# FEDERAL COURT OF AUSTRALIA

Mehenni v Minister for Immigration & Multicultural Affairs

[1999] FCA 789

**MIGRATION** – judicial review of decision of Refugee Review Tribunal refusing applicant protection visa – whether applicant raised claim to fear persecution because of conscientious objection to compulsory military service – whether persecution might arise merely from application to conscientious objector of law of general application providing for compulsory military service – whether absence of consideration by Tribunal of claim of conscientious objection a failure to make finding on material question of fact

**WORDS AND PHRASES** – *"for reasons of"*

*Migration Act* 1958 (Cth) ss 430(1)(c), 476(1)(a), 476(1)(e)

*Minister for Immigration and Multicultural Affairs v Israelian* [1999] FCA 649 cited

*Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225 applied

*R v Immigration Appeals Tribunal, Exp Shah* [1999] 2 All ER 545 cited

*Morato v Minister for Immigration, Local Government and Ethnic Affairs (No. 2)* (1992) 39 FCR 401 cited

*Ram v Minister for Immigration and Ethic Affairs* (1995) 57 FCR 565 applied

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

*Canas-Segovia v Immigration and Naturalisation Service* 902 F 2d 717 (9th Cir 1990) referred to

RABAH MEHENNI v THE MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS

# LEHANE J
# 24 JUNE 1999
SYDNEY

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| IN THE FEDERAL COURT OF AUSTRALIA | |
| NEW SOUTH WALES DISTRICT REGISTRY | N 160 OF 1999 |

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| BETWEEN: | RABAH MEHENNI<br><br>Applicant |
| AND: | THE MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS<br><br>Respondent |
| JUDGE: | LEHANE J |
| DATE OF ORDER: | 24 JUNE 1999 |
| WHERE MADE: | SYDNEY |

THE COURT ORDERS THAT:

1. The application be dismissed.
2. The applicant pay the respondent's costs.

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

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**REASONS FOR JUDGMENT**

1 By his amended application filed on 30 April 1999, Mr Mehenni seeks an order setting aside a decision of the Refugee Review Tribunal made on 27 January 1999. By that decision the Tribunal affirmed the decision of a delegate of the Minister to refuse Mr Mehenni's application for a protection visa. The grounds of the amended application are that procedures required by the *Migration Act* 1958 (Cth) to be observed in connection with the making of the Tribunal's decision were not observed (s 476(1)(a)) and that the decision involved an error of law (s 476(1)(e)). The former ground relies on a claim that the Tribunal did not observe the requirements of s 430(1)(c) of the *Migration Act*; the particulars of that ground are:

"The Tribunal failed to make findings on the question of fact as to whether the applicant had a genuine conscientious objection to performing military service in

Algeria, and whether he thereby faced persecution by reason of his membership of a particular social group or political opinion."

2 The particulars of the alleged error of law are similar:

"The Tribunal failed to consider whether the applicant, by reason of his conscientious objection to performing military service in Algeria, faced persecution on the grounds of membership of a particular social group or political opinion."

# Facts: Tribunal's findings

3 Mr Mehenni is an Algerian national. He is aged 28. He arrived in Australia, from South Africa, on 10 October 1998. He claimed to have been a successful student: in 1989 he went to the then Soviet Union where he studied electrical and mechanical engineering at a university in the Ukraine. He completed his undergraduate course and commenced studies for a master's degree. However, he claimed, the introduction of a requirement that fees be paid resulted in his discontinuing the course; in 1996 he travelled to Yemen where he taught mathematics for a year. From there, in November 1997, he travelled to Ethiopia and then, by land, to South Africa. He said that he applied there for acceptance as a refugee and was permitted to work (though he did not obtain employment). Concerns for his safety, and about the adequacy of South African protection, led him, he said, to leave for Australia before his application had been considered: he acquired a false passport and travelled to Australia on a South African Airways flight.

4 The Tribunal accepted evidence that under Algerian law men of military age were liable to conscription and that the Algerian army continued *"to confront armed Islamic groups"*. Deferral of military service obligations was permissible under Algerian law in certain circumstances, including for the duration of certain courses of study. Mr Mehenni obtained a deferral until December 1994. While studying in the Ukraine he had returned to Algeria for brief periods during vacations; he returned for the last time in September 1994. Mr Mehenni claimed that he did not wish to return to Algeria because he would be conscripted and he did not wish to become a tool of what he described as an undemocratic regime in its campaigns against the Islamic opposition groups. He feared that he would be regarded by the authorities as a deserter, because he had not returned and because he had refused a request that he work for Algerian intelligence in Yemen. He said that he feared harsh punishment on that account; he feared also that, if conscripted, he would be regarded by the Islamic groups as a supporter of the government and would be targeted by them.

5 Except in relation to evidence about the basis on which one of his brothers had avoided conscription, the Tribunal regarded Mr Mehenni as a credible witness and substantially accepted his evidence. Particularly, the Tribunal found that Mr Mehenni was approached to provide information on Algerian expatriates in Yemen, that he did not provide the information sought and that he tried to avoid contact with the consular official who had

approached him. The Tribunal found, however, that this was unlikely to have brought him to the adverse attention of the Algerian authorities. It found also, on the basis of country information, that the conscription laws were applied in a non-discriminatory way and that deserters or draft evaders were not subjected to excessive or inhumane punishment. It found also that he would be no more singled out by Islamic groups than other conscripts in the army which was fighting those groups. Accordingly, the Tribunal upheld the decision not to grant Mr Mehenni a protection visa.

# Applicant's submissions: conscientious objection

6 Counsel for Mr Mehenni accepted that the Tribunal's decision, as to the matters with which it dealt, was not open to attack. He submitted, however, that Mr Mehenni had squarely raised the question whether he was a conscientious objector; there was material before the Tribunal capable of establishing that Algerian law provided no exemptions for conscientious objectors; and that the Tribunal should have considered, but did not consider, whether Mr Mehenni had a well-founded fear of persecution because he was a conscientious objector: that is, whether he feared persecution by reason of conscientious objection as a political opinion or by reason of his membership of a social group comprising those who hold a conscientious objection to military service generally or to service in the particular campaigns against the Islamic groups.

7 Counsel for Mr Mehenni relied on certain passages in the 1992 edition of the United Nations High Commission for Refugees (UNHCR) publication, *Handbook on Procedures and Criteria for Determining Refugee Status*,which, he submitted, suggested that in some circumstances the failure of a state to recognise conscientious objection, or punishment for desertion or draft evasion, might be regarded as persecution. He referred me also to a discussion of certain of the United States authorities by Kevin J Kuzas in his note, *"Asylum for Unrecognised Conscientious Objectors to Military Service: Is There a Right Not to Fight?"* (1991) 31 *Virginia Journal of International Law* 447. Additionally, the recent decision of the Full Court in *Minister for Immigration and Multicultural Affairs v Israelian* [1999] FCA 649 recognised the possibility that punishment of a conscientious objector for refusing conscription might amount to persecution for a Convention reason; and that conscientious objectors, or even deserters and draft evaders, might comprise a *"particular social group"* for the purposes of the definition of *"refugee"* in the Convention (the 1951 *United Nations Convention Relating to the Status of Refugees* as amended by the 1967 *Protocol Relating to the Status of Refugees*).

8 Although it could not be said that an explicit claim that he had a conscientious objection was central to the way in which Mr Mehenni put his application both to the Minister's delegate and to the Tribunal (and it was not raised at all in submissions made by Mr Mehenni's adviser to the Tribunal),

counsel submitted that the claim had been clearly raised by Mr Mehenni and was maintained by him both in his application to the delegate and before the Tribunal, so that s 430 of the *Migration Act* required the Tribunal to deal with it.

9 The matter was first raised, it was submitted, in certain passages in Mr Mehenni's responses to certain questions in the form of application for a protection visa. In answer to the question *"why did you leave* [Algeria]*?"* Mr Mehenni said, in the course of a lengthy response:

"There is a compulsory military service for me for two years. The military service was deferred due to my studies. However, after graduation I have to do the military service. So, I cannot return to Algeria as they the military authorities will arrest me and take me to the barracks and hand weapons to kill innocent people which is against my religion and beliefs, and thus I became part of the regime that does not follow the Sharia in its struggle with the Islamists.

That is the reason I am fleeing from the Algerian regime that will forcibly draft. The 'GIA' which monitor such activities and they would certainly know about it, my family and I will be their target and will kill me and my family."

10 Then, in answer to a series of questions about what he feared would happen if he returned to Algeria, he said:

"I will face great danger. The regime will arrest me and interrogate me using torture. They would then put me in a military barracks and I would be ordered to kill people to protect this undemocratic regime. On the other hand if the Islamic Armed Group knew that I carry arms for the government they would kill me and all my family. … The military authorities want me to do my compulsory military service to kill innocent people and protect the corrupt regime. I do not want to be a [tool] of killing in the hands of the government.

The 'GIA' would kill me and my family when they learn that the Algerian [military] authorities put weapons in my hands. … No, the military regime in Algeria want to use me [as] fodder to their guns to protect the regime. They do not protect us they punish severely those who do not want to be tools of killing in the hands."

11 Similar themes were repeated in Mr Mehenni's oral evidence before the Tribunal. Counsel relied on the following questions and answers:

"Q56 Yes. Well, can I just ask you why do you – why did you not want to do what all the other people in Algeria of your age were having to do? …

A (INTPRTR) I – we have to be sure that life – military service is a duty and an honour. But to become part, you know, in a civil war where brother will kill his brother and a son will kill his father, between the regime, and Islamic groups, that's not human, because this war has a lot of horrifying monstrous things and I have to say one word here – the regime was wrong to stop the elections and

the Islamic groups were wrong to take up the arms. And we, as normal citizens, are paying the price."

12 Then, in answer to a question about the demands made of him by officials of the Algerian consulate in Yemen, Mr Mehenni said:

"He would say that my refusal to return to Algeria and perform my military service was a [indistinct] and he said many things, among them for example once I asked him why all these massacres in Algeria and he said, 'As long as that would keep the regime in power, we don't care how many people would be dead'. I knew that I was dealing with monsters, that's why I was very scared. That's why I took my decision that my – I wouldn't be in Yemen when my passport would expire. That's why I risked my life and I entered the African jungles."

13 Later, in answer to a question about what Mr Mehenni thought would happen to him if he were returned to Algeria, he said:

"My problem in Algeria is of three points. The first point is the military service, second my persecution from the Islamic army group; third, my political opinion. First of all, talk about military service; I already said that military service is an honour and a duty but during the civil war in Algeria the military service has another aspect. Because the government and the regime in Algeria is using the military service as a way to prosecute [sic] and to punish people. They are using the military service for their own interests and I have no objective or no interest in standing with the government against that [indistinct] if I ever go back, return to Algeria my punishment would be great because I'm now considered as a deserter from military service and that's why they would apply penalties to me. In – during peacetime the penalty would reach – the sentence would reach up to 10 years in prison. During wartime it could be up to 20 years in prison and since Algeria is in sort of emergency state and it's in war, they would apply the war, adding to that torture and big possibility of killing. Killing me might be direct killing after the sentence or they would put me on the front line in the war."

14 In answer to a long question in which the Tribunal member put to Mr Mehenni certain country information, particularly a document of the UNHCR in which the view was expressed that in Algeria desertion or draft evasion did not, of itself, lead to persecution, Mr Mehenni said:

"Well, … this information is very far from reality because everything in Algerians politics life – how would you do your military service without politics involved? Military service is created basically to protect the regime. My avoiding the military service would not be explained as just random desertion from military service, it would have some more politicised explanation. It would be based on politics. My politics is I refused the regime in power. It's a military regime. They stopped elections and it became aggressive against its own people. They are using the authority of the law to involve me in a war I don't want to get involved in. They were wrong to stop the election in January 1992 and I don't want to pay the price for their mistake. And I don't want to stand and protect this regime because it's not a democratic regime."

15 Other passages in the evidence were discussed in argument, but those I have quoted sufficiently show the basis of the submission made on behalf of Mr Mehenni. That submission was to the effect that Mr Mehenni had sufficiently, indeed clearly, stated a claim that he had a selective conscientious objection to service in the Algerian army, of one of the kinds identified by Mr Kuzas, in the note to which I have referred, as sufficient to establish a well-founded fear of persecution. Mr Kuzas summarises the effect of his argument as follows, at 472, 473:

"An applicant who cannot qualify as an absolute pacifist, but expresses a conscientious objection to a particular military action which is unrecognised by his country of origin, has established a well-founded fear of persecution if the requirements of either section (1) or (2) below are met:

Section 1: The conduct of the armed forces engaged in the military action is condemned by the international community as contrary to the basic rules of human conduct, the government in question is unwilling or unable to control those individuals or groups engaged in the offending conduct, and the applicant can show a reasonable possibility that he will be personally forced to participate in such conduct.

Credible documented evidence that, for example, the rules of war are being violated, or that other human rights violations are widespread, establishes a prima facie case that the actions are condemned by the international community. Relevant factors for determining whether the government in question is unwilling or unable to control the offending individuals or group include, but are not limited to, the prevalence or pervasiveness of the violations, and whether the individuals who engage in the violations are captured, prosecuted, and convicted.

Section 2: The political justification or policy motivating the military activity of the country of origin is condemned by the international community, as evidenced by a resolution adopted by an international governmental organisation (such as the UN) by an overwhelming majority of states."

16 Counsel's submissions relied on *"section 1"* rather than *"section 2"* and, in addition to Mr Mehenni's own evidence, on passages in certain documents which were before the Tribunal which suggested, first, that conscientious objection was not recognised in Algeria and, secondly, that the armed forces had been responsible for serious abuses of human rights.

# Discussion

17 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 (*Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225 at 264 per McHugh J; *R v Immigration*

*Appeal Tribunal, Ex p Shah* [1999] 2 All ER 545; *Morato v Minister for Immigration, Local Government and Ethnic Affairs (No.2)* (1992) 39 FCR 401; *Ram v Minister for Immigration and Ethic Affairs* (1995) 57 FCR 565). The Full Court in *Israelian* proceeded on the footing that it might be so; so did O'Loughlin J in *Magyari v Minister for Immigration and Multicultural Affairs* (Federal Court of Australia, 22 May 1997, unreported) at 25-27. But, of course, as O'Loughlin J pointed out at 30, that is only the first step: the fact that an applicant for a protection visa is a member of a particular social group is significant only if he or she has a well-founded fear of persecution *"for reason of"* membership of that group. As his Honour said, with reference to the facts of that case, at 30:

"Even if it be accepted that the applicant is a conscientious objector and if it be assumed that Hungary treats such persons harshly (to the point of persecution in the legal sense) one is left wondering whether the reason for the persecution is a convention reason. The applicant could have given evidence before the Tribunal on that subject; he could have explained the grounds for his objection to military service, but he failed to do so."

18 That, I think, is necessary background to a consideration of the authorities and writings on which Mr Mehenni relied. Although it is lengthy, I think it is desirable to set out in full the section of the *Handbook* which deals with the position of *"deserters and persons avoiding military service"*:

"167. In countries where military service is compulsory, failure to perform this duty is frequently punishable by law. Moreover, whether military service is compulsory or not, desertion is invariably considered a criminal offence. The penalties may vary from country to country, and are not normally regarded as persecution. Fear of prosecution and punishment for desertion or draft-evasion does not in itself constitute well-founded fear of persecution under the definition. Desertion or draft-evasion does not, on the other hand, exclude a person from being a refugee, and a person may be a refugee in addition to being a deserter or draft-evader.

168. A person is clearly not a refugee if his only reason for desertion or draft-evasion is his dislike of military service or fear of combat. He may, however, be a refugee if his desertion or evasion of military service is concomitant with other relevant motives for leaving or remaining outside his country, or if he otherwise has reasons, within the meaning of the definition, to fear persecution.

169. A deserter or draft-evader may also be considered a refugee if it can be shown that he would suffer disproportionately severe punishment for the military offence on account of his race, religion, nationality, membership of a particular social group or political opinion. The same would apply if it can be shown that he has well-founded fear of persecution on these grounds above and beyond the punishment for desertion.

170. There are, however, also cases where the necessity to perform military service may be the sole ground for a claim to refugee status, i.e. when a person can show that the performance of military service would have required his participation in military action contrary to his genuine political, religious or moral convictions, or to valid reasons of conscience.

171. Not every conviction, genuine though it may be, will constitute a sufficient reason for claiming refugee status after desertion or draft-evasion. It is not enough for a person to be in disagreement with his government regarding the political justification for a particular military action. Where, however, the type of military action, with which an individual does not wish to be associated, is condemned by the international community as contrary to basic rules of human conduct, punishment for desertion or draft-evasion could, in the light of all other requirements of the definition, in itself be regarded as persecution.

172. Refusal to perform military service may also be based on religious convictions. If an applicant is able to show that his religious convictions are genuine, and that such convictions are not taken into account by the authorities of his country in requiring him to perform military service, he may be able to establish a claim to refugee status. Such a claim would, of course, be supported by any additional indications that the applicant or his family may have encountered difficulties due to their religious convictions.

173. The question as to whether objection to performing military service for reasons of conscience can give rise to a valid claim to refugee status should also be considered in the light of more recent developments in this field. An increasing number of States have introduced legislation or administrative regulations whereby persons who can invoke genuine reasons of conscience are exempted from military service, either entirely or subject to their performing alternative (i.e. civilian) service. The introduction of such legislation or administrative regulations has also been the subject of recommendations by international agencies.[24] In the light of these developments, it would be open to Contracting States, to grant refugee status to persons who object to performing military service for genuine reasons of conscience.

174. The genuineness of a person's political, religious or moral convictions, or of his reasons of conscience for objecting to performing military service, will of course need to be established by a thorough investigation of his personality and background. The fact that he may have manifested his views prior to being called to arms, or that he may already have encountered difficulties with the authorities because of his convictions, are relevant considerations. Whether he has been drafted into compulsory service or joined the army as a volunteer may also be indicative of the genuineness of his convictions.

**24** Cf Recommendation 816 (1977) on the Right of Conscientious Objection to Military Service, adopted at the Parliamentary Assembly of the Council of Europe at its Twenty-ninth Ordinary Session (5-13 October 1977)."

19 To a large extent that passage speaks for itself. One aspect of it may be noted immediately. It is suggested in par 172 that if the country of which an applicant is a national does not take account of the applicant's genuine religious convictions in considering whether he should be subjected to compulsory military service, the applicant *may* be able to establish a claim to refugee status. It is not suggested that the mere requirement that a person serve, in opposition to genuine religious convictions, in itself necessarily amounts to persecution for a Convention reason. Paragraph 173 then suggests that in the light of more recent developments in attitudes to compulsory military service and conscientious objection, *"it would be open to Contracting States, to grant refugee status to persons who object to performing military service for genuine reasons of conscience"*: that, however, as I read it, is not a suggestion that Contracting States are bound by the Convention to adopt that approach, but rather an indication that States might consider it appropriate to do so.

20 Counsel referred also to J C Hathaway, *The Law of Refugee Status* 1991 at 179-181. The author's discussion is substantially similar to that in the Handbook. Some United States authority appears to go further. For instance, in *Canas-Segovia v Immigration and Naturalisation Service* 902 F 2d 717 (9th Cir 1990) the US Court of Appeals, Ninth Circuit, held that a Salvadoran law of general application, which imposed military service obligations on all males between the ages of 18 and 30, operated in a discriminatory way, and that persecution might arise in the application of the law to persons, such as the applicants, who refused service for conscientious reasons. The Court said, at 728:

"A Salvadoran who prefers not to serve in the military for reasons not amounting to genuine reasons of conscience (for example, fear of combat) does not suffer disproportionately greater punishment when his will is overcome by being forcibly conscripted. By comparison, however, the Canases suffer disproportionately severe punishment when forced to serve in the military because that service would cause them to sacrifice their religion's fundamental principle of pacifism."

That view was based partly on a reading of the *Handbook* (the Court adopted at 724, 725, for reasons which, with respect, I find unconvincing, a different view of par 173 from that which I have expressed) and also on particular principles of United States constitutional law. The following passage, at 723, makes that clear:

"The BIA gave great weight to the facially neutral characteristics of the Salvadoran conscription policy. Because nearly all conscription policies will appear facially neutral, the BIA's reasoning effectively means that no such policy can ever result in persecution within the meaning of the INA. Such a result ignores an elementary tenet of United States constitutional law, namely, that a facially neutral policy nonetheless may impermissibly infringe upon the rights of specific groups of persons. This tenet has been deemed particularly important where religion is concerned."

A footnote to that portion of the judgment makes the position clear:

"While we do not suggest that United States constitutional law is binding upon the Salvadoran government, we do believe that United States jurisprudence is relevant to analysis of new issues of United States refugee law. Here we consider solely whether the Canases are entitled to relief afforded under United States refugee law."

> 21 Both the text of the Convention and the course of Australian authority require, in my view, that I should not follow that approach. The terms of Art 1A(2) of the Convention make it clear that a refugee is a person who has a well-founded fear of being persecuted *for reasons of* race, religion, nationality, membership of a particular social group or political opinion. The importance of the words *"for reasons of"*, was emphasised by the Full Court in *Ram*. Burchett J (with whom O'Loughlin and Nicholson JJ agreed) said at 568:

"The link between the key word 'persecuted' and the phrase descriptive of the position of the refugee, 'membership of a particular social group', is provided by the words 'for reasons of' – the membership of the social group must provide the reason. There is thus a common thread which links the expressions 'persecuted', 'for reasons of', and 'membership of a particular social group'. That common thread is a motivation which is implicit in the very idea of persecution, is expressed in the phrase 'for reasons of', and fastens upon the victim's membership of a particular social group. He is persecuted because he belongs to that group."

Again, in *Applicant A*, McHugh J said at 257:

"When the definition of refugee is read as a whole, it is plain that it is directed to the protection of individuals who have been or who are likely to be the victims of intentional discrimination of a particular kind. The discrimination must constitute a form of persecution, and it must be discrimination that occurs because the person concerned has a particular race, religion, nationality, political opinion or membership of a particular social group."

> 22 That is the perspective from which the sufficiency of the Tribunal's reasons must be assessed. It is important also that Mr Mehenni did not suggest, to the Department or to the Tribunal, that, assuming that his attitude to military service might properly be characterised as conscientious objection, he would on that account be singled out for discriminatory treatment. Nor was it suggested that there was any material before the Tribunal which indicated that those who objected to military service on conscientious grounds were specially targeted by the Algerian authorities. Mr Mehenni's fears, as he described them to the Tribunal, concerned the harsh punishment which he said was meted out to draft evaders generally, what he saw as the likely consequence of his failure to cooperate with the Algerian authorities in Yemen coupled with his failure to return to Algeria (he would be seen as an opponent of the government) and his likely treatment (and the likely treatment of his family) at the hands of the Islamic groups if he were compelled to serve in the army. But the Tribunal found that Mr Mehenni was not likely to have come *"to the adverse attention"* of the Algerian authorities; it did not accept that Mr Mehenni would be singled out by the Islamic groups; and it accepted that

Algerian draft evaders were not subjected to excessive or discriminatory punishment, so that an Algerian claiming to fear persecution only on the ground of being a deserter or draft evader would not be a refugee for Convention purposes. Those findings were not challenged. On the last matter, the Tribunal expressed its finding as follows:

"The Tribunal notes the published evidence of the penalties for draft evasion, cited above in the Amnesty International Report, and that the US Bureau of Democracy, cited above, in its 1996 report said that draft evaders were among those targeted by the Algerian authorities. The Tribunal accepts the UNHCR statement, cited above, that Algerians claiming persecution on the mere ground of being deserters or draft evaders do not normally qualify unless other elements are involved in the case. It does so in light of the UNHCR capacity to have access to a broad range of Algerian asylum claims made in a number of countries. Following the logic applied by Mr Mehenni, all Algerian draft evaders would be regarded by the Algerian Government as holding an imputed political opinion in opposition to the Government. Yet the evidence of UNHCR is that, 'in the context of Algeria, UNHCR is not aware of any cases where excessive or discriminatory punishment and/or inhumane or degrading treatment has been applied vis-à-vis deserters and/or draft evaders."

23 In circumstances where, as I have pointed out, Mr Mehenni did not suggest that he would be singled out from draft evaders generally and there was no material suggesting that conscientious objectors were singled out, it is not surprising that Mr Mehenni's adviser did not seek, in submissions to the Tribunal, to rely upon a claim that Mr Mehenni was a conscientious objector. Nor is it surprising that the Tribunal did not deal with such a claim. In my view, the evidence relied upon on the application for judicial review, relating to conscientious objection, did not raise a material question of fact on which s 430 of the *Migration Act* obliged the Tribunal to make a finding. For the reasons I have given, and having regard to the other aspects of Mr Mehenni's claim, it would have been a finding which led nowhere.

# Conclusion

24 Thus, in my view, the Tribunal made the findings which it was required to make in order to deal with Mr Mehenni's claim properly. It follows that neither of the grounds on which Mr Mehenni seeks review of the Tribunal's decision is made out and the application must be dismissed with costs.

I certify that the preceding twenty-four (24) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Lehane.

Associate:

Dated: 24 June 1999

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| Counsel for the Applicant: | Mr N C Poynder |
| Solicitor for the Applicant: | Legal Aid Commission of NSW |
| Counsel for the Respondent: | Mr P S Braham |
| Solicitor for the Respondent: | Australian Government Solicitor |
| Date of Hearing: | 3 June 1999 |
| Date of Judgment: | 24 June 1999 |