FEDERAL COURT OF AUSTRALIA

Erduran v Minister for Immigration & Multicultural Affairs [2002] FCA 814

MIGRATION– protection visa – claim of well-founded fear of persecution on ground of liability to compulsory military service – Tribunal found military service law a law of general application – whether error of law – whether Tribunal obliged to consider whether objection to military service a conscientious objection – whether conscientious objection to military service can arise from political opinion or religion, can itself amount to political opinion, or can give rise to membership of a particular social group

Migration Act 1958 (Cth) ss 36, 476(1)

Federal Court Rules O 80

Mijoljevic v Minister for Immigration & Multicultural Affairs [1999] FCA 834 considered

Murillo-Nunez v Minister for Immigration & Ethnic Affairs (1995) 63 FCR 150 referred to

Timic v Minister for Immigration & Multicultural Affairs [1998] FCA 1750 (Federal Court of Australia, Einfeld J, 23 December 1998, unreported) referred to

Minister for Immigration & Multicultural Affairs v Shaibo [2000] FCA 600 referred to

Trpeski v Minister for Immigration & Multicultural Affairs [2000] FCA 841 referred to

Magyari v Minister for Immigration & Multicultural Affairs (Federal Court of Australia, O'Loughlin J, 22 May 1997, unreported) considered

Mehenni v Minister for Immigration & Multicultural Affairs [1999] FCA 789 (1999) 164 ALR 192 followed

Applicant N 403 of 2000 v Minister for Immigration & Multicultural Affairs [2000] FCA 1088 considered

Applicant M v Minister for Immigration & Multicultural Affairs [2001] FCA 1412 followed

Minister for Immigration & Multicultural Affairs v Yusuf [2001] HCA 30 (2001) 180 ALR 1 applied

Wang v Minister for Immigration & Multicultural Affairs [2000] FCA 1599 (2000) 105 FCR 548 applied

Office of the United Nations High Commissioner for Refugees *Handbook on Procedures and Criteria for Determining Refugee Status* 1992

Hathaway *The Law of Refugee Status* 1991

SERTAC ERDURAN v MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS

V 227 of 2001

GRAY J

27 JUNE 2002

MELBOURNE

IN THE FEDERAL COURT OF AUSTRALIA	
VICTORIA DISTRICT REGISTRY	V 227 of 2001

BETWEEN:	SERTAC ERDURAN APPLICANT
AND:	MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS RESPONDENT
JUDGE:	GRAY J
DATE OF ORDER:	27 JUNE 2002

WHERE MADE:	MELBOURNE

THE COURT ORDERS THAT:

1. The decision of the Refugee Review Tribunal, made on 14 February 2001, be set aside.

2. The matter be referred to the Refugee Review Tribunal, differently constituted, for further consideration.

3. The respondent pay the applicant's costs of the proceeding.

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules.

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PLACE:	MELBOURNE

REASONS FOR JUDGMENT

The nature of the proceeding

1 This is an application for judicial review, pursuant to s 476 of the *Migration Act 1958* (Cth) ("the Migration Act"), of a decision of the Refugee Review Tribunal ("the Tribunal"). The Tribunal affirmed a decision of a delegate of the respondent, the Minister for Immigration and Multicultural Affairs ("the Minister"), not to grant the applicant a protection visa.

2 Section 36 of the Migration Act provides that there is a class of visas known as protection visas. A criterion for a protection visa is that the person applying for it be a non-citizen in Australia to whom Australia has protection obligations under the Refugees Convention, as amended by the Refugees Protocol. The term "Refugees Convention" is defined in s 5(1) of the Migration Act to mean the Convention relating to the Status of Refugees done at Geneva on 28 July 1951. The term "Refugees Protocol" is similarly defined to mean the Protocol relating to the Status of Refugees done at New York on 31 January 1967. It is convenient to call these two instruments, taken together, the "Convention". For present purposes, it is sufficient to note that, pursuant to the Convention, Australia has protection obligations to 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".

3 The applicant is a citizen of Turkey. He arrived in Australia on 12 March 1996 as a student. On 24 September 1999, he lodged an application for a protection visa. On 16 February 2000, a delegate of the Minister refused to grant a protection visa. The applicant applied to the Tribunal for review of that decision. On 14 February 2001, the Tribunal published its decision and its reasons for decision. Its decision was to affirm the decision of the delegate of the Minister. In this proceeding, the applicant seeks judicial review of that decision of the Tribunal.

4 Because of the age of the matter, it must be dealt with in accordance with the provisions of the Migration Act as they stood before amendments that came into operation on 2 October 2001.

The applicant's claims

5 In its reasons for decision, the Tribunal summarised the claim made initially by the applicant as follows:

"In his protection visa application the applicant stated that he came to Australia to study. He does not want to return to Turkey because he does not want to do military service. He does not believe in war and he does not want to kill anyone. He wants world peace. The applicant is afraid that he will be imprisoned."

6 The Tribunal then said this of the applicant's application to the Tribunal:

"In his application for review to the Tribunal the applicant reiterated his statement that he did not want to undergo his military service. He stated that he had friends who were killed or injured whilst undergoing their military service. He believes he will be sent to the west to fight. He does not want to die and he does not want to fight. He has lived in Australia for many years and regards it as his home."

7 In his evidence to the Tribunal, the applicant said that he did not want to undergo compulsory military service.

8 Before the Tribunal, the applicant made two other relevant claims. One was by reference to the political situation in Turkey. The other, raised at the end of the hearing, was that the factory where his father worked had been targeted by the Mafia. The owners of the factory were sent to gaol and the Mafia managed to kill them in gaol. The applicant's family was owed money by the Mafia. If he went back and claimed the money they would try to shut him up.

The Tribunal's reasons

9 The Tribunal summarised its view of the applicant's case as follows:

"The applicant does not want to return to Turkey because he does not want to undergo compulsory military service and is afraid that he maybe [sic] injured or killed, like his friends were, whilst undergoing military service."

10 The Tribunal found that in Turkey, military service is compulsory for all men over twenty. It lasts for eighteen months. Exemption is granted only to unfit persons. Service can be deferred for university study. There is no option to perform unarmed service. Conscripts who avoid military service are liable to gaol sentences, although some sources indicate that after May 1994 the penalty for draft evasion was converted to a fine, followed by a requirement to undergo the military service. The Tribunal found that the applicant is liable to undergo military service on his return to Turkey and that could entail fighting in the east of Turkey.

11 The Tribunal then said:

"Conscription or compulsory military service or punishment for avoidance of military service, does not of itself constitute persecution within the meaning of the Convention. Without evidence of selectivity in its enforcement, conscription generally amounts to no more than a non-discriminatory law of general application.

To amount to persecution and found a claim for refugee status the applicant must be at risk, of the requirement to perform military service, or the punishment for failing to undergo military service, being imposed in a discriminatory manner for a Convention reason."

12 The Tribunal referred to *Mijoljevic v Minister for Immigration & Multicultural Affairs* [1999] FCA 834 as authority for its view as to the relationship between compulsory military service, or the punishment for avoiding it, and the Convention. It quoted from the judgment of Branson J in *Mijoljevic*. The Tribunal then continued:

"Based on the material before the Tribunal there is nothing to indicate that the applicant will be forced to undergo military service for any Convention reason; rather it is a requirement for all males over 20. Further if he evades military service there is nothing to suggest that he will receive a harsher penalty on account of his race, his nationality, his religious beliefs, his political opinions or because of his membership of a particular social group. The requirement to perform military service and the punishment for failing to do so are laws of general application and the Tribunal finds they will not be differentially applied for a Convention reason in the applicant's case. Therefore the requirement to undergo military service and the likelihood of a penalty for failing to undertake military service does not amount to persecution within the meaning of the Convention and the applicant is not a refugee for this reason."

13 The Tribunal then dealt with the applicant's claim in relation to the problems his family had with the Mafia. It found that people who are owed money by the Mafia, or who defy the Mafia, were not a particular social group for the purposes of the Convention. Any harm the applicant feared was therefore not related to any Convention ground.

14 The Tribunal concluded that, having considered the evidence as a whole, it was not satisfied that the applicant was a person to whom Australia

has protection obligations under the Convention. He did not therefore satisfy the criterion in s 36 of the Migration Act.

The grounds for judicial review

15 The application to the Court, filed on 28 March 2001, was not filed by a legal representative. It recited every ground in s 476(1) of the Migration Act except the ground of fraud or actual bias. No ground was particularised.

16 The applicant sought referral to a legal practitioner, pursuant to O 80 of the Federal Court Rules. Another judge of the Court refused to make such a referral. Subsequently, I referred the applicant to a legal practitioner and made orders by consent, including an order for the filing and service of an amended application. No amended application was filed. At the hearing of the proceeding, on 24 April 2002, the applicant appeared in person and made submissions through an interpreter. In answer to a question from me, he indicated that his case to the Tribunal had been that his objection to compulsory military service in Turkey was a conscientious objection.

17 Counsel for the Minister took no objection to the matter being considered on the basis that the Tribunal may have overlooked this aspect of the applicant's case before it. The applicant did not attempt to argue any other ground.

Military conscription and the Convention

18 So far as its analysis of the question whether Australia has protection obligations towards a person who is liable for compulsory military service went, the Tribunal was correct. There is a line of authority establishing that the liability of a person to punishment for failing to fulfil obligations for military service does not give rise to persecution for a Convention reason. See *Murillo-Nunez v Minister for Immigration & Ethnic Affairs* (1995) 63 FCR 150 at 159, *Timic v Minister for Immigration & Multicultural Affairs* (Federal Court of Australia, Einfeld J, 23 December 1998, unreported) at 3, *Minister for Immigration & Multicultural Affairs v Shaibo* [2000] FCA 600 at [28] and *Trpeski v Minister for Immigration & Multicultural Affairs* [2000] FCA 841 at [27] – [28]. Laws relating to compulsory military service for all men of a certain age are generally to be regarded as laws of general application. Liability to punishment under a law of general application does not ordinarily provide a foundation for a fear of persecution for a Convention reason. As the Tribunal said, if a law is applied in a discriminatory manner to persons within the protected categories, its application will amount to persecution for a Convention reason. Thus, if persons of a particular race, religion or political opinion are more likely to be punished, or if their punishment is likely to be of greater severity, than others to whom the law applies, this may amount to persecution of those within the group concerned.

19 The Tribunal's analysis did not go far enough. There is also a line of authority to the effect that a refusal to undergo military service on the ground of conscientious objection to such service may give rise to a well-founded fear of persecution for a Convention reason. In *Magyari v Minister for Immigration & Multicultural Affairs* (Federal Court of Australia, O'Loughlin J, 22 May 1997, unreported), O'Loughlin J cited the Office of the United Nations High Commissioner for Refugees *Handbook on Procedures and Criteria for Determining Refugee Status* 1992 and Hathaway *The Law of Refugee Status* 1991. His Honour accepted:

"that there may be cases in which conscientious objection to military service will be the basis of a well founded fear of persecution for a convention reason. For example, the refusal to perform military service may derive from one's religious beliefs, or it may be by virtue of one's political opinions."

20 In *Mehenni v Minister for Immigration & Multicultural Affairs* [1999] FCA 789 (1999) 164 ALR 192 at [17] Lehane J said:

"Conscientious objection, whether the objection of a pacifist to all military service or a 'selective' objection, may reflect religious beliefs or political opinions; and there is no reason to doubt that conscientious objectors, or a class of conscientious objectors defined by reference to a particular belief or opinion, may be, for the purposes of the Convention, a 'particular social group', defined as such by some characteristic, attribute, activity, belief, interest or goal that unites its members."

21 In *Mijoljevic v Minister for Immigration & Multicultural Affairs* [1999] FCA 834, on which the Tribunal relied, at [21], Branson J recognised that:

"It may be that pacifist views which do not have a religious or political base, and which are not part of the belief system of a particular social group, are irrelevant to a claim to be entitled to a protection visa."

22 Hill J discussed the matter at some length in *Applicant N 403 of 2000 v Minister for Immigration & Multicultural Affairs* [2000] FCA 1088 at [20] – [27]. At [23], his Honour said:

"The draft laws as implemented in Australia during the Vietnam War permitted those with real conscientious objections to serve, not in the military forces, but rather in non-combatant roles. Without that limitation a conscientious objector could have been imprisoned. The suggested reason for their imprisonment would have been their failure to comply with the draft law, a law of universal operation. But if the reason they did not wish to comply with the draft was their conscientious objection, one may ask what the real cause of their imprisonment would be. It is not difficult, I think, to argue that in such a case the cause of the imprisonment would be the

conscientious belief, which could be political opinion, not merely the failure to comply with a law of general application."

> 23 In *Applicant M v Minister for Immigration & Multicultural Affairs* [2001] FCA 1412, Carr J held that it was necessary to consider not only whether a person refusing to undergo military service in Afghanistan under the Taliban Government might be persecuted by reason of political opinion, but also the possibility that there was a particular social group of such persons. At [31] – [34], his Honour said:

"Even if there exists a conscription law of general application in the country from which a claimant refugee has fled, conscientious objectors, or a class of conscientious objectors defined by reference to a particular belief or opinion, may be, for the purposes of the Convention, a particular social group - see Lehane J in Mehenni v Minister for Immigration and Multicultural Affairs [1999] FCA 789and the authorities there cited. As his Honour pointed out, it would be necessary for an applicant for a protection visa to show that he or she had a well-founded fear of persecution for reason of membership of that group.

...

In the present matter, as I have mentioned, there was no evidence of a law of general application on the matter of conscription. All the evidence points to forcible conscription by the Taliban without any lawful justification. In my opinion, when the Tribunal relied on Branson J's decision in Mijoljevic v Minister for Immigration and Multicultural Affairs [1999] FCA 834, which was a case of enforcement of laws of general application providing for compulsory military service, it fell into error.

In my view, the Tribunal was obliged to consider whether the applicant had a well-founded fear of persecution by reason of his membership of a particular social group comprising those persons who held a conscientious objection to military service. In failing to do so I consider the Tribunal erred in law to the extent that it fell into jurisdictional error."

> 24 In the case reported as *Minister for Immigration & Multicultural Affairs v Yusuf* [2001] HCA 30 (2001) 180 ALR 1, the High Court of Australia dealt with a case of *Israelian*, who claimed to have a fear of persecution if he returned to Armenia because of his failure to perform compulsory military service in that country. In the case of Mr Israelian, the Tribunal had made a specific finding that Mr Israelian was not opposed to all war. His opposition to the particular war that he might be called upon to fight in if he returned to Armenia was not based on ethical, moral or political grounds, but on a desire to avoid personal danger. It was argued before the High Court that the Tribunal should have made a finding as to whether or not Mr Israelian was a member of a particular social group comprised of deserters or draft resisters. At [55], Gaudron J said:

"Nor, in my view, does the failure of the tribunal to make a finding as to whether or not Mr Israelian was a member of a particular social group comprised of deserters and/or draft resisters reveal reviewable error for the purposes of s 476(1) of the Act. The tribunal's conclusion that the punishment Mr Israelian would face 'for avoiding his call-up notice . . . would be the application of a law of common application' necessarily involves the consequence that that punishment would not be discriminatory and, hence, would not constitute persecution. In that context, the question of Mr Israelian's membership of a particular social group comprised of deserters and/or draft resisters became irrelevant."

25 McHugh, Gummow and Hayne JJ, with whom Gleeson CJ expressed agreement, said at [97]:

"Nevertheless, it must be recalled that the tribunal did not base its conclusion affirming the decision to refuse Mr Israelian a protection visa only on its finding about conscientious objection. It concluded that there would not be persecution of Mr Israelian if he returned to his country of nationality, only the possible application of a law of general application. The tribunal is not shown to have made an error of law in that respect. Moreover, the evidence to which counsel for Mr Israelian pointed as suggesting that the sanctions imposed on Mr Israelian would go beyond the application of the general law related to deserters, not draft evaders. It was not demonstrated that those groups formed part of a single 'social group' within the meaning of the Convention definition."

26 At [245] – [246], Callinan J adopted a passage from the judgment of Emmett J in the Full Court of this Court, who said:

"it is difficult to see how the Tribunal could have come to a view, on the material before it, that deserters or draft evaders constitute a particular social group. That is to say, in so far as they are persecuted by the harshness of punishment, that would be no more than the application of a law of common application to them in respect of their contravention of that law. In any event, that would be a finding of fact which would not be subject to review in the Court."

27 Nothing in those passages suggested that the High Court was intending to overrule the second line of authority to which I have referred above. The specific finding of the Tribunal in relation to Mr Israelian, that he was not opposed to all war and that his opposition to a particular war did not have an ethical, moral or political basis, made any discussion of that line of authority irrelevant. Nor, in my view, is the High Court to be taken as having said that there can never be a particular social group consisting of conscientious objectors, or some class of conscientious objectors. The passages I have quoted from the judgments in the High Court are based on the absence of any evidence before the Tribunal in that case that draft evaders and deserters together formed a particular social group. In my view, the line of authority from *Magyari* to *Applicant M* represents the law on this subject.

28 It therefore appears that, when an issue of refusal to undergo compulsory military service arises, it is necessary to look further than the question whether the law relating to that military service is a law of general application. It is first necessary to make a finding of fact as to whether the refusal to undergo military service arises from a conscientious objection to such service. If it does, it may be the case that the conscientious objection arises from a political opinion or from a religious conviction. It may be that the conscientious objection is itself to be regarded as a form of political opinion. Even the absence of a political or religious basis for a conscientious objection to military service might not conclude the inquiry. The question would have to be asked whether conscientious objectors, or some particular class of them, could constitute a particular social group. If it be the case that a person will be punished for refusing to undergo compulsory military service by reason of conscientious objection stemming from political opinion or religious views, or that is itself political opinion, or that marks the person out as a member of a particular social group of conscientious objectors, it will not be difficult to find that the person is liable to be persecuted for a Convention reason. It is well-established that, even if a law is a law of general application, its impact on a person who possesses a Convention-related attribute can result in a real chance of persecution for a Convention reason. See *Wang v Minister for Immigration & Multicultural Affairs* [2000] FCA 1599 (2000) 105 FCR 548 at [65] per Merkel J. Forcing a conscientious objector to perform military service may itself amount to persecution for a Convention reason.

29 In the present case, the Tribunal did not even embark on the first stage of this process. Having recited the applicant's claims, including his initial claim that he does not believe in war and does not want to kill anyone and wants world peace, the Tribunal did not go on to consider whether the applicant was a conscientious objector. It appears to have assumed that, even if he were, his liability to punishment for that conscientious objection would not give rise to a real chance of persecution for a Convention reason. It also appears to have assumed that only a real chance of a harsher than normal penalty, by reason of a Convention attribute, would give rise to a well-founded fear of persecution. Those assumptions reveal a failure to understand the law. 30 Counsel for the Minister referred to a sentence in the Tribunal's reasons for decision in the following terms:

"The Tribunal concluded on this basis that any harm that the applicant might suffer by reason of his pacifist views would not amount to persecution."

The context of this sentence shows clearly that it is not intended to express a finding of the Tribunal in relation to the present case. Rather, it is the Tribunal's attempt to summarise a finding made in the case of *Mijoljevic*, to which the Tribunal was referring in some detail. The Tribunal made no finding in the present case as to whether the applicant did or did not have "pacifist views". As I have said, it bypassed the issue.

31 In doing so, the Tribunal failed to deal with the case made by the applicant. It ignored the essence of what the applicant had said, by determining that the case was concluded on the basis that the law of Turkey relating to compulsory military service was a law of general application. This conclusion amounted to an error of law on the part of the Tribunal. As I have said, the law goes further than the Tribunal's statement of it.

32 By failing to deal with the case the applicant had put, the Tribunal misunderstood its task. It asked itself the wrong question and ignored relevant material in a way that affected the exercise of its power. It therefore made an error of law of the kind referred to in the joint judgment of McHugh, Gummow and Hayne JJ (with whom Gleeson CJ expressed agreement) in *Minister for Immigration& Multicultural Affairs v Yusuf* [2001] HCA 30 (2000) 180 ALR 1 at [82].

Conclusion

33 The applicant has succeeded in establishing that there was an error of law on the part of the Tribunal. It was plainly an error that effected the Tribunal's decision. The applicant is therefore entitled to have the decision of the Tribunal set aside and the matter referred back to the Tribunal, differently constituted, for further consideration. In case the applicant incurred any out-of-pocket expenses in the preparation and conduct of the application, an order for costs in his favour and against the Minister should be made.

I certify that the preceding thirty-three (33) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Gray.

Associate:

Dated: 27 June 2002

Counsel for the Applicant:	The applicant appeared in person
Counsel for the Respondent:	P R D Gray

Solicitor for the Respondent:	Clayton Utz
Date of Hearing:	24 April 2002
Date of Judgment:	27 June 2002