Municipal Court of Budapest
No.1.

The Municipal Court has, in the appeal procedure of a decision brought in the case of the asylum request of ZT represented by attorney Lilla Farkas versus the Ministry of the Interior's Office for Immigration and Nationality (OIN) represented by XY - in a non-litigious procedure - made the following

D e c i s i o n

The Court annuls the decision of OIN (November 1999) **and obliges OIN to conduct a new procedure.**

The procedural fee (HUF 3750.-) is to be born by the state.

An appeal against this decision can be submitted within 15 days. The appeal should be addressed to the Supreme Court and submitted to this Court in 3 copies.

R e a s o n i n g

The applicant, a Yugoslav citizen of Serbian ethnicity, with his family members applied for asylum at the Field Office of OIN in Budapest, on 19 May 1999.
On 2 July 1999, during an interview, he presented his reasons to escape and stated that two days after a discussion on politics and war in front of his grocery shop, he had been caught by the police and had been interrogated concerning what happened in front of his grocery shop. He was questioned why he was boycotting in war situation and he was beaten. Finally, he was released by saying that he was a nice guy after all and was warned that he should not have had behaved like that. Next day, on 11 April 1999, he received an army call-in. Although, his wife refused to take it over, the courier left it there. It was clear to him why he had been drafted. While hiding at his acquaintances, the police looking for him provoked his wife. On 1 May 1999, he was apprehended and a week later he was put on a lorry heading for the front lines. He managed to escape before the departure of the lorry. He was hiding at acquaintances as long as he managed to organize the escape of the family. On 17 May 1999, they arrived in Hungary, they destroyed their passports not to cause any trouble to the friend who assisted their crossing of the border.

The wife's statements supported the statements of the applicant.

Both the applicant and his wife were interviewed by the Deputy Representative of UNHCR in Budapest. The transcripts of the interview and the assessments of UNHCR were forwarded by a note to OIN. From these documents it turned out that the applicant served in the army as a conscript in 1989. He was informed about aggression in Kosovo by volunteers returning from the fight. He was warned at the local police station to not make any anti-government statements. The border guard enabled their border-crossing into Hungary for some money. The applicant

explained, that in general, he was not against drafting/military service as such, he was of the opinion, however, that the last two wars were military aggressions, implemented by the Yugoslav army, violating human rights of the civil population *en mass*. Beyond his fear of losing his life, he felt he should leave his country because he did not want to participate in the violation of human rights.

OIN rejected the asylum application on 25 November 1999 – the rejection extended to his wife and two children -, however, it recognized all members of the family as persons authorized to stay.
According to the reasoning of the decision, the applicant's refusal of the military service was not based on his religious or political conviction. In the war situation significant proportion of Yugoslav citizens of drafting age became endangered due to the military call-in order, therefore, in the case of the applicant there was no individual persecution, consequently, the extension of international protection to him was not justified.
However, due to the imprisonment , draft evaders may face upon return to their country of origin, the applicant must not be sent back to Yugoslavia.

The decision of OIN is based on Sections 16, 32, 39 and 40 of the Act on Asylum No. CXXXIX of 1997 (hereinafter: AA) and on Sections 2, 9, 30 (1) f., 32(2), 33, 34, 35. of Gvt.Decree No. 24/1998 (II.18)(hereinafter: GD).

The applicant submitted a request for judicial review to the Court in order to achieve his recognition as refugee. His secondary request aimed at the anullation of the first instance decision and at the obligation of OIN to conduct a new procedure.
He explained that he found OIN had insufficiently explored the relevant facts of the case, the legal reasoning of the decision seemed to not comply with the Geneva Convention, with the international case-law and with the recommendations/guidelines of UNHCR.
He duly explained during the procedure his reasons based on his conscience/convictions to escape as well as the charges of the Yugoslav police. The interpreter, however, had problems by interpreting appropriately certain statements made by him, and in this way the information/message delivered was substantially shortened. The decision did not take into consideration the arguments of the applicant concerning his unwillingness to participate in actions abusing human rights. OIN took its decision without appropriately interviewing the applicant's wife to check the credibility of the applicant.
The applicant quoted paragraph 171 of UNHCR's Handbook, which states that the refusal of being involved in a war that is contrary to basic rules of human conduct might constitute the basis of asylum/refugee status. He is of the opinion that OIN should have taken into consideration the opinion expressed by the international community with regard to the Yugoslav army.

OIN in its counter-appeal requested the rejection of the appeal. It claimed that the applicant had been interviewed appropriately, the information provided by him was duly considered. OIN continued to be of the opinion that the applicant would have not faced/suffered disproportionate punishment in comparison to other citizens of the country. OIN found it unnecessary to specifically take into consideration the opinion expressed by the international community on the

aggression by the Yugoslav army since Hungary became indirectly involved in the events in Kosovo.

The appeal is found to be justified due to reasons as follows:

The Court was not in a position to take an in-merit decision in the issue of recognition the applicant as refugee since OIN did not fully clarify the relevant facts of the case necessary to a well-founded decision, the circumstances were not assessed satisfactorily, therefore, the decision was not well-reasoned.

According to Section 3(1) of AA - with exception included in Section 4 - the refugee authority shall recognize a foreigner as refugee if s/he can certify or substantiate that in his/her case, Articles 1. A and B (1) b of the Geneva Convention and Articles 1 (2) and (3) of the Protocol, are applicable.

Section 3 (1) of AA stipulates that the applicant is expected to *substantiate* only - during the refugee status determination procedure - the reasons motivating his/her flights. The exploration of the relevant facts calls for the cooperation of the authority and the applicant, OIN as a decision taking public administrative authority is obliged to establish conditions conducive to the applicant to present all the facts known by him/her as well as to draw attention to circumstances substantial from the point of view of the claim. Moreover, the authority is obliged to take steps to fully clarify the relevant facts of the claim, on the basis of Section 47 (1) of AA and of Section 26 (1) of Law No. IV of 1957 on the General Rules of the Public Administrative Procedure (PAP), stipulating that the public administrative authority is obliged to fully clarify the facts necessary for making a decision. If the data available are not sufficient, the authority shall conduct - upon request or ex officio - a verification procedure.

OIN should have had a much more detailed interview with the applicant - on the basis of the above provision of PAP -, should have further inquired about the relevant/substantial circumstances necessary for the decision. The applicant cannot be expected to realize/identify what are the relevant circumstances s/he is supposed to highlight/emphasize to substantiate his/her claim.
According to the transcripts of the interview, OIN invited the applicant to elaborate his reasons to escape, but there was no question about his political conviction, OIN did not clarify the reasons leading to conscientious draft-evasion. Due to negligence as described, the assessment of OIN declaring that the reason of draft-evasion was not political conviction, cannot be considered as a well-founded one.

The above statement is all the more doubtful because when the decision was made, UNHCR documents expressly referring to the applicant's political conviction, were already available.

Although the content of the UNHCR documents does not oblige OIN, however, the information included in these documents clearly referred to facts and circumstances which ought to have been taken into consideration during the refugee status determination procedure, or in case of doubt,

for the sake of clarification, the applicant should have been given another opportunity to substantiate his reasons of flight.
The court in this respect wishes to emphasize that in the Hungarian system of free deliberation of evidence any tools/means can be used to establish legally relevant facts. The most common tools/means of evidence are enlisted in Section 26 (3) of PAP according to which, tools/means of evidence are *especially*: statements by the client; document; testimony of a witness; inspection/fact-finding and expert-opinions. The term 'especially' indicates that in the public administrative procedure other tools/means of evidence can also be utilized. There was no obstacle, therefore, for OIN to take into consideration the information provided by UNHCR in the procedure.

Besides what has already been explained above, the court wishes to highlight the following elements in the framework of the refugee status determination procedure:

According to Article 1A(2) of the Geneva Convention: a refugee is a person who owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence, as a result of such events, is unable or, owing such fear, is unwilling to return to it.
Consequently, the decision to recognize someone as refugee should be taken by considering the fact whether the applicant could substantiate his persecution or well-founded fear of persecution owing to race, religion, nationality, membership of a particular social group or political opinion.

Neither AA nor GD have concrete directives whether the decision should be taken by considering the circumstances prevailing at the time of leaving the country of origin or that of the time of taking the decision.
However, since the refugee definition of the Geneva Convention describes a fear, due to which the protection is not available for the applicant in his/her country of origin, in this case the present situation needs to be taken into consideration to reach a decision concerning refugee status. The circumstances of the flight are relevant in establishing the well-foundedness of the fear of persecution.
There is no war in Yugoslavia at the moment. The applicant is threatened by the risk of being punished for draft-evasion or/and desertion upon return, therefore, in the refugee status determination procedure it has to be decided whether this punishment can be considered as individual persecution in the sense of the Geneva Convention.

The court holds that the mere risk of punishment due to desertion *per se* cannot be considered as persecution according to the Geneva Convention.
International protection (asylum) is only justified in case of such punishment if the draft-evasion is linked to the race, nationality, religious or political - and apparently to conscientious - conviction of the applicant.
A genuine conviction, opposing actions contrary to international norms, resulting in massive and large scale violations of human rights, cannot be excluded as valid reason substantiating refugee status.

In case there is a causal relation between the political conviction of the asylum-seeker and the military call-in order, and - indirectly - his/her being threatened by punishment, the conditions for refugee status can be considered to be granted.

According to the information available in this case: the expression of political opinion of the applicant, his interrogation by the police, the arrival of the military call-in order, the arrest of the applicant and his fleeing have followed each other chronologically in a strict sequence. On the basis of the applicant's statements there is no reason to question that his obligation for army service and his political conviction were closely related. Consequently, it is evident that the punishment for desertion is indirectly linked to the political conviction of the applicant, irrespectively from the fact whether the punishment will be increased later due to political consideration.

OIN should have taken into consideration the above factors/elements and in case of doubts it should have been taken care of the appropriate interview of the applicant.

On the basis of the above, the Court has found in the procedure according to Section 39(2) of AA that the decision of OIN is not well founded, therefore, it has annulled the decision and has obliged OIN to conduct a new procedure.

During the repeated procedure OIN can get into the situation to be able to reach an informed decision on the basis of the relevant legislation in force if it will conduct a detailed interview with the applicant aiming to explore the links between his political conviction and the risk of the punishment. The Court agreed with OIN that a specific assessment of the opinion on the aggression by the Yugoslav army in Kosovo expressed by the international community is unnecessary as it can be considered as public knowledge, namely, that the Yugoslav army seriously and at a large scale violated human rights by its actions.

Applicant has had no substantial costs in this procedure, therefore, the Court did not take any decision in this respect.

The appeal procedural fees are to be born by the State on the basis of Sections 5(1)c and 39(3)b of the Law on Duties (XCIII of 1990).

Budapest, 28 February 2000

judge