Citizenship and Immigration Canada | Citoyenneté et Immigration Canada

File Number: **5359-5558; 5359-5562; 5359-5563**

Date: 22 July 2008

HINZMAN, Jeremy Dean
NGUYEN, Nga Thi
NGUYEN HINZMAN, Liam Liem

-To be delivered by hand-

This refers to your application for permanent residence from within Canada on humanitarian and compassionate grounds.

Humanitarian and compassionate factors are assessed to determine whether an exemption from certain legislative requirements to allow your application for permanent residence to be processed from within Canada will be granted.

On 22 July 2008, a representative of the Minister of Citizenship and Immigration reviewed the circumstances of your request and decided that an exemption will not be granted for your application.

You are presently in Canada without status. Since you are the subject of a removal order, this letter is being copied to the Canada Border Services Agency, Enforcement Centre.

You will be contacted in the near future by that office to make removal arrangements. If you require clarification, more information, wish to provide a change of address or other information, visit the CIC Web site at http://www.cic.gc.ca or telephone the Call Centre at 1 (888) 242-2100.

The cost recovery fee that you paid for this application is not refundable. If you have paid the Right of Permanent Residence Fee, it will be refunded in eight to ten weeks.

The client number in the upper right corner of this letter is your personal identification number and it provides access to information on your file. For your own protection, do not allow any other person to use this number.

Yours truly,

S. Parr, Pre-Removal Risk Assessment Officer
Citizenship & Immigration Canada
6080 McLeod Road, Unit 12
Niagara Falls, Ontario
L2G 7T4

cc. file; Geraldine Sadoway & Neil Wilson, Parkdale Community Legal Services, 126 Queen Street West, Toronto, Ontario, M6K 1L3.

Canada

HUMANITARIAN AND COMPASSIONATE (H&C) GROUNDS APPLICATION

PRINCIPAL APPLICANT'S NAME: HINZMAN, Jeremy Dean
FILE: 5359-5558 ID: 5359-5558

COUNTRY OF NATIONALITY: United States of America
COUNTRY OF FORMER HABITUAL RESIDENCE: United States of America

1. Personal Information

Family Name: HINZMAN **Given Name(s):** Jeremy Dean **Gender:** Male **DOB:** 20 October 1978 **Marital Status:** Married
Aliases or Former Names: n/a
Address: 31 Melbourne Ave., Apt. #206, Toronto, Ontario, M6K 1K4 **Telephone number (H):** (416) 531-1369
Dependents: NGUYEN, Nga Thi (spouse) born 08 December 1972 in Laos (citizen of the United States), 5359-5562 NGUYEN HINZMAN, Liam Liem (son) born 12 May 2002 in United States (5359-5563)
Counsel: Geraldine Sadoway & Neil Wilson, Parkdale Community Legal Services Inc. **Address:** 1266 Queen Street West, Toronto, Ontario, M6K 1L3 **Telephone number (B):** (416) 531-2411

2. Immigration Information

Date	Event
03 January 2004	Applicants enter Canada
16 February 2004	Applicants make a claim for refugee protection
24 March 2005	Applicants determined to be neither Convention refugees or persons in need of protection by the Refugee Protection Division (RPD)
10 November 2005	Leave to seek judicial review of the negative RPD decision granted by the Federal Court of Canada
31 March 2006	Judicial review denied by the Federal Court of Canada
30 April 2007	Appeal of the Federal Court decision denied by the Federal Court of

	Appeal
15 November 2007	Leave to appeal the Federal Court of Appeal decision to the Supreme Court of Canada denied
17 January 2008	Applicants submit Pre-Removal Risk Assessment (PRRA) applications
12 March 2008	Applicants' Humanitarian and Compassionate (H&C) application received

3. References

Documents/Materials Reviewed:

Immigration Documents

- IMM5001, attachments and submissions (including updated submissions)
- PRRA application and submissions
- RPD Decision and Reasons (TA4-01429; TA4-01430; TA4-011431)

Jurisprudence

- *Hinzman v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 420.
- *Hinzman v. The Minister of Citizenship and Immigration*, 2007 FCA 171.
- *Minister of Employment and Immigration* v. *Villafranca* (1992) (F.C.A., Case No. A-69-90).
- *Nazim v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 125.
- *Pannu v. The Minister of Citizenship and Immigration*, 2006 FC 1356.
- *The Minister of Citizenship and Immigration v. Legault*, 2002 FCA 125.
- *Ward* v. *Attorney General of Canada*, [1993] 2 S.C.R. 689.

Legislation

Canada

- *Immigration and Refugee Protection Act*, S.C. 2001, c.27.
- Immigration and Refugee Protection Regulations, SOR/2002-227.
- *National Defence Act*, R.S.C. 1985, c.N-5 at ss.88(1), and 90(1).
- *Interpretation Act*, R.S.C. 1985, c. I-21 at s. 34(1)(b).

United States

- Chapter XII – Appeals and Review, Manual for Courts-Martial United States (2008 Edition), <http://www.jag.navy.mil/documents/mcm2008.pdf>.
- Chapter 3 of U.S. Army Regulation 27-10, 'Legal Services Military Justice, unclassified (effective 16 December 2005), <http://www.fas.org/irp/doddir/army/ar27-10.pdf>.
- Uniform Code of Military Justice, Articles 85-87.

- U.S. Army Regulation 600-43, 'Personnel-General: Conscientious Objection', unclassified (effective 21 September 2006), <http://www.fas.org/irp/doddir/army/ar600-43.pdf>.
- U.S. Department of Defense, 'Instruction Number 1300.06' (May 5, 2007), <http://www.dtic.mil/whs/directives/corres/pdf/130006p.pdf>.
- North Carolina General Statutes, Chapter 14 – Criminal Law, §14-32.4 and §14-33.

Publicly Available Documents

- BBC News, 'Thousands in US anti-war protests', (28 October 2007), <http://newsvote.bbc.co.uk/mpapps/pagetools/print/news.bbc.co.uk/2/hi/americas/7065975.stm>.
- CBC News, 'Rallies in Canada and U.S. protest Iraq war, Afghan mission' (17 March 2007), <http://www.cbc.ca/canada/story/2007/03/17/protest-afghanistan.html>.
- Freedom House, 'Freedom in the World – United States of America' (2007), < http://www.freedomhouse.org/template.cfm?page=22&year=2007&country=7298>.
- The New York Times, 'Pvt. Eddie Slovik's Remains Are Found in San Francisco (11 July 1987), <http://query.nytimes.com/gst/fullpage.html?res=9B0DE4DF153CF932A25754C0A961948260>.
- United Nations Children's Fund, 'At a glance: United States of America – Statistics', <http://www.unicef.org/infobycountry/usa_statistics.html>.
- U.S. Department of Education, 'Choices for Parents', <http://www.ed.gov/nclb/choice/index.html>.
- U.S. Department of Education, 'NCLB FAQs', <http://answers.ed.gov/cgi-bin/education.cfg/php/enduser/prnt_adp.php?p_faqid=4&p_created=1095255813&p_sid=Ralpm_8j&p_li=>.
- U.S. Department of Education, 'Overview – Four Pillars of NCLB', <http://www.ed.gov/nclb/overview/intro/4pillars.html>.

Other Documents

- Citizenship Laws of the World, 'United States', (March 2001), <http://www.opm.gov/extra/investigate/IS-01.pdf>.
- IP 5 Manual – Immigrant Applications in Canada made on Humanitarian or Compassionate Grounds.
- Hansard Debates (Number 104), 39th Parliament, 2nd Session (paras. 1510-1515), <http://www2.parl.gc.ca/HousePublications/Publication.aspx?Language=E&Mode=1&Parl=39&Ses=2&DocId=3543213>;.
- Hansard Debates (Number 101), 39th Parliament, 2nd Session (paras. 1010-1310), 29 May 2008, <http://www2.parl.gc.ca/HousePublications/Publication.aspx?Language=E&Mode=1&Parl=39&Ses=2&DocId=3529225>.

4. In Consideration

FACTORS

1. **Spousal, family or personal relationships that would create hardship if severed?**
   - No other family members in Canada are listed on the applicants' H&C or PRRA applications. Other relationships created while in Canada are discussed in the section entitled 'Establishment'.

2. **Children of applicant in Canada?**
   - The principal applicant has one child with him in Canada; his name is Liam and he is six years old.
   - Submissions indicate that Liam will be entering Grade 1 at Dewson Street Junior Public School in Toronto in September 2008; he is enrolled in the French Immersion program.
   - Submissions include captioned photographs of Liam and his parents at various family events (e.g. Halloween, Santa Claus parade, school concerts etc.).
   - Counsel's submissions state that Liam has adapted to life in Canada and has begun to develop a network of friends here. Further, counsel argues that he has adjusted well at school and that returning him to the United States will disrupt his stability. Apart from his integration into Canadian society, counsel states that the negative sentiments directed towards the principal applicant from Americans who object to his views on the war in Iraq will negatively impact Liam and cause him to be subjected to bullying and discrimination. Further, counsel states that the principal applicant's likely incarceration upon his return to the United States would also cause hardship to Liam.
   - Submissions include letters from friends attesting to Liam's relationship with other children. One such letter, written by Joyce Wong Schumann states: "*Over the years my son Nolan who is also 5 years old formed a strong and close friendship with Liam. My son's bond with Liam is so strong that he refers to him as family. If Liam was to be deported back to the states it would be devastating for them both.*"

3. **Hardship or sanctions upon return to country of origin?**
   - An affidavit dated 03 July 2008, signed by the principal applicant states in part that: "*My family and I came to Canada because we feared that I would be persecuted in the USA for my refusal to serve in the occupation of Iraq. I still fear that if I am returned to the USA I will be persecuted...I believe that I will suffer significant hardship amounting to persecution if returned to the United States, because of my public involvement at the international level with the War Resisters Support Campaign in Canada and because of my political opinion on the occupation of Iraq...Not only do I fear persecution, in the form of being imprisoned for my moral and religious beliefs, if returned to the U.S., but I also fear that I will be subjected to cruel and unusual punishment.*"
   - The applicants' H&C submissions include articles describing the potentially applicable punishments for desertion in the United States and note a trend of

increasing prosecutions for military desertion.

- Counsel's submissions state that: "*The treatment which would face Mr. Hinzman if he were to be returned to the U.S. would be a hardship involving non-official forms of punishment such as social ostracism, employment discrimination, physical danger from his opponents, and severe physical non-judicial punishment from within the army.*"
- In addition to his fear of judicial punishment under the Uniform Code of Military Justice (UCMJ), the principal applicant states that he will also face hardship based on non-judicial punishment. Specifically, counsel's submissions state that: "*Mr. Hinzman risks facing cruel and unusual punishment from the Commander of his former unit...resulting from non-judicial punishments authorized by the Command.*" Counsel specifically references Army regulation 27-10, which states that a commander is given the authority to impose any non-judicial punishment deemed appropriate upon a soldier under their command. The principal applicant's affidavit states: "*This policy to the best of my understanding with respect to soldiers who have gone AWOL or who have deserted, will be returned to their previous unit and an attempt will be made to re-incorporate them into the ranks before the decision on whether or not to lay charges under the UCMJ is made...That regulation, to the best of my understanding, indicates that a commanding officer has full and complete discretion to determine what punishments a soldier should receive.*"
- Prior to entering Canada, the principal applicant was a Specialist in Alpha Company, 2nd Battalion, 504th Parachute Infantry Regiment of the 82nd Airborne Division of the U.S. Army. He has been Absent Without Leave (AWOL) since January 2004.
- The principal applicant signed his enlistment documents with the US Army on 27 November 2000 and travelled to Fort Benning, Georgia to begin basic training on 17 January 2001. He enlisted for a period of four years. He states that he enlisted in the Army because of the College funding that would be provided and to allow for better job prospects. His affidavit states that: "*During my basic training I began to awaken to the realization that the ultimate purpose of a soldier is to kill. I grew increasingly disturbed by the conditioning that I and my fellow recruits were subjected to.*" With respect to basic training, the RPD noted that: "*This was the beginning of the self-questioning process that led to his application for non-combatant status.*"
- Following basic training, the principal applicant began three weeks of training at the Airborne School and received his parachutist badge on 15 June 2001. Approximately one month later, he received his posting orders for Fort Bragg. He became airborne qualified and continued to maintain his jump status. He was awarded his Expert Infantryman's Badge on 21 September 2001 and was promoted to Private First Class earlier than average as a result of his positive performance in the Army. The RPD noted that the principal applicant was one of 15% of 135 soldiers in his company selected for the pre-Ranger course.
- The panel noted: "*Mr. Hinzman testified that he had been 'kind of living a double life'. On the one hand, he gave every outward indication to his peers and superiors that he was a 'soldier's soldier'. Inwardly, however, his concerns about killing were simmering. He self-questioned whether he should be proceeding to pre-Ranger school and Ranger school, which he described as a point of no return. After that there would be no turning back, and he would be living his life as a lie. At that time,*

he became aware that the army made provision for personnel to apply for conscientious objector status, in which the options of a complete discharge from the army or remaining in the army in a non-combatant role were available. He did not share his dilemma with anyone in the army because the work atmosphere was loaded with machismo. He did tell his wife, whom he had married on 12 January 2001, and his grandmother, who had been the primary maternal figure in his life."

- Submissions indicate that the principal applicant's hesitations about the military became crystallized in an aversion to killing when he began reading books on Buddhism at Fort Bragg. The applicants began attending weekly meetings of the Religious Society of Friends (also known as Quakers) shortly after their wedding in 2001, when the female applicant was pregnant with Liam. His affidavit states: "*It became clear to me that I had made a profound mistake in joining the infantry. Consequently I took steps to change my situation while still honouring my commitment to the army.*"
- The applicant applied for conscientious objector status in August 2002 and requested that he be granted non-combatant status. He states that he gave the application directly to his company commander; however, he was informed three months later that his application had never been received. He resubmitted an application for conscientious objector status on the eve of his battalion's deployment to Afghanistan. He states in his affidavit that the timing of his second application made: "*...it appear on record that I was desperate and opportunistic to avoid deployment, and not that I had deeply felt moral aversions to war.*"
- In accordance with Army Regulation 600-43, a hearing was held in relation to the principal applicant's application. The hearing was conducted in Afghanistan on 02 April 2003. Submissions indicate that the principal applicant was assigned to menial kitchen duties while in Afghanistan. The investigating officer submitted his findings, conclusions and recommendations on 29 April 2003. As noted by the RPD, the report contained the following information:
    - "*a) The applicant sincerely opposes war on philosophical, societal and intellectual levels.*
    - *b) The applicant truly feels that he could not perform an offensive combat operation, but feels that he could perform defensive operations, and*
    - *c) The applicant's wife had recently given birth to the applicant's son during the same time frame as when this unit found that they were headed to Afghanistan in support of OEF* [Operation Enduring Freedom]. *The applicant subsequently submitted the application for reclassification.*"
- The investigating officer concluded that the principal applicant was using the conscientious objector regulation to get out of the infantry and that his beliefs were not congruent with the definition of conscientious objector outlined in the regulation. Specifically, the report stated: "*He is not willing to conduct offensive operations as a combatant, but he is willing to conduct defensive operations as a combatant...He clearly stated 'it would be his duty to defend his airfield if it were attacked.' He is willing to defend a military installation as part of his duty. If he is willing to fight and defend against the enemy, he cannot choose when or where.*"
- The principal applicant continued his assigned duties in Afghanistan and resumed his regular infantryman duties when he returned to Fort Bragg in July 2003. He did not

exercise any of his appeal rights within the military chain of command or through the outside court system with respect to the negative conscientious objector decision. He states in his affidavit that: "*After my application was rejected I resigned myself to continue my term of service. Contrary to what my unit wanted to believe, my convictions regarding war did not suddenly evaporate.*"

- The principal applicant received notification that his battalion was to be deployed to Iraq in mid-January 2004. He states in his affidavit that: "*I was aware that a soldier had a duty to refuse to follow a manifestly unlawful order. It is my view that since the military occupation of Iraq is without legal underpinnings, I would have been a criminal if I were to take part in it...I remain opposed to the occupation of Iraq, and to war in general. I now consider myself to be a pacifist, and against all participation in war.*"
- The RPD noted that the principal applicant decided that he was not going to Iraq and only discussed his decision with his wife. They discussed two options: the first was to refuse the orders of his command and take the repercussions under the UCMJ; the second option was to go AWOL to Canada. The applicants arrived in Canada on 03 January 2004.
- The RPD found that the applicants were not Convention refugees or persons in need of protection. In part, the panel found that the court martial process that would apply to the principal applicant: "*...reveals a sophisticated military judicial system that respects the rights of the service person, guarantees appellate review and a limited access to the US Supreme Court.*" Further, the panel noted that the UCMJ is a law of general application and that the principal applicant had not discharged the onus of showing that the law was inherently, or for another reason, persecutory in relation to a Convention ground. The RPD continued its discussion of state protection by finding that the principal applicant had brought forward no evidence to support that he would not be afforded full protection of the law and that US military law has regulations in place to provide for conscientious objector status. The principal applicant availed himself of this process; however, the panel found that he did not provide sufficient evidence to establish that he was, or would be, denied due process or treated differently were he to return to US and be court-martialled. In conclusion, the panel stated: "*I find that Mr. Hinzman has not rebutted the presumption that the US system of military justice, including court-martialling, is fair and independent, nor has he established any persecutory intent toward him on the part of enforcement officials, prosecutors or judges within the US military justice system.*"
- The RPD then considered whether the principal applicant met the definition of a refugee based on conscientious objection as described in the United Nations High Commissioner for Refugees (UNHCR) 'Handbook on Procedures and Criteria for Determining Refugee Status' (the 'Handbook'). The panel concluded that he was not a conscientious objector because he was 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. The panel also noted his failure to pursue an appeal of his conscientious objector application, or to make a new application, or to make a request to delay the hearing until he returned to the United States. The RPD stated: "*As a result, punishment that he may receive under the UCMJ as a consequence of his decision to desert is not inherently persecutory.*"

- The RPD also considered whether the principal applicant's deployment to Iraq was condemned by the international community as contrary to basic rules of human conduct, and therefore, any punishment for desertion should be regarded as persecution, as outlined in paragraph 171 of the Handbook. The panel concluded he had failed to establish that he would have engaged, been associated with, or complicit in military action condemned by the international community. Specifically, they stated: "*He has not shown that the US 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.*"
- Overall, the RPD concluded that: "*I find, on a balance of probabilities, that, were Mr. Hinzman to return to the US, he would be court-martialled, found to have breached the article respecting desertion, would be sentenced to a term of one to five years imprisonment, would forfeit his pay and be dishonourably discharged. I find that Mr. Hinzman has failed to establish that a sentence for desertion that included imprisonment for a term of one to five years would be persecutory...Nor has Mr. Hinzman established that this would constitute a disproportionately severe punishment for desertion, such that it amounts to cruel and unusual punishment.*"
- The applicants were granted leave to seek judicial review of the negative RPD decision to the Federal Court of Canada.[1] A central issue before the Court was the panel's interpretation and application of paragraph 171 of the Handbook. The applicants argued that the RPD erred in excluding evidence of the Iraq war's illegality as irrelevant to the refugee claims and that the panel erred in their finding that the applicants had not established that the violations of international humanitarian law are systemic. The Court rejected all of the applicants' claims and found the RPD's decision that the applicants had not rebutted the presumption of state protection was appropriate. The Court also certified the following question: "*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*"?
- The Federal Court's decision was appealed to the Federal Court of Appeal.[2] The Court declined to answer the certified question as it found that the applicants failed to first satisfy the court that they sought, but were unable to obtain, protection from their home state, or that their home state could not be expected to provide protection. "*In conclusion, the appellants 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 protection in the United States.*"[3]
- With respect to the RPD's opinion that the principal applicant would be imprisoned for desertion if returned to the United States, the Federal Court of Appeal found that the panel's opinion could not be relied on. The Court found that the RPD failed to make reference to the critical statistic that most deserters have not been imprisoned, and therefore, the panel did not consider all of the important evidence. Statistics

indicate that approximately 94% of deserters from the US Army have not faced prosecution and imprisonment, but have been released from the military with a less-than-honourable discharge. Leave to appeal the Federal Court of Appeal's decision was denied by the Supreme Court of Canada.

- The applicants' H&C submissions state that the principal applicant would be unable to obtain state protection from judicial and non-judicial punishment if returned to the United States. Counsel's submissions state: "*Even if it is found under an analysis on state protection in the PRRA application that Mr. Hinzman would have available to him effective procedures to prevent the cruel and unusual hazing that he would suffer at the hands of commanding officers, or to prevent him from receiving a more severe sentence, as fellow resisters have, for having spoken out against the war, it is submitted that the experiences that he would doubtless undergo upon return to the United States would constitute unusual, undeserved and disproportionate hardship.*"
- Submissions include a letter dated 12 March 2008 from Amnesty International Canada that states: "*Amnesty International (AI) believes that as an individual who deserted the United States military for reasons of conscience, there is significant risk Mr. Hinzman will be imprisoned upon his return to the United States, and as such he should not be forcibly removed to that country. If imprisoned, AI would consider him to be a prisoner of conscience.*"
- Submissions include news articles describing detainee-related abuse in Iraq, and crimes committed by U.S. soldiers against people in Iraq.
- Submissions include an affidavit from Eric A. Seitz, a U.S. attorney who has represented U.S. military personnel and draft resisters since 1967 and has also taught courses in military law and related topics. In part, his affidavit notes that since 2003 individuals who are absent from military service to avoid participating in the current war have been given uncharacteristically harsh treatment upon their return.
- Submissions include affidavits and letters describing first-hand accounts of members of the U.S. military who, counsel states: "*...were treated differently and subjected to harsh and unfair treatment because of their opinions with respect to the war in Iraq, and particularly because these persons chose to speak out publicly regarding their political opinions.*"
- Submissions include examples of hate mail sent to the War Resisters Support Campaign.

4. Degree of establishment demonstrated since <u>03 January 2004</u>?

- Submissions indicate that the principal applicant has been employed since shortly after arriving in Canada. The applicants have never been in receipt of social assistance in Canada. The principal applicant worked as a bike courier for two years and was subsequently employed full-time at Starbucks. He also worked part-time as a gardener/landscaper for members of the Quaker community. He is currently employed full-time as a bike courier.
- The female applicant is a homemaker and provides child care to a friend's son for 2 ½ hours per week. Her affidavit states that it will be very difficult for her to continue to be a stay-at-home parent if the family is returned to the United States because of her husband's likely incarceration.
- Submissions indicate that the applicants attend weekly meetings of the Quaker

Society and have participated in church activities and committees (letters on file from the Quaker Society in support of the applicants).

- The principal applicant is extensively involved with the War Resisters Support Campaign and submissions indicate that he dedicates large portions of his time to this cause. His involvement includes delivering speeches across Canada, attending rallies, and appearing in documentaries (letter of support on file from the Coordinator of the Campaign). His affidavit states that his involvement with this Campaign is related to the hardships he will face upon his return to the United States: "*I believe that I will be targeted because I have spoken out so vocally against the occupation of Iraq. My case has become the lead case of War Resisters in Canada seeking asylum. It was my case that was appealed to the Federal Court of Appeal. I have become the de facto spokesperson for the War Resisters.*"
- Submissions indicate that the principal applicant is a dedicated runner and participates in marathons. Counsel's submissions state that this activity: "*...has connected him and his family with a significant number of Canadian friends and supporters.*"
- The principal applicant has published three book reviews for the *Catholic Registrar*.
- Submissions indicate that the applicants are active in their community through their participation in the Dufferin Grove Housing Cooperative (letter of support on file from the President of the Cooperative). The female applicant is on the Board of Directors and writes articles for the newsletter.
- The applicants are also involved in local children's care organizations (letters of support on file from College-Montrose Children's Place and More Than Child's Play).
- Submissions include several letters of support from friends and community members attesting to the applicants' work ethic, and contribution to Canadian society.
- Counsel's submissions state that the principal applicant: "*...would certainly meet the requirements of the Skilled Worker application.*" Counsel further states that the only thing preventing the principal applicant from making a skilled worker application is the likelihood of a conviction for military desertion upon his return to the United States. Counsel states that such a conviction would make him criminally inadmissible to Canada. Counsel's submissions state: "*Mr. Hinzman has been unable to leave Canada to go to the U.S. because of the threat of prosecution and incarceration if he ever returns. ...It is submitted that this inability to leave Canada has led to establishment here, evidenced by the employment, community and family factors discussed in this application.*"
- Submissions indicate that the applicants have good civil records in Canada.

5. Establishment, ties or residency in any other country?

- The principal applicant's mother, two sisters and grandparents reside in the United States.
- The female applicant's parents, and four siblings reside in the United States.

6. Other factors?

- Submissions indicate that the female applicant is pregnant. Counsel's submissions state that the family would suffer severe hardship if the principal applicant, as the primary breadwinner, were incarcerated upon their return to the United States.

6. Decision and Reasons

The applicants are seeking an exemption from the in-Canada selection criteria and the requirement to not be inadmissible in Canada based on humanitarian and compassionate or public policy considerations to facilitate processing of their applications for permanent residence from within Canada. The applicants bear the onus of satisfying me that their personal circumstances, including the best interest of any child directly affected by my decision, are such that the hardship of not being granted the requested exemption would be i) unusual and undeserved or ii) disproportionate.

These are not rigid requirements, however, I am guided by the following definitions:

- *Unusual and undeserved* hardship involves a hardship not anticipated by the Act or Regulations; and in most cases, a hardship resulting from circumstances beyond the person's control;
- *Disproportionate hardship* – "Humanitarian and compassionate grounds may exist in cases that would not meet the 'unusual and undeserved criteria' but where the hardship would have a disproportionate impact on the applicant due to his or her personal circumstances."

The applicants have been in Canada for approximately 4 ½ years. During this time, a certain level of establishment is expected to occur. However, this in and of itself may not amount to the applicants facing unusual and undeserved, or disproportionate hardship. The applicants' humanitarian and compassionate grounds are based on: Risk; Establishment; Best Interest of the Child; and Other Factors (the pregnancy of the female applicant). I have considered the applicants' H&C and PRRA applications and submissions in this decision as risk has been cited. However, I recognize that the threshold is one of hardship for an H&C application and not section 96 or 97 of the *Immigration and Refugee Protection Act* (IRPA). **This H&C application has been assessed on the basis of unusual and undeserved, or disproportionate hardship.**

As a PRRA Officer, it is important to note that my delegated authority with respect to H&C applications includes the authority to grant exemptions from some requirements of IRPA if I find that the exemption is justified by H&C considerations.[4] As the decision-maker, I conduct the first-step assessment to consider whether the H&C grounds justify the applicants being exempted from the selection criteria related to becoming a permanent resident from within Canada. I do not have the authority to make findings with respect to the legality of the war in Iraq or to comment on the foreign policy of the United States government.

I am aware that a motion was passed in the Canadian House of Commons on 03 June 2008 stating: "*The Committee* [The Standing Committee on Citizenship and Immigration] *recommends that the government immediately implement a program to allow conscientious objectors and their immediate family members (partners and dependents), who have refused or left military service related to a war not sanctioned by the United Nations and do not have a criminal record, to apply for permanent resident status and remain in Canada; and that the*

government should immediately cease any removal or deportation actions that may have already commenced against such individuals."[5] This motion was introduced by the New Democratic Party, an opposition political party in Canada. Although the motion was supported by all three opposition parties, it is not binding on the Canadian government. As of the date of this decision, the motion has not been adopted as law, or immigration policy, in Canada.

In addition, I note that I am not bound by the findings of the RPD; however, the panel's findings, to the extent they have not been overturned by a Canadian court, may be considered in this assessment as they relate to an assessment of the applicants' unusual and undeserved, or disproportionate hardship.

Hardship Associated with the Applicants' Identified Risks

The applicants submit that the hardships associated with their identified risks amount to an unusual and undeserved, or disproportionate hardship. Specifically, the principal applicant states that he will face persecution and cruel and unusual punishment because he will be imprisoned for desertion if he is returned to the United States. In addition, he states that he will be subjected to disproportionately harsh treatment because of his public involvement with the War Resisters Support Campaign and speaking out against the war in Iraq.

Judicial Punishment

The UCMJ includes several sections which are applicable to soldiers who are voluntarily absent from their military unit. Desertion, the most serious of these types of offences, is discussed in Article 85. Articles 86 and 87 outline the offence and punishment for being Absent Without Leave and Missing Movement respectively.[6] The punishment for these offences varies greatly, including punishment by death for desertion or attempt to desert in time of war. Although the principal applicant's affidavit indicates that the death penalty is the maximum punishment for desertion, his submissions specifically refer to being imprisoned for desertion and receiving a harsher sentence than other deserters in similar circumstances.

The RPD found there to be less than a mere possibility that the principal applicant would receive the death penalty if returned to the United States. The panel noted: "*Counsel for the claimants acknowledges, in his reply to the Minister's submissions, that the claimants have not met the burden of establishing that the degree of the risk of the imposition of the death penalty on Mr. Hinzman for desertion is more likely than not.*" Submissions provided in support of the applicants' H&C application have not countered this finding of the RPD and, for the reasons that follow, I find it objectively unreasonable to conclude that the applicant would face the death penalty if court-martialled upon his return to the United States. As directed by the Federal Court of Appeal, I am not relying on the RPD's finding with respect to the likely punishment that the principal applicant would receive if court-martialled upon his return to the United States.[7]

The Federal Court of Appeal referred to statistics presented by Crown counsel, for which the applicants' counsel could not provide contrary evidence: "*Statistics adduced by the Crown indicate that approximately 94% of deserters from the U.S. Army have not faced prosecution and imprisonment, but have merely been dealt with administratively by being released from the*

military with a less-than-honourable discharge. Arguably, the chance of receiving an administrative discharge will be even higher for those who attempt to negotiate a discharge before deserting their units."[8] In addition, I note that the last time the death penalty was imposed on a U.S. soldier was in 1945, and prior to that, was during the civil war.[9] The applicants have made submissions which argue that the principal applicant will receive a harsher prison sentence than other soldiers in similar circumstances because of the high-profile nature of his case and his public speeches in opposition to the war in Iraq.

Submissions include affidavits and letters from U.S. soldiers who believe they were treated differently and subjected to harsher treatment because of their decisions to publicly voice their opinions with respect to the war in Iraq. These submissions indicate that the soldiers were convicted of varying offences, including unauthorized absence, desertion and missing movement. They received prison sentences ranging from 6 to15 months, demotions, forfeiture of pay, fines, and bad conduct discharges. Counsel's submissions note that some of these soldiers had submitted conscientious objector applications that were not processed. Counsel's submissions state that these soldiers' circumstances support that the principal applicant will be subjected to a court-martial proceeding and receive a harsher punishment than others who have committed similar offences. For the following reasons, I find that objective evidence does not support that the principal applicant will be subjected to a disproportionate punishment should he be charged and convicted in a court martial proceeding upon his return to the United States.

I accept that the affidavits and letters provided by the applicants recounting the first-hand experiences of certain U.S. soldiers demonstrate that the U.S. military does, in some circumstances, prosecute soldiers for being AWOL, desertion, and missing movement. However, I do not find that this evidence supports that it would amount to an unusual and undeserved, or disproportionate hardship for the principal applicant to access state protection in the United States, or to receive due process in the military and/or civilian court system. The specific affidavits and letters submitted by counsel all indicate that where soldiers were charged with an offence, they were afforded due process in the form of a court-martial proceeding. I note that the letter from Monica Benderman to the Honorable Supreme Court Justices, dated 13 November 2007, indicates that her husband's first court-martial proceeding was dismissed when the judge ruled that the investigating officer had shown implied bias. She also notes that as of the date of the letter, his case was on appeal at the military court level. In addition, I note that, unlike some of these soldiers, the principal applicant's conscientious objector application was processed by the U.S. Army and he did receive a hearing as prescribed by the regulations. There are avenues of appeal available to soldiers who are dissatisfied with the outcome of their conscientious objector hearing, however, the principal applicant chose not to exhaust these avenues.

As noted by the Federal Court of Appeal: "*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.*"[10] It is recognized that sentences imposed for any offences in democratic countries will vary depending on the individual circumstances of the case; it is also recognized that public opinion on these differing sentences will also vary. Nevertheless, the discretion afforded judges, including in court-martial proceedings, is an inherent component of an independent judiciary, unless it can be shown that the discretion has been applied in violation of the principles of natural justice, or

imposed in disregard of accepted international standards. Evidence does not support that the sentences imposed on the soldiers referred to in the applicants' submissions were disproportionately harsh because of their public opposition to the war in Iraq. I have been provided with insufficient evidence to conclude that the UCMJ will be applied in a disproportionately harsh manner against the principal applicant because of his personal circumstances.

It is important to note that the possibility of prosecution for a law of general application is not, in and of itself, sufficient evidence that an applicant will face unusual and undeserved, or disproportionate hardship. The H&C application is not an avenue to circumvent lawful and legitimate prosecutions commenced by a democratic country. There is a warrant for the arrest of the applicant for military desertion; however, evidence does not indicate that he has been charged with an offence in the United States. Nevertheless, accepting the applicants' submissions that he will face charges and prosecution upon his return to the United States, documentary evidence, and evidence personal to the principal applicant, indicates that he will be afforded due process and that accessing due process and state protection would not be a hardship. As a result, I find that the evidence does not support that the principal applicant would not receive due process if charged with being AWOL, desertion, or missing movement upon his return to the United States.

I recognize that the United States has been criticized by domestic, international and human rights organizations for, among other things, its detention of prisoners at Guantanamo Bay, military abuses such as the Abu Ghraib prison occurrences, interrogation techniques, and the death penalty. However, documentary evidence supports that the government is making serious efforts to address deficiencies in the system and to protect its citizens generally. For example, submissions made by the applicants include several news articles describing abuses by U.S. soldiers against Iraqi civilians; however, the articles also outline the convictions and sentences imposed on the soldiers for their crimes. The Federal Court of Appeal in *Villafranca* stated that: "*No government that makes any claim to democratic values or protection of human rights can guarantee the protection of all of its citizens at all times. Thus, it is not enough for a claimant merely to show that his government has not always been effective at protecting persons in his particular situation.*"[11]

As noted by the Federal Court of Appeal, and supported by documentary evidence: "*The United States is a democratic country with a system of checks and balances among its three branches of government, including an independent judiciary and constitutional guarantees of due process. The appellants therefore bear a heavy burden in attempting to rebut the presumption that the United States is capable of protecting them and would be required to prove that they exhausted all the domestic avenues available to them without success before claiming refugee status in Canada.*"[12] I recognize that the Court was applying the standard of providing 'clear and convincing evidence' outlined in *Ward* when determining whether the applicants had rebutted the presumption of state protection. Nevertheless, I find that the democratic nature of the United States and the country's sophisticated and comprehensive military justice system is relevant to an assessment of an unusual and undeserved, or disproportionate hardship faced by the applicants.

Specifically, I note that the U.S. military justice system provides the following avenues for those

who object to military service: Army Regulation 600-43, "*...establishes uniform standards for processing conscientious objector applications during mobilization*"[13]; Department of Defense – Instruction Number 1300.06, '*...provides policy on uniform DoD procedures governing conscientious objectors and processing requests for discharge based on conscientious objection*"[14]; and appellate review rights and limited access to the U.S. Supreme Court under the UCMJ and the Manual for Courts-Martial.[15] The principal applicant availed himself of some of these avenues prior to seeking international protection; however, he did not exhaust all avenues available to him. I do not find that it amounts to the required level of hardship for him to return to the United States and access the avenues of state protection, including the military justice system, available to him.

Non-Judicial Punishment

The applicants also submit that the non-judicial punishment that the principal applicant would face upon returning to the United States amounts to hardship. Specifically, counsel refers to excerpts of Army Regulation 27-10 included in the applicants' PRRA submissions and paraphrases: "*...a commander is given the authority to impose any non-judicial punishment that he or she deems appropriate upon a soldier under his or her command.*"

I accept that Army Regulation 27-10 provides for the imposition of non-judicial punishment by commanders on commissioned officers, warrant officers, and other military personnel of a commander's command.[16] However, I do not find that the existence of the regulation, in and of itself, demonstrates that it will be applied towards the principal applicant in a manner that amounts to an unusual and undeserved, or disproportionate hardship.

The excerpts included in the applicants' submission contain a small portion of the 22 pages of the regulation that pertain to non-judicial punishment. I note that the regulation provides for maximum punishments that can be imposed by specific grades of officers against enlisted members, and commissioned and warrant officers. The regulation also outlines the circumstances under which non-judicial punishment may or should be imposed, and direction with respect the personal exercise of discretion. I also note that the regulation contains appeal rights and, specifically, section 3-31 of the regulation provides that: "*All appeals will be made on DA Form 2627 or DA Form 2627–1 and forwarded through the imposing commander or successor-in-command, when applicable, to the superior authority. The superior authority will act on the appeal unless otherwise directed by competent authority. The Soldier may attach documents to the appeal for consideration. A Soldier is not required to state reasons for the Soldier's appeal; however, the Soldier may do so. For example, the person may state the following in the appeal:*

> *a. Based on the evidence the Soldier does not believe the Soldier is guilty.*
> *b. The punishment imposed is excessive, or that a certain punishment should be mitigated or suspended.* (emphasis added)."[17]

The principal applicant's affidavit indicates that he fears he will suffer arbitrary and cruel and unusual punishment in the form of non-judicial punishment. Submissions do not indicate that he has experienced such treatment in the past; however, submissions include an affidavit of Christian Kjar, a former member of the Marine Corps, who sought refugee status in Canada. His

affidavit describes incidents of non-judicial punishment and the applicants state that the principal applicant's punishment would far exceed Mr. Kjar's treatment because of the principal applicant's high-profile nature. I do not find this conclusion to be supported by the evidence.

Admittedly, Mr. Kjar's affidavit describes humiliating and physically difficult forms of non-judicial punishments. However, I note that, unlike the principal applicant, Mr. Kjar did not file a conscientious objector application. Additionally, I note that the affidavit does not indicate that Mr. Kjar exercised any of his rights under Army Regulation 27-10 with respect to non-judicial punishment. As a result, it is difficult to consider this affidavit to be objective evidence as it provides a one-sided account of incidents that are not substantiated by any formal complaint process or corroborated by objective sources. I find that this affidavit is insufficient to lead me to conclude that the principal applicant would suffer a disproportionate amount of non-judicial punishment upon his return to the United States because of the high-profile nature of his case. Regardless, I find the authority of commanders under Army Regulation 27-10 to impose non-judicial punishment to be a law of general application under which the principal applicant would be afforded due process should it be improperly imposed.

Other identified risks

The applicants state that the hardships associated with their identified risks also include being socially ostracized, physical danger from individuals opposed to the principal applicant's political opinions, the inability to vote or work in certain occupations if convicted of desertion or other military convictions, and the inability to apply to immigrate to Canada as skilled worker.

With respect to the hardships of social ostracism and physical violence, I note that state protection exists in the United States for these types of potential offences. Whether the behaviour amounts to an offence will depend on the individual circumstances of the act. However, should the applicants experience physical violence or other forms of criminally prohibited behaviour, state protection in the United States can be accessed in numerous ways. Law enforcement is divided between federal, state and local levels. Individuals are free to approach any, or all, levels of law enforcement. Physical violence is prohibited under criminal law at the state level; for example, an assault charge in North Carolina may be categorized as either a misdemeanor or felony depending on the circumstances.[18] While I accept that being socially ostracized by certain members of the public will be difficult, I find that the applicants would be able to access state protection should they encounter incidents of violence and I do not find that it amounts to a hardship for them to access such protection.

I recognize and accept that there are Americans who will disagree with the applicants' political opinions and public opposition to the war in Iraq; further, I recognize that submissions support that many people have expressed their displeasure in the form of emails directed at the applicants. I accept that these emails and other forms of expression are upsetting and emotionally difficult to handle. However, except for threats which may amount to criminal acts themselves, freedom of expression is a fundamental value respected in both Canada and the United States. As a result, I do not find that the potential or actual expression of opposing opinions to those of the applicants amounts to an unusual and undeserved, or disproportionate hardship.

With respect to the principal applicant's inability to vote or seek employment in certain occupations because of a military conviction, I find that any laws prohibiting such activity are generally applicable in nature and do not amount to a hardship for the applicants. Assuming the principal applicant is convicted of a military offence, evidence does not support that these laws disproportionately target him compared to other individuals charged and convicted of similar military offences.

With respect to the principal applicant's inability to apply under the skilled worker program in Canada, counsel states: "*Furthermore, if convicted in the U.S., Mr. Hinzman would then become inadmissible to Canada due to foreign felony conviction and his wife and son would also become inadmissible under s.42 of IRPA. It is submitted that this would be a disproportionate hardship of returning to the U.S. related to the Hinzman family's personal circumstances.*" Submissions include a letter from the Minister of Public Safety, Stockwell Day, dated 12 October 2007. The letter indicates that being AWOL from the U.S. military is not a crime in Canada and that a foreign national is not inadmissible to Canada only based on an outstanding charge of being AWOL from the U.S. military. The letter also states that being AWOL from the Canadian military is an offence pursuant to section 90(1) of the *National Defence Act*. However, since that section does not indicate whether being AWOL is a summary or indictable offence, section 34(1)(b) of the *Interpretation Act* deems it be a summary offence. Independent research has confirmed that this information remains accurate as of the date of this decision.[19]

Section 36(1) of the IRPA provides that a foreign national is inadmissible to Canada for *inter alia*: "*(b)...having been convicted of an offence outside Canada that, if committed in Canada, would constitute an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years; or (c) committing an act outside Canada that is an offence in the place where it was committed and that, if committed in Canada, would constitute an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years.*"[20] Therefore, should the principal applicant be charged and/or convicted of being AWOL upon his return to the United States, he would not, for that reason alone, be inadmissible to Canada. However, should he be charged and/or convicted of a different or additional offence(s) that does meet the inadmissibility provisions of section 36(1) and/or (2) of the IRPA, he may become inadmissible to Canada. Nevertheless, I am unable to conclude that a charge and/or conviction for being AWOL from the U.S. military amounts to an unusual and undeserved, or disproportionate hardship as it would not, in and of itself, render the principal applicant inadmissible to Canada.

However, should the principal applicant be convicted of desertion in the United States, he would be inadmissible to Canada as the offence carries a maximum term of imprisonment for life if committed while on active service or under orders for active service.[21] Even if the principal applicant becomes inadmissible to Canada, I do not find that this, in and of itself, amounts to an unusual and undeserved, or disproportionate hardship. The H&C process is intended to provide an exemption based on humanitarian and compassionate considerations; it is not intended to circumvent the ability of a democratic country to carry out a prosecution against one of its citizens, as long as the prosecution is not being imposed in disregard of accepted international standards. As discussed above, evidence does not support that the UCMJ is being, or will be,

imposed against the principal applicant in a manner that disregards accepted international standards. The hardship is not unusual and undeserved, as criminality is contemplated by IRPA under section 36; it was not beyond the principal applicant's control as it has been determined that he did not exhaust all available avenues prior to seeking international protection. The hardship is not disproportionate as section 36 of the IRPA applies generally to all foreign nationals and does not disproportionately impact the principal applicant.

Establishment

I now turn to the applicants' degree of establishment in Canada. The applicants have been in Canada for approximately 4 ½ years. During this time, the applicants have become involved in their community by volunteering for various organizations and the principal applicant is employed full-time. The female applicant is a stay-at-home mother and provides child-care to another child on a part-time basis. Both applicants are involved with the Quaker Society and participate in a number of activities within the organization. Submissions indicate that they have made a number of meaningful friendships while in Canada. I have considered all of these factors and place positive consideration on the applicants' efforts to become integrated and established in Canadian society since their arrival.

The Federal Court in *Nazim* noted that: "*The humanitarian and compassionate process is designed to provide relief from unusual, undeserved or disproportionate hardship. The test is not whether the applicant would be, or is, a welcome addition to the Canadian community. In determining whether humanitarian and compassionate circumstances exist, immigration officers must examine whether there exists a special situation in the person's home country and whether undue hardship would likely result from removal.*"[22]

The applicants have made commendable efforts to establish themselves in Canada, however, I do not find that severing their ties in this country would amount to an unusual and undeserved, or disproportionate hardship. The work experience of the principal applicant is transferable to similar positions in the United States. It would be a family decision whether the applicants will choose for the female applicant to remain at home with Liam and their unborn child upon their return to the United States. The inability of one parent to stay at home and raise the children is a difficulty facing many Canadian and American families and is not, in and of itself, a hardship. The applicants began their involvement with the Quaker Society while living in the United States and submissions do not indicate that the applicants would be unable to re-integrate themselves into the organization, or that doing so would amount to hardship.

The principal applicant states that he will be targeted upon his return to the United States because of his extensive involvement with the War Resisters Support campaign in Canada. I recognize that the principal applicant has spoken out publicly against the war in Iraq and has been involved in numerous rallies, protests and documentaries in Canada. However, I also note that the First Amendment of the United States Constitution guarantees the right to free speech and the right to assemble peaceably. Documentary evidence supports that there have been numerous rallies and protests held across the United States with respect to the war in Iraq.[23] Submissions do not support that the principal applicant would be unable to continue his efforts in the United States; further, it is reasonable to expect that his involvement in the war resisters movement in Canada

has provided him with several contacts for similar movements in the United States.

I accept that the principal applicant's media coverage and high-profile involvement with the War Resisters Support campaign makes him and his family recognizable and may lead to some difficult encounters with individuals who disagree with his political opinions. Nevertheless, evidence does not support that these difficulties amount to unusual and undeserved, or disproportionate hardship. As noted above, I find that state protection is available to the applicants should it be necessary and that it does not amount to hardship to access such protection. As the Federal Court noted in *Pannu*: "*The fact that Canada is a more desirable place to live than the country of removal is not determinative of an H&C application.*"[24]

Best Interest of the Child

In accordance with section 25(1) of the IRPA, this H&C decision considers the best interest of Liam, and all children directly affected by my decision. Liam is six years old and will be entering Grade 1 in September 2008, and was enrolled in the French Immersion program at his school in kindergarten. He has attended all of his schooling to date in Canada.

I recognize that Liam has adjusted well to entering school and is progressing academically. However, I note that he would also have access to the education system in the United States. Education is provided at the elementary and secondary level to all children in the United States. The United Nations Children's Fund (UNICEF) reports that the gross primary school enrolment ratio for boys between 2000-2006 was 100 and the net ratio was 92.[25] The *No Child Left Behind Act* was signed into law in January 2002 and is based on four principles: accountability for results; more choice for parents; greater local control and flexibility; and an emphasis on doing what works based on scientific research.[26] The law allows parents to choose other public schools or take advantage of free tutoring if their child attends a school that needs improvement. Parents can choose from a range of education options for their children, including: public school; supplemental educational services; charter schools, magnet schools, private education; or home-schooling.[27]

Liam's native language is listed as English on his H&C application. It is reasonable to expect that he would not encounter language difficulties in transferring to the U.S. school system. I recognize that he is currently enrolled in the French Immersion program in Canada, and he may not be able to access this same type of education in the United States. However, I do not find the inability to attend French Immersion to be a hardship, as documentary evidence demonstrates this his basic education needs would be met in the United States.

Submissions indicate that the applicants are concerned about the possibility of Liam being bullied or negatively impacted by sentiments directed at the principal applicant because of his opinions concerning the war in Iraq. While I recognize that children are significantly influenced by their parents' opinions and can be behave in an unkind or callous manner towards other children, I note that protection against such behaviour is available in the United States. The *No Child Left Behind Act* provides that students who attend a persistently dangerous school, or are the victim of a violent crime while in their school, have the option to attend a safe school within their district.[28] In addition, I note the various educational options available to parents in the

United States discussed above. The applicants would also have the option, if necessary, of seeking protection for Liam from the authorities, whether within the education system itself or through the police.

I recognize and accept that Canada is the only country in which Liam has been educated, and likely the only country with which he identifies. However, given his young age, it is reasonable to expect that the difficulties associated with returning and re-integrating into the United States would be minimal. He speaks English and has extended family members residing in the United States who could help facilitate his re-integration. I also note that the applicants will be removed from Canada as a family unit, and therefore, Liam will continue to remain with his primary caregivers throughout the process. I accept that he has made meaningful friendships and connections in Canada, however, the evidence does not support that severing these relationships amounts to an unusual and undeserved or disproportionate hardship for Liam or the other children. Liam will also have the option of continuing these friendships through other means such as phone calls or emails.

Other Factors – the female applicant's pregnancy

Submissions indicate that as of the date of this decision, the female applicant was pregnant. Should the child be born prior to the applicants' departure from Canada, the child will be a Canadian citizen by birth. The child will not lose this citizenship regardless where he or she resides. However, if the child is born in Canada, he or she will also be a citizen of the United States by descent as both parents are U.S. citizens and resided in the United States prior to the birth of the child.[29]

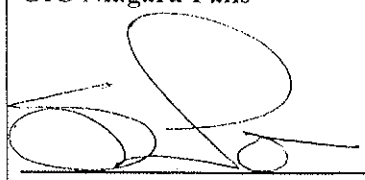
The due date of the female applicant is unclear. I recognize that airlines restrict the ability of pregnant women to fly at a certain stage in their pregnancy. However, I note that the applicants will be removed to the United States by motor vehicle; therefore, the female applicant's health will not be jeopardized by their removal. I also refer to the documentary evidence discussed above regarding the child's access to education in the United States. It is reasonable to expect that any difficulties adjusting and integrating into American society will be minimal given his or her young age at the time of removal (assuming the child is born in Canada). For these reasons, I do not find that the female applicant's pregnancy amounts to an unusual and undeserved, or disproportionate hardship.

Conclusion

I have considered all of the information regarding this application as a whole. Having reviewed and considered the grounds the applicants have forwarded as grounds for an exemption, I do not find they constitute an unusual and undeserved or disproportionate hardship. Therefore, I am not satisfied that sufficient humanitarian and compassionate grounds exist to approve this exemption request.

The application is refused.

Name of Decision Maker: S. Parr
CIC Niagara Falls



Signature

22 July 2008
Date

End Notes:

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[1] *Hinzman v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 420.
[2] *Hinzman v. The Minister of Citizenship and Immigration*, 2007 FCA 171.
[3] *Ibid.* at para. 62.
[4] See section 25(1) of the *Immigration and Refugee Protection Act*, and the IP 5 Manual – Immigrant Applications in Canada made on Humanitarian or Compassionate Grounds.
[5] Hansard Debates (Number 104), 39th Parliament, 2nd Session (paras. 1510-1515), <http://www2.parl.gc.ca/HousePublications/Publication.aspx?Language=E&Mode=1&Parl=39&Ses=2&DocId=3543213>; also see: Hansard Debates (Number 101), 39th Parliament, 2nd Session (paras. 1010-1310), 29 May 2008, <http://www2.parl.gc.ca/HousePublications/Publication.aspx?Language=E&Mode=1&Parl=39&Ses=2&DocId=3529225>
[6] Uniform Code of Military Justice, Articles 85-87.
[7] *Supra,* note 2 at para. 61.
[8] *Ibid.* at para. 58.
[9] See: The New York Times, 'Pvt. Eddie Slovik's Remains Are Found in San Francisco (11 July 1987), <http://query.nytimes.com/gst/fullpage.html?res=9B0DE4DF153CF932A25754C0A961948260>; also see the applicants' RPD decision.
[10] *Supra,* note 2 at para. 47.
[11] *Minister of Employment and Immigration* v. *Villafranca* (1992) (F.C.A., Case No. A-69-90).
[12] *Supra,* note 2 at para. 46.
[13] U.S. Army Regulation 600-43, 'Personnel-General: Conscientious Objection', unclassified (effective 21 September 2006), <http://www.fas.org/irp/doddir/army/ar600-43.pdf>.
[14] U.S. Department of Defense, 'Instruction Number 1300.06' (May 5, 2007), <http://www.dtic.mil/whs/directives/corres/pdf/130006p.pdf>.
[15] See: Chapter XII – Appeals and Review of the Manual for Courts-Martial United States (2008 Edition), <http://www.jag.navy.mil/documents/mcm2008.pdf>.
[16] See: Chapter 3 of U.S. Army Regulation 27-10, 'Legal Services Military Justice, unclassified (effective 16 December 2005), <http://www.fas.org/irp/doddir/army/ar27-10.pdf>.
[17] *Ibid.* at section 3-31.
[18] See for example: North Carolina General Statutes, Chapter 14 - Criminal Law, §14-32.4 and §14-33.
[19] *National Defence Act*, R.S.C. 1985, c.N-5 at s. 90(1); and *Interpretation Act*, R.S. 1985, c. I-21 at s. 34(1)(b).
[20] *Immigration and Refugee Protection Act*, 2001, c.27 at s.36(1)(b) and (c).
[21] *Supra,* note 19 at s. 88(1).
[22] *Nazim v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 125 at para. 15.
[23] See for example: CBC News, 'Rallies in Canada and U.S. protest Iraq war, Afghan mission' (17 March 2007). <http://www.cbc.ca/canada/story/2007/03/17/protest-afghanistan.html>; BBC News, 'Thousands in US anti-war protests', (28 October 2007), <http://newsvote.bbc.co.uk/mpapps/pagetools/print/news.bbc.co.uk/2/hi/americas/7065975.stm>.
[24] *Pannu v. The Minister of Citizenship and Immigration*, 2006 FC 1356; also see: *The Minister of Citizenship and Immigration v. Legault*, 2002 FCA 125.
[25] United Nations Children's Fund, 'At a glance: United States of America – Statistics', <http://www.unicef.org/infobycountry/usa_statistics.html>.
[26] U.S. Department of Education, 'NCLB FAQs', <http://answers.ed.gov/cgi-bin/education.cfg/php/enduser/prnt_adp.php?p_faqid=4&p_created=1095255813&p_sid=Ralpm_8j&p_li=>.
[27] U.S. Department of Education, 'Choices for Parents', <http://www.ed.gov/nclb/choice/index.html>.
[28] U.S. Department of Education, 'Overview – Four Pillars of NCLB', <http://www.ed.gov/nclb/overview/intro/4pillars.html>.
[29] Citizenship Laws of the World, 'United States', (March 2001). <http://www.opm.gov/extra/investigate/IS-01.pdf>.