep the public, not only in the US, but around the world, informed on a continuous and vigilant basis. This expectation of accountability by the military is an important hallmark of a democracy.

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<sup>17</sup> See: Exhibit C-2, Tabs, 9, 10, 12 and 14.

In *Hughey*, the Board Member considered a more recent HRW Report (the HRW Report)<sup>18</sup> in addition to the documents referred to in *Hinzman*. The claimant's counsel argued that this report and others demonstrated that senior US government and military leaders knowingly created an environment that permitted serious and widespread violations of international human rights law. Referring to this new report, the Board Member noted that U.S. officials have argued that the military justice system must be given time to run its course and that they point out that the Department of Defence and related investigations have been undertaken.<sup>19</sup>

In the current case, also referring to this HRW Report, the claimant's counsel queries how many generals do the human rights organizations have to accuse of violations before they are found to be systematic? While there have been numerous allegations, in my view, it is the response of the U.S. government to these allegations that is key, and not the number of allegations. The evidence establishes that the government has taken the allegations seriously and has begun investigations.

Counsel provided additional documentary evidence in support of the arguments he

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<sup>18</sup> Exhibit C-2, Tab 11.

<sup>19</sup> *Hughey*, paragraphs 71 and 72.

has maintained on this issue.<sup>20</sup> The reports and newspaper articles continue to criticize U.S. troops in Iraq, but the reports also note the involvement of the U.S. administration and Department of Defence in investigations and/or disciplinary actions taken relating to specific incidents that have arisen. Tab 9, in particular, is a Human Rights Watch report (the Checkpoint report) relating to the death of an Italian citizen at a blocking checkpoint in March 2005. Following an investigation by both Italian and U.S. authorities, it was determined that improper procedures were employed. While the U.S. practice and investigation procedures were severely criticized following this isolated incident, I am not persuaded that it reflects a systemic human rights violation within the meaning of paragraph 171 as contrary to the rules of basic human conduct. In my view, the Board Member's comments in *Hughey* continue to be relevant.

In *Hughey*, the Board Member concluded, and I agree that the HRW report (referred to above), along with all of the other reports entered into evidence, which includes documents entered into evidence in the current hearing<sup>21</sup> (and takes into consideration new documents entered into evidence at the current hearing), fall short of establishing that the US engaged in military actions that are condemned by the international community contrary to basic rules of human conduct.

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<sup>20</sup> Exhibit C-2, Tabs, 9 and 27, in particular.

<sup>21</sup> Exhibit C-2, Tabs 10, 12 and 16.

As the Board Member noted in *Hinzman*, there will always be “collateral damage” associated with war, which includes the loss of life, and particularly innocent civilian lives. However, as I noted above, the evidence before me indicates that the military is in control of its troops, has established procedures for its checkpoints and routinely and regularly instructs its soldiers regarding the rules of engagement, which includes the use of force and treatment of civilians generally.

Moreover, as the Board Member noted in *Hughey*, where accusations of wrongdoing have been made, the evidence indicates that the U.S. military has investigated instances of alleged reckless or indiscriminate use of force in Iraq and has taken disciplinary action, which have resulted in court-martials, convictions and/or reprimands, and many are still open.<sup>22</sup>

According to the documents cited by the Board Member in *Hughey*,<sup>23</sup> the most serious sentence handed out in the completed cases is three years in prison, which was given to two soldiers in separate cases of manslaughter.

More recent documentation<sup>24</sup> cited in the current case indicates that a Brig. Gen. in charge of detention operations at Abu Ghraib prison at the time certain abuses were committed, while apparently not charged or convicted of any crimes, was relieved of her command and received a written reprimand. This document indicates further that the

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<sup>22</sup> *Hughey*, paragraph 75.

<sup>23</sup> See: Exhibit C-2, Tab 26.

<sup>24</sup> Exhibit C-2, Tab 27.

most senior-ranking service member to be successfully prosecuted was a Marine Major, who was dismissed from service without jail time for his role in the strangulation death of a detainee. The details of his prosecution and/or involvement were not discussed in this report.

After reviewing all of the documentation submitted in the current case, I am persuaded that the Board Member's observations and conclusions in *Hinzman*, as cited above and subsequently relied upon in *Hughey* are relevant to the facts in this claim. Moreover, I agree fully with his conclusions.

If the claimant were to return to Iraq, it is likely that he would be engaged in similar activities to his first deployment. This activity may result in him killing Iraqi citizens who are subsequently determined to be innocent civilians, either during raids, patrols or on checkpoint duty. Moreover, I am not persuaded that the claimant would not be able to act with discretion in accordance with his training on the rules of engagement in order to minimize loss of life.

Similar to the Board Member's findings in *Hinzman* and *Hughey*, I find that the claimant in the current case has failed to establish that he has, or that he would be likely to be required to engage, associate with or be complicit in military action, condemned by the international community as contrary to basic rules of human conduct. He has not shown that the U.S 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. As a result, any punishment he receives as a consequence of his desertion is not persecutory.

The final issues to decide are whether the claimant has rebutted the presumption of state protection and whether his punishment for desertion constitutes prosecution or persecution.

### **State Protection**

A significant issue before me is whether the claimant will be afforded due process and thus the protection of his state should he return to the U.S. As the Board Member noted in *Hughey*, even where the alleged persecutor is the U.S. government, the Federal Court has relied on a state protection analysis to find that the claim was unfounded.<sup>25</sup>

The claimant has the burden of rebutting the presumption of state protection by presenting “clear and convincing proof” of the state’s inability to protect.<sup>26</sup> I am also mindful of the principle that international refugee protection is not meant to permit a claimant the opportunity to seek better protection abroad than he would receive at home.<sup>27</sup>

In *Hinzman*, dated March 16, 2005, the Board Member conducted a careful analysis of the issue of state protection and provided extensive and detailed reasons for

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<sup>25</sup> *Canada (Minister of Employment and Immigration) v. Siatcum* (1989), 99 N.R. 171 (F.C.A.); *Kubby, Steve v. M.C.I. (F.C., no. IMM-10013-03), Simpson, July 15, 2005, 2005 FC 990*

<sup>26</sup> *Ibid.*

<sup>27</sup> *Manorath, Rahonie v. M.C.I. (F.C.T.D., no. IMM-2369-94), Cullen, January 26, 1995.*

concluding that the claimant in that case, also a deserter from the U.S. military, had failed to rebut the presumption and thus failed to establish a requisite element of both sections 96 and 97 of *IRPA*. He subsequently followed this decision in *Hughey*, dated August 16, 2005, after noting that the claims were similar in that both men deserted the U.S. military rather than serve in Iraq, and came to Canada where they sought refugee protection, and that both men faced the possible consequences of their desertion, should they return or be returned to the U.S. In *Hughey*, the Board Member addressed additional arguments presented by Counsel.

The current claim raises identical issues. The distinguishing factors between these cases are that the claimant in *Hinzman* applied for conscientious objector status and the claimant in the current case actually served a tour of duty in Iraq, whereas neither claimant in the other two cases went to Iraq, although the claimant in *Hinzman* had served in Afghanistan. Nevertheless, based on the claimant's testimony in the current claim, and based on established case law<sup>28</sup> regarding the effective mechanisms of state protection available in the U.S., I find that the analysis of the availability of state protection in *Hinzman* and *Hughey* applies equally to the claimant's claim. I am not persuaded that I should come to a different conclusion from that drawn by the Board

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<sup>28</sup> *Canada (Minister of Employment and Immigration) v. Satiacum* (1989), 99 N.R. 171 (F.C.A.) and *Kubby, Steve v. M.C.I.* (F.C., no. IMM-10013-03), Simpson, July 15, 2005, 2005 FC 990.

Member in *Hinzman* and *Hughey*. Accordingly, I find that the claimant has failed to rebut the presumption of state protection.

### **Punishment for Desertion: Prosecution or Persecution**

The claimant fears that he will be arrested, charged, convicted and sentenced to jail for more than one year for desertion. He believes that if he ran into members of his former platoon they would beat him up. He also believes, although he could not provide a basis for his belief, that the military would treat him differently from other soldiers who desert, such as those who desert because they do not like the military, because of his political opinion that the war and U.S. involvement in Iraq is wrong.

The Board Member in *Hinzman* and *Hughey* fully canvassed this issue having found that the claimant in both cases was not a conscientious objector, either by reason of genuine religious, political or moral convictions, or in that the claimant would be participating in military action condemned by the international community as contrary to basic rules of human conduct, and concluding that any punishment he faces as a result of his desertion is not *per se* persecution.<sup>29</sup> In doing so, he reviewed the relevant provisions of the UNHCR *Handbook*, the UCMJ and relevant case law, as well as the claimants' testimony on this issue. I agree fully with his analysis and findings in these two cases as it pertains to the documents considered by him and adopt it for the purposes of this discussion.

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<sup>29</sup> See: *Hinzman*, paragraphs 145 – 168 and *Hughey*, paragraphs 82 – 92.

As I have made similar findings regarding the claimant's allegations regarding his conscientious objection to the war in Iraq, the claimant must establish that the punishment he fears would be as a result of discriminatory application of the law under the UCMJ, or that the punishment he would receive amounts to a risk of cruel and unusual treatment or punishment or risk to his life.

The claimant testified that he believes there is a warrant for his arrest, based on his understanding of military law and because a notation on his service record indicates that he is listed as a deserter. He sincerely believes that he will be arrested if he returns to the U.S. and will be court-martialled. He believes that desertion is considered a serious offence, but based on his own research believes that he would receive approximately one year in jail. While he thought the U.S. government or its military might wish to target him for more serious punishment because he has expressed views contrary to those held by the U.S. administration and military, however, he honestly did not know whether that concern had a valid basis in fact.

I am not persuaded that the claimant's personal circumstances are appreciably different from those of the claimants in *Hinzman* and *Hughey*. Accordingly, I find the Board Member's conclusions that the punishment the claimants in these cases would receive if they were to return to the U.S. would not amount to persecution or to cruel and unusual treatment or punishment or a risk to their lives are similarly applicable in the case at bar.

Accordingly, based on the evidence before me, I find that the treatment or punishment that the claimant fears would be punishment for breach of a neutral law that does not violate human rights, and does not adversely differentiate on a Convention ground, either on its face or in its application. Any punishment the claimant would receive for desertion would be pursuant to the punitive articles of the UCMJ (Articles 85 and 86), which is a law of general application that neither violates human rights, nor adversely distinguishes on a Convention ground, either expressly or in its application. Other than his unsubstantiated belief that he would be treated differently or punished more severely, the claimant has provided no evidence that this would be the case.

Moreover, he has not established that the punitive articles of the UCMJ amount to cruel and unusual treatment or punishment. The articles are a lawful sanction, not imposed in disregard of acceptable international standards, because they do not represent a disproportionate punishment for the offence of desertion, and the punishment is not so excessive as to outrage standards of decency and surpass all rational bounds of punishment. The punishment is not grossly disproportionate to the inherent seriousness of the offence of desertion.<sup>30</sup>

I find, on a balance of probabilities, that, were the claimant to return to the U.S., he would be arrested and court-martialled as a deserter for having breeched Article 85 of the UCMJ. Although his sentence may be as low as one year imprisonment, it is possible

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<sup>30</sup> *R. v. Smith* [1987] 1 SCR 1045.

that he could be sentenced for a longer term, as noted in *Hinzman* and *Hughey*, for a term between one to five years. It is also probable that the claimant would receive additional punishment, such as receiving a dishonourable discharge and forfeiture of pay in accordance with the penalties set out in the UCMJ. I am not persuaded that a sentence of imprisonment for a term of one to five years is persecutory as the claimant has not established that he falls under paragraph 171 and is a conscientious objector within the meaning of that paragraph..

I find further that the claimant has failed to establish that this would constitute disproportionately severe punishment for desertion, such that it amounts to cruel and unusual treatment or punishment.

## CONCLUSION

For these reasons, this claim for refugee protection is rejected.

“Laurel Cropley”

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Laurel Cropley

DATED at Toronto this 4<sup>th</sup> day of April 2006

**KEYWORDS - REFUGEE PROTECTION DIVISION - MILITARY SERVICE - CONSCIENTIOUS OBJECTION - DESERTERS - CREDIBILITY - INTERNATIONAL LAW - INTERNATIONAL INSTRUMENTS - STATE PROTECTION - PERSECUTION - PROSECUTION - LAW OF GENERAL APPLICATION - RISK OF CRUEL AND UNUSUAL TREATMENT OR PUNISHMENT - DISCRIMINATION - MALE - NEGATIVE - USA**