FEDERAL COURT OF AUSTRALIA

SZAOG v Minister for Immigration & Multicultural & Indigenous Affairs [2004] FCAFC 316

MIGRATION — appeal from decision of Federal Magistrates Court — protection visas — whether conscientious objection to military service may stem from or constitute a political opinion or religious view — whether compulsory military service may amount to persecution of the appellant — whether such claim had been made by appellant before the Refugee Review Tribunal — no such claim had been made by appellant before the Refugee Review Tribunal - failure by the Refugee Review Tribunal to make such a finding not a jurisdictional error — decision of the Federal Magistrates Court not affected by jurisdictional error — appeal dismissed.

Migration Act 1958 (Cth) s 474(2)

1951 United Nations Convention Relating to the Status of Refugees

Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts

Bouianov v Minister for Immigration and Multicultural Affairs [1998] FCA 1348 cited

Saliba v Minister for Immigration and Multicultural Affairs (1998) 159 ALR 247 cited

Immigration and Naturalization Service v Cardoza-Fonseca 480 US 421 (1987) cited

Applicant A & Anor v Minister for Immigration & Ethnic Affairs & Anor (1997) 190 CLR 225 cited

Chan Yee Kin v Minister for Immigration and Ethnic Affairs (1989) 169 CLR 379 cited

Minister for Immigration & Multicultural Affairs v Yusuf (2001) 180 ALR 1 cited

WADA v Minister for Immigration & Multicultural Affairs [2002] FCAFC 202 cited

WACW v Minister for Immigration & Multicultural & Indigenous Affairs [2002] FCAFC 155 cited

Zolfagharkhani v Canada [1993] 3 FC 540 cited

Ciric v Canada [1994] 2 FC 65 cited

Barraza Rivera v Immigration & Naturalization Service 913 F2d 1443 (9th Cir 1990) cited

Ramos-Vaszuez v Immigration Naturalization Service 57 F3d 857 (9th Cir 1995) cited

Martirosyan v Immigration & Naturalization Service 229 F3d 903 (9th Cir 2000) cited

Sepet& Anor v Secretary of State for the Home Department [2003] UKHL 15 considered

Dranicknikov v Minister for Immigration & Multicultural Affairs [2003] 197 ALR 389 cited

Chen Shi Hai v Minister for Immigration & Multicultural Affairs (2000) 201 CLR 293 considered

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

SZAOG & ANOR v MINISTER FOR IMMIGRATION & MULTICULTURAL & INDIGENOUS AFFAIRS

N 403 OF 2004

BEAUMONT, NORTH & EMMETT JJ

26 NOVEMBER 2004

SYDNEY

IN THE FEDERAL COURT OF AUSTRALIA	
NEW SOUTH WALES DISTRICT REGISTRY	N 403 OF 2004

ON APPEAL FROM THE FEDERAL MAGISTRATES COURT OF AUSTRALIA

BETWEEN:	SZAOG APPELLANT SZAOH SECOND APPELLANT
AND:	MINISTER FOR IMMIGRATION & MULTICULTURAL & INDIGENOUS AFFAIRS RESPONDENT
JUDGES:	BEAUMONT, NORTH & EMMETT JJ
DATE OF ORDER:	26 NOVEMBER 2004
WHERE MADE:	SYDNEY

THE COURT ORDERS THAT:

1. The appeal be dismissed.

2. The appellants pay the respondent's costs of the appeal.

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

IN THE FEDERAL COURT OF AUSTRALIA

NEW SOUTH WALES DISTRICT REGISTRY	N 403 OF 2004

ON APPEAL FROM THE FEDERAL MAGISTRATES COURT OF AUSTRALIA

BETWEEN:	SZAOG APPELLANT SZAOH SECOND APPELLANT
AND:	MINISTER FOR IMMIGRATION & MULTICULTURAL & INDIGENOUS AFFAIRS RESPONDENT

JUDGES:	BEAUMONT, NORTH & EMMETT JJ
DATE:	26 NOVEMBER 2004
PLACE:	SYDNEY

REASONS FOR JUDGMENT

BEAUMONT J:

1 I have had the benefit of reading the reasons for judgment of Emmett J and I agree with those reasons and the proposed orders.

I certify that the preceding one (1) numbered paragraph is a true

copy of the Reasons for Judgment herein of the Honourable Justice Beaumont.

Associate:

Dated: 26 November 2004

IN THE FEDERAL COURT OF AUSTRALIA	
NEW SOUTH WALES DISTRICT REGISTRY	N403 OF 2004

ON APPEAL FROM THE FEDERAL MAGISTRATES COURT OF AUSTRALIA

BETWEEN:	SZAOG APPELLANT SZAOH SECOND APPELLANT
AND:	MINISTER FOR IMMIGRATION & MULTICULTURAL & INDIGENOUS AFFAIRS RESPONDENT
JUDGES:	BEAUMONT, NORTH AND EMMETT JJ
DATE:	26 NOVEMBER 2004
PLACE:	SYDNEY

REASONS FOR JUDGMENT

NORTH J:

2 The factual setting, the appellant's claims, the decision of the Refugee Review Tribunal ('the Tribunal') and the judgment of the Federal Magistrates Court are described in the judgment of Emmett J, the draft of which I have had the benefit of reading.

3 The question to be resolved by this Court is whether the Tribunal made a jurisdictional error in its treatment of the appellant's conscientious objection. It is therefore necessary, first, to examine whether the appellant raised a claim based on his conscientious objection which the Tribunal was required to determine.

4 On this issue, it is significant that the Tribunal treated the appellant's application as based, in part, on a claim of conscientious objection. The Tribunal said:

'The applicant claims he is still subject to call up and the war continues. Recognition of the right of a government to conscript its citizens is provided in the International Covenant on Civil and Political Rights. It is not enough that an applicant's refusal to perform military service is motivated by reasons of being a pacifist, a conscientious objector or a partial conscientious objector. It is not enough to found a claim for refugee status based on punishment for refusal to perform military service, unless the sanctions that are imposed on an applicant are for Convention reasons. See: RAM v MIEA & Anor (1995) 57 FCR 565 at 568, Amanyar Anor v MIEA (1995) 63 FCR 194 and Jahazi v MIEA (1996) 133 ALR 437. The applicant claims that he objects to the Chechen conflict and the Russian military methods of dealing with this conflict. Whilst I accept the applicant has these beliefs, I have found no independent evidence to suggest that persons who object to the conflict are treated any differently or any punishment imposed upon citizens for disobeying the draft is enforced in a discriminatory manner. I find that any reservist call up is the enforcement of a law of general application.'

5 The Tribunal's reference to the appellant's objection to the Chechen conflict is supported by evidence given by the appellant in a declaration accompanying his original visa application. The appellant said:

'Once I happened to be a witness as Russians wiped out a Chechen village killing all civilians. The officer who ordered to fire explained later that they (Chechens) started firing first… But I personally was at the helicopter and saw what was going on. No one was firing at us.'

And, in a written declaration in support of his application for review by the Tribunal, the appellant further stated:

'My numerous public protests against the policy and methods of the war between Russia and Chechnya, against meaningless and brutality of the slaughter of peaceful citizens by Russian troops, were considered by my commanders as a "political sabotage", and I was persecuted for that, and my life was put under fatal danger.

In my complaints to the State Procurator and to the President I described the criminal activities of superiors, but the main point was the injustice of that war, and that, according to my deep belief, the Russian authorities had used that war for their political goals.'

6 Because the Tribunal treated the appellant as having made a claim based in part on his conscientious objection, and further, because the evidence relied on by the appellant substantiated this treatment by the Tribunal, I cannot agree with the conclusion reached by Beaumont and Emmett JJ that there was no finding that a claim in relation to conscientious objection to service in the army was made by the appellant.

7 In all the circumstances, it is not decisive that the appellant's migration agent failed, in written submissions filed with the Tribunal, to articulate expressly that conscientious objection was one basis for the application. The evidence of the appellant obliged the Tribunal to consider this basis even if, contrary to my view, it had not been expressly articulated by the appellant: *Bouianov v Minister for Immigration and Multicultural Affairs* [1998] FCA 1348 at 2; *Saliba v Minister for Immigration and Multicultural Affairs* (1998) 159 ALR 247 at 258.

8 Having determined that the appellant based his claim before the Tribunal on his conscientious objection, I turn to the question of whether the Tribunal made a jurisdictional error when it rejected the appellant's claim on the basis that military service in Russia results from a law of general application, and there was no evidence that the law was applied in a discriminatory way against the appellant.

9 The Tribunal's reasoning fails to deal fully with the legal issues raised by this aspect of the appellant's case. Perhaps surprisingly, the question of whether a person suffers persecution for the purposes of the *1951 United Nations Convention Relating to the Status of Refugees* where, under a law of general application, they are obliged to render military service in a conflict in which they will or might be forced to engage in human rights abuses or breaches of humanitarian law has not been the subject of direct judicial authority in Australia. It is, however, recognised in the *Handbook on Procedures and Criteria for Determining Refugee Status* (1979) published by the Office of the United Nations High Commissioner for Refugees (the Handbook), by leading academic scholarship, and by United States, Canadian and United Kingdom case law.

10 The Handbook, at paragraph 171, states:

'Where… 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.'

In the United States, the Handbook has been held to provide significant guidance in construing the Convention: *Immigration and Naturalization Service v Cardoza-Fonseca* 480 US 421 (1987) at 439 footnote 22**.** In Australia, a similar view was expressed by Kirby J in *Applicant A & Anor v Minister for Immigration & Ethnic Affairs & Anor* (1997) 190 CLR 225 at 302. Other Australian authorities emphasise that the Handbook provides a practical guide for the determination of refugee status: *Chan Yee Kin v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379 at 392 per Mason CJ; *Minister for Immigration & Multicultural Affairs v Yusuf* (2001) 180 ALR 1 at 171 per Kirby J; *WADA v Minister for Immigration & Multicultural Affairs* [2002] FCAFC 202 at [42] per Gray, Nicholson and Emmett JJ; *WACW v Minister for Immigration& Multicultural & Indigenous Affairs* [2002] FCAFC 155 at [17] per Gray, Nicholson and Emmett JJ.

11 The leading academic text J C Hathaway, *The Law of Refugee Status,* Butterworths, Toronto, 1991, p 185 states:

'… the specific form of military service objected to may be fundamentally illegitimate, as when it contemplates violation of basic precepts of human rights law, humanitarian law, or general principles of public international law. Where the service is itself politically illegitimate, refusal to enlist or remain in service cannot be construed as a bar to refugee protection.'

See also GS Goodwin-Gill, *The Refugee in International Law,* Clarendon, Oxford 1996, p 59 and, for an interesting case note which examines the issue of the grant of asylum in cases of selective conscientious objection, see K Kuzas, 'Asylum for Unrecognized Conscientious Objectors to Military Service: Is There a Right Not to Fight?' *Virginia Journal of International Law* vol 31, 1990-1991 p 447.

12 The Canadian courts have applied this approach. In *Zolfagharkhani v Canada* [1993] 3 FC 540, the Court of Appeal upheld the claim of an Iranian to object to military service on the ground that it would involve him in the conflict with Iranian Kurds in which chemical warfare was being used. MacGuigan J said at 555:

'The probable use of chemical weapons, which the Board accepts as a fact, is clearly judged by the international community to be contrary to basic rules of human conduct, and consequently the ordinary Iranian conscription law of general application, as applied to a conflict in which Iran intended to use chemical weapons, amounts to persecution for political opinion.'

Zolfagharkhani was followed in *Ciric v Canada* [1994] 2 FC 65 which upheld the claim of a Serbian who refused to fight in the Yugoslav civil conflict because the conflict involved violation of human rights and atrocities abhorrent to the world community.

13 The same approach has been applied in a series of cases at the appellate level in the United States: *Barraza Rivera v Immigration & Naturalization Service* 913 F2d 1443 (9th Cir 1990) especially [10]; *Ramos-*

Vaszuez v Immigration & Naturalization Service 57 F3d 857 (9th Cir 1995) especially [13], [14] and [18]; *Martirosyan v Immigration & Naturalization Service* 229 F3d 903 (9th Cir 2000) especially [8]-[10].

14 The House of Lords endorsed this approach last year when Lord Bingham said in *Sepet & Anor v Secretary of State for the Home Department* [2003] UKHL 15 at [8]:

'There is compelling support for the view that refugee status should be accorded to one who has refused to undertake compulsory military service on the grounds that such service would or might require him to commit atrocities or gross human rights abuses or participate in a conflict condemned by the international community, or where refusal to serve would earn grossly excessive or disproportionate punishment.'

15 As noted above, the appellant in this case objects to returning to military service because of the methods used by the Russian army against civilians in the Chechen conflict, particularly the targeting of civilians as part of the strategy of the federal forces.

16 Evidence of violations of human rights and humanitarian law in the Chechen conflict was before the Tribunal. For instance, the *US Department of State Country Report on Human Rights Practices, Russia, 2001* included the following information:

'In August 1999, the Government began a second war against Chechen rebels. The indiscriminate use of force by government troops in the Chechen conflict resulted in widespread civilian casualties and the displacement of hundreds of thousands of persons, the majority of whom sought refuge in the neighbouring republic of Ingushetiya. Attempts by government forces to regain control over Chechnya were accompanied by the indiscriminate use of air power and artillery. There were numerous reports of attacks by government forces on civilian targets, including the bombing of schools and residential areas.

…

A wide range of reports indicated that federal military operations resulted in numerous civilian casualties and the massive destruction of property and infrastructure, despite claims by federal authorities that government forces utilize precision targeting when combating rebels. The number of civilian fatalities caused by federal military operations cannot be verified, and estimates of the total number of civilian deaths since 1999 vary from hundreds to thousands. For example, in December 2000, seven students were killed when Russian forces fired mortar rounds on Groznyy State Pedagogical Institute.

…

According to Human Rights Watch and other NGO reports, Russian soldiers executed at least 38 civilians in the Staropromyslovskiy district between December 1999 and January 2000. Most of the victims were women and elderly men, and all

apparently were shot deliberately by Russian soldiers at close range. Similar events also occurred in Katr Yurt, were hundreds of already displaced persons were forced to flee, persons were killed, and houses were burned. Russian forces allegedly committed these abuses because Chechen fighters had passed through the village after retreating from Groznyy December 1999 in the village of Alkhan-Yurt and in other villages. There were no reports of an investigation in to these actions by year's end.

…

A typical antiterrorist operation involved the "cleansing" of an area following a rebel attack on a block post or a vehicle carrying military personnel. In March a cleansing in Argun resulted in the deaths of four detainees. Other cleansings took place during the year in the villages of Alleroy (August), Staryye Atagi (August), Goyskoye (August), Tsotin-Yurt (July), Chernorechiye (June), and in the Kurchaloy district (May and June). In the Kurchaloy district, members of the federal forces entered a private house on May 12 and fatally shot the owner and his son. On June 1, federal forces using trained dogs detained, beat, and attacked 30 men; two of the detainees disappeared. On June 16, federal forces detained 120 men; local residents found the bodies of 5 men on June 21.

…

Reportedly armed forces and police units routinely abused and tortured persons held at so-called filtration camps, where federal authorities claimed that fighters or those suspected of aiding the rebels were sorted out from civilians. Federal forces reportedly ransomed Chechen detainees (and at times, their corpses) to their families. Prices were said to range from several hundred to thousands of dollars.

…

There were some reports that federal troops purposefully targeted some infrastructure essential to the survival of the civilian population, such as water facilities or hospitals.'

17 Targeting a civilian population in civil conflict is a breach of humanitarian standards. For instance, the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts [Protocol II], opened for signature Dec. 12, 1977, art. 13, 1124 U.N.T.S. 609, 16 I.L.M. 1442 (1977) art 13. (entered into force 8 June 1977) provides that the civilian population shall enjoy general protection against the dangers arising from military operations and shall not be the object of attack.

18 In view of this evidence the Tribunal was bound to address the question of whether further compulsory service in the army amounted to persecution of the appellant. The Tribunal failed to address the appellant's conscientious objection claim on the basis that he objected to service in the Chechen conflict because the army in which he was required to serve had been involved in breaches of humanitarian law and human rights abuses. This

was a jurisdictional error. It amounted to a constructive failure to exercise jurisdiction: *Dranichnikov v Minister for Immigration & Multicultural Affairs* [2003] 197 ALR 389 at 394. For this reason I would allow the appeal and make consequential orders.

19 The appellant also contended that a law of general application requiring military service may give rise to persecution even if it is not enforced in a discriminatory way, where it has a differential impact on conscientious objectors. The notion of indirect discrimination resulting from facially neutral legislation is well known in the area of discrimination law. There is good reason in principle that facially neutral legislation which impacts unequally on certain people for a Convention reason indicates such discrimination as to require the Tribunal to investigate whether persecution exists. The Tribunal did not make such an investigation in this case. However, in view of my conclusion on the alternative argument it is not necessary for me to further address this issue on which the authorities are not entirely clear.

I certify that the preceding eighteen (18) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice North.

Associate:

Dated: 26 November 2004

IN THE FEDERAL COURT OF AUSTRALIA

NEW SOUTH WALES DISTRICT REGISTRY N403 OF 2004

ON APPEAL FROM THE FEDERAL MAGISTRATES COURT OF AUSTRALIA

BETWEEN: SZAOG

FIRST APPELLANT

SZAOH

	SECOND APPELLANT
AND:	MINISTER FOR IMMIGRATION & MULTICULTURAL & INDIGENOUS AFFAIRS RESPONDENT

JUDGES:	BEAUMONT, NORTH & EMMETT JJ
DATE:	26 NOVEMBER 2004
PLACE:	SYDNEY

REASONS FOR JUDGMENT

EMMETT J:

20 The appellants are father and daughter. They are citizens of Russia and arrived in Australia on 20 February 1998. On 23 March 1998, the father lodged applications for Protection (Class AZ) Visas for his daughter and himself. Only the father made specific claims and it is therefore convenient to refer to him as 'the appellant'. The daughter was accepted by the Refugee Review Tribunal ('the Tribunal') and the Federal Magistrates Court of Australia as a member of his family unit and no separate consideration was necessary in relation to her claims.

21 On 1 May 1998, a delegate of the respondent, the then Minister for Immigration & Multicultural Affairs ('the Minister'), refused the applications. On 22 May 1998, the appellant and his daughter applied for review of that decision by the Tribunal. On 26 September 2000, the Tribunal affirmed the delegate's decision. Following an application to the Federal Court of Australia, the Court affirmed the Tribunal's decision on 27 February 2001. However, on 8 April 2004 the High Court of Australia apparently set aside the orders of the Federal Court and ordered that the matter be remitted to the Tribunal to be determined according to law.

22 On 11 April 2003, the Tribunal, differently constituted, published its decision, made on 20 March 2003, affirming the delegate's decision not to grant protection visas to the appellant and his daughter. On 8 May 2003, the appellant and his daughter filed an application to the Federal Magistrates Court for constitutional writ relief in respect of the second decision of the

Tribunal. On 22 March 2004, the Federal Magistrates Court ordered that the application be dismissed. By Notice of Appeal filed on 24 March 2004, the appellant and his daughter appealed to the Federal Court from the judgment of the Federal Magistrates Court. Since no contrary direction has been given by the Chief Justice, the appeal has been heard by a Full Court.

THE APPELLANT'S CLAIMS AND THE DECISION OF THE TRIBUNAL

23 The original application for protection visas was accompanied by an undated declaration by the appellant. The reasons of the delegate summarised the claims made in that declaration as follows:

'The [appellant] claims that his life has been threatened in Russia by unknown persons who appear to be Chechen or connected in some way to the previous conflict between Russia and Chechnya. He claims they have threatened his life as a result of his supplying a testimony relating to events during the Chechen conflict to the Russian authorities. I find the applicant's claim to be non-Convention related. The applicant does not fear persecution as a result of his race, religion, nationality, membership of a particular social group or political opinion.

The [appellant] does not fear persecution for reasons of his membership of a particular social group. There is no recognisable or cognisable group that for reasons of his membership of that group the [appellant] is being targeted for persecutory treatment. I accept that the [appellant] may be the target of threats of a criminal nature related to his purported experiences in the military during the Chechen conflict and his subsequent testimony to the Russian authorities, however this does not bring the [appellant] within the ambit of the Convention. The [appellant] has become a target of violent criminal actions as the result of an act or an event he witnessed, and not for a Convention related reason.'

It is significant that there was no reference to a claim based on conscientious objection to service in the army.

24 In his original declaration the appellant also said:

'Once I happened to be a witness as Russians wiped out a Chechen village killing all civilians. The officer who ordered to fire explained later that they (Chechens) started firing first… But I personally was at the helicopter and saw what was going on. No one was firing at us.'

25 In a written declaration in support of his application for review by the Tribunal, the appellant further stated:

'My numerous public protests against the policy and methods of the war between Russia and Chechnya, against meaningless and brutality of the slaughter of peaceful

citizens by Russian troops, were considered by my commanders as a “political sabotage”, and I was persecuted for that, and my life was put under fatal danger.

In my complaints to the State Procurator and to the President I described the criminal activities of superiors, but the main point was the injustice of that war, and that, according to my deep belief, the Russian authorities had used that war for their political goals.’

26 On 31 October 2002, New Galaxy Consulting, migration agents, made a written submission to the Tribunal in support of the appellant’s application for review (‘the Submission’). In the Submission, the migration agents asserted that the appellant fears persecution ‘*on the basis of his actual and imputed political opinion*’. The Submission referred to the question of whether the exposure of corruption in the army could be considered as political opinion within the meaning of the Convention. The Submission cited *V v Minister for Immigration and Multicultural Affairs* (1999) 92 FCR 355 in support of the proposition that the exposure of corruption, while itself an act and not a belief, can be the outward manifestation of a belief. Thus, a person who is opposed to corruption may be prepared to expose it, even if so to do may bring consequences, although the act may be in disregard of those consequences. If the corruption is itself directed from the highest levels of society or endemic in the political fabric of society such that it either enjoys political protection, or the government of that society is unable to afford protection to those who campaign against it, the risk of persecution can be said to be for reasons of political opinion (supra at [32]).

27 The Submission also asserted that the appellant fears that he will be subject to physical violence and intimidation by the authorities in Russia if he is forced to return there. The Submission claimed that fear was the result of the appellant’s decision to make public his opinion by sending letters to the military prosecutor and former President Yeltsin expressing belief that military crimes and corruption were part of the political system in Russia. The Submission asserted that there was abundant evidence to show persecution of political opponents in Russia. Again, it is significant that no claim was made in relation to conscientious objection to service in the army.

28 The Tribunal recorded the appellant’s claim that he feared returning to Russia because he had exposed the entire structure of the Russian military, showed the Russian violations of Chechnya and had access to secret information. He claimed that he gave information to a journalist about the military although he made no claims that the journalist did anything with that information.

29 The Tribunal’s reasons for its second decision referred to the contention by the appellant that his numerous public protests against the policy and methods of the war between Russia and Chechnya and against the brutality of the slaughter of peaceful citizens by Russian troops were considered by his commanders in the army as political sabotage. That was a reference to the assertions in his original declaration that, following his conscription in 1995 into the Russian military, he happened to be a witness to

the Russians' wiping out a Chechen village, killing all civilians. The appellant asserted that, while most servicemen were against the inhuman war, not many people dared to struggle against it openly because their careers would have depended upon it. He claimed that he was independent and that, for that reason, during one regular meeting, he decided to talk about it. He claimed that, when he finished, he was accused of being alarmist and a liar. He claimed that the commander of his regiment then banned him from fighting and later ordered his arrest due to his refusal to obey orders.

30 The Tribunal was not satisfied that the appellant was a witness of truth. It considered his claims were implausible and were not supported by the independent evidence. The Tribunal was of the view that the appellant had created his claims in order to enhance his claim to refugee status. While he claimed to have exposed the entire structure of the Russian military system, showing the violations and genocide that happened in Chechnya, he had only been in the military for some weeks as a reservist officer. The appellant also claimed that he was a marked man, unable to return to Russia because he had written to the military prosecutor and to former President Yeltsin exposing corruption. Nevertheless, after writing those letters, he was able to return to Russia after a trip to Finland. The Tribunal found that the appellant's claims, that a Russian threatened and harassed by Chechens could not obtain police protection, was not supported by independent information available. Rather, the information available to the Tribunal indicated that Russian authorities harass Chechens.

31 The Tribunal also referred to the appellant's claim that, in about November 1995, whilst serving in the Russian army, his section commander expelled him because he criticised the regiment command and expressed his political view about the war in Chechnya at a gathering where regimental officers were present. He claimed that, as a consequence, he spent ten days in the brig. The Tribunal considered that a military reservist officer of the Russian army would not be in a position to express an anti-government view to his military commander or to have any access to such a person. The Tribunal did not consider that it was plausible that an army reservist would have access to the upper echelons of the military in an army, particularly an army noted for its ability to deal severely with people and its record of human rights abuses. The Tribunal was therefore not satisfied that the appellant's claims about criticising the commander or expressing his political views about the war, or obtaining any information about violations of human rights by the military, were plausible.

32 The appellant also claimed that he was on the KGB blacklist because he had access to secret information and was dangerous to the system. However, the Tribunal found no evidence to suggest that the appellant was in a position to access secret information or that he had in any way come to the notice of the KGB. Whilst the Tribunal accepted that the authorities in Russia censor and obstruct journalists reporting on Chechnya, the Tribunal observed that the appellant is not a journalist. It was not satisfied that the appellant had access to any sensitive information.

33 The Tribunal was also satisfied that the appellant could have applied for protection in Finland. The Tribunal placed weight on the appellant's failure to apply for protection in Finland as indicating a lack of subjective fear of persecution. It rejected his explanation as to why he did not do so.

34 The Tribunal summarised its conclusions in the following terms:

'Taking into account all of the evidence including findings as to the implausibility of the applicant's claims, the fact that the applicant did not engage in any political activities other than once criticising the military in 1995, speaking to a journalist, writing to the President and the Military Prosecutor, I am satisfied that the chance that harm, let alone harm amounting to persecution, will befall the applicant in the reasonably foreseeable future for reasons relating to his political affiliations is remote.

The independent evidence does not state that citizens are unable to express their political views in Russia. The Constitution provides for freedom of association and freedom of speech. I accept that there are attempts to restrict freedom of the press especially in relation to the Chechen conflict but the applicant is not a journalist. I am satisfied that on his return to Russia he would be able to express his political views.'

35 Thus, the Tribunal rejected all of the appellant's claims as formulated in his original application for a protection visa and in the Submission. No complaint has been made in relation to the Tribunal's rejection of those claims. Rather, the appellant asserts that the Tribunal failed to deal adequately with claims that he would be at risk of persecution because of his conscientious objection to military service.

THE JUDGMENT OF THE FEDERAL MAGISTRATES COURT

36 After the commencement of the hearing before the Federal Magistrates Court, the Federal Magistrate granted leave to the appellant to file an amended application, which confined his grounds for relief to the following:

'The Tribunal erred in its understanding of the law in relation to conscientious objection to military service, and such an error went to the Tribunal's jurisdiction.'

That ground is based on observations made by the Tribunal in its reasons.

37 After dealing with the claims made by the appellant in his original declaration and made on his behalf in the Submission, and rejecting them, the Tribunal made the following further observations:

'The applicant claims he is still subject to call up and the war continues. Recognition of the right of a government to conscript its citizens is provided in the International Covenant on Civil and Political Rights. It is not enough that an applicant's refusal to perform military service is motivated by reasons of being a pacifist, a conscientious

objector or a partial conscientious objector. It is not enough to found a claim for refugee status based on punishment for refusal to perform military service, unless the sanctions that are imposed on an applicant are for Convention reasons. See: RAM v MIEA & Anor (1995) 57 FCR 565 at 568, Amanyar& Anor v MIEA (1995) 63 FCR 194 and Jahazi v MIEA (1996) 133 ALR 437. The applicant claims that he objects to the Chechen conflict and the Russian military methods of dealing with this conflict. Whilst I accept the applicant has these beliefs, I have found no independent evidence to suggest that persons who object to the conflict are treated any differently or any punishment imposed upon citizens for disobeying the draft is enforced in a discriminatory manner. I find that any reservist call up is the enforcement of a law of general application.

In Applicant A & Anor v MIEA, McHugh J considered the possibility of a law, which is on its face legitimate and non discriminatory, being applied in a persecutory manner. His Honour stated at 354-355:

> Conduct will not constitute persecution,… if it is appropriate and adapted to achieving some legitimate object of the country of the refugee. A legitimate object will ordinarily be an object whose pursuit is required in order to protect or promote the general welfare of the state and its citizens. The enforcement of a generally applicable criminal law does not ordinarily constitute persecution…
>
> However where a racial, religious, national group or the holder of a particular political opinion is the subject of sanctions that do not apply generally in the state, it is more likely than not that the application of the sanction is discriminatory and persecutory. It is therefore inherently suspect and requires close scrutiny. …Only in exceptional circumstances is it likely that a sanction aimed at persons for reasons of race, religion or nationality will be an appropriate means for achieving a legitimate government object and not amount to persecution.

This reasoning clearly applies to the situation where the state conscripts persons of a particular racial, religious, or national group, the holders of a particular political opinion or members of a particular social group.

I take the view that conscientious objection to military service or pacifist views or objection to call up as a reservist are not sufficient grounds to attract the protection of the Convention. If the applicant were to be called upon to serve as a reservist on his return to Russia, as a reservist this action would be a legal requirement in that country. The obligation to perform reservist military service is universal upon all males in the applicant's country, and hence it does not in itself amount to discrimination against him. I have found no suggestion in the independent evidence that such laws are enforced in a discriminatory manner.'

38 After referring to a number of authorities, the Federal Magistrate concluded that the Tribunal was not, in the passage cited above, focussing simply upon the requirement that the appellant undergo compulsory military service. Rather, the Tribunal was considering the core issue of whether the appellant had a well-founded fear of persecution for a Convention reason. His Honour considered that the Tribunal had found that, whilst the appellant had a genuine objection to military service in Chechnya, there was no independent evidence to suggest that persons who objected to that particular conflict were treated any differently to any other objectors or that any punishment imposed upon such objectors was enforced in a discriminatory manner. His Honour concluded that, since those findings were open to the Tribunal, the Appellant could not succeed on the ground raised in his amended application.

THE APPEAL

39 In the Notice of Appeal to the Federal Court, the following ground is raised:

'The Court erred in holding that the Tribunal had not erred in law in its understanding of the law in relation to conscientious objection and what constitutes a refugee under the Convention, and consequently erred in failing to find that the Tribunal had failed to exercise its jurisdiction, or exceed its jurisdiction.'

Counsel for the appellant formulated the question before the Court as:

'…whether a finding that a law punishing those who refuse to fight when conscripted is a law of general application, applied without regard to the reasons for the objection, is enough to determine that an applicant falls outside the terms of the Refugee Convention.'

40 It is by no means clear in what circumstances, if at all, the appellant made any claim that he feared persecution by reason of being required to fight as a conscript in the Russian army against Chechnya. He made no such claim in his original application for a protection visa. Nor did his migration agents make any such claim on his behalf in the Submission. He may have made such a claim during the course of a hearing before the Tribunal but there was no evidence before the Federal Magistrate of the hearing before the Tribunal other than as appears from the Tribunal's reasons. It is therefore difficult to see why the Tribunal would be addressing the question of conscientious objection to service as a possible basis for entitlement to a protection visa, if indeed that is what the Tribunal was doing in the passage cited.

41 In *Chen Shi Hai v Minister for Immigration& Multicultural Affairs* 201 CLR 293 (at [25] – [26]) the High Court held that not every form of discriminatory or persecutory behaviour is covered by the Convention definition of 'refugee'. It covers only conduct undertaken for reasons specified in the Convention. The question whether conduct is undertaken for a Convention reason cannot be entirely isolated from the question whether the

conduct amounts to persecution. Moreover, the question whether particular discriminatory conduct is or is not persecution for one or other of the Convention reasons may necessitate different analysis, depending upon the particular reasons assigned for that conduct. If persons of a particular race, religion or nationality are treated differently from other members of society, that, of itself, may justify the conclusion that they are treated differently by reason of their race, religion or nationality. That is because, ordinarily, race, religion and nationality do not provide a reason for treating people differently.

42 In *Chen Shi Hai* the High Court held that the position is somewhat more complex when persecution is said to be for reasons of membership of a particular social group or political opinion. There may be groups that warrant different treatment to protect society. So, too, it may be necessary for the protection of society to treat persons who hold certain political views differently from other members of society. The question whether the different treatment of persons of a particular race, religion, nationality or political persuasion or who are members of a particular social group constitutes persecution for that reason ultimately depends on whether that treatment is appropriate and adapted to achieving some legitimate object of the country concerned: see *Chen Shi Hai* (at [27] –[28]).

43 The appellant, through his counsel, placed considerable store on observations made by Gray J in *Erduran v Minister for Immigration & Multicultural Affairs* ([2002] FCA 814, at [28]) to the effect that, where an issue of refusal to undergo compulsory military service arises, it may be necessary to look further than the question of whether the law relating to that military service is a law of general application. It is 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 a person will be punished for refusing to undergo military service by reason of conscientious objection stemming from political opinion or a religious view, or if that of itself is political opinion, it may not be difficult to find that the person is liable to be persecuted for a Convention reason.

44 Counsel for the appellant contended, in effect, that a genuinely held conscientious objection to fighting in a war may constitute a political opinion. If one refuses to fight by reason of that objection and one is thereby at risk of punishment to a degree that could constitute persecution, the real or effective reason for the punishment could be seen to be persecution for a political opinion, notwithstanding that the punishment is by way of law of general application, applied without discrimination.

45 However, there was no finding that such a claim had been made by the appellant. *A fortiori*, there was no finding by the Tribunal that the appellant had a conscientious objection to fighting in the war against Chechnya that constituted a political opinion. The most that can be said is that the Tribunal accepted that the appellant held the belief that he objected to the Chechen conflict and the Russian military methods of dealing with that conflict. On the other hand, there was no finding as to what it was about the Chechen conflict that the appellant objected to. Nor was there any finding about the appellant's

understanding as to the Russian military methods of dealing with that conflict. Indeed, the Tribunal's only conclusion about the appellant's evidence was that he was not a witness of truth and that his claims were implausible, as they were unsupported by independent evidence.

46 The Tribunal made no finding that any reluctance on the part of the appellant to serve in the Russian army was the result of any political opinion. While it may be possible for conscientious objection itself to be regarded as a form of political opinion, the question would still need to be asked whether the conscientious objection to military service had a political or religious basis or whether conscientious objectors, or some particular class of them, could constitute a particular social group. If a person would be punished for refusing to undergo military service by reason of conscientious objection stemming from political opinion or religious view, or the conscientious objection is itself political opinion, it may be possible to find that the person is liable to be persecuted for a Convention reason. There was no claim to that effect made by the appellant. Accordingly, the failure by the Tribunal to make a finding to that effect could not amount to jurisdictional error.

CONCLUSION

47 The appellant has not demonstrated that the Federal Magistrate erred in the conclusion that he reached. That is to say, there is no basis for concluding that the Tribunal made any error of a jurisdictional kind such that its decision was not a decision under the Act as provided in s 474(2) of the Act. It follows that the Tribunal's decision is not subject to *certiorari* or *mandamus* as claimed by the appellant. The appeal should be dismissed with costs.

I certify that the preceding twenty-eight (28) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Emmett.

Associate:

Dated: 26 November 2004

Counsel for the Appellants:	C Jackson
Counsel for the Respondent:	R Beech-Jones

Solicitor for the Respondent:	Clayton Utz
Date of Hearing:	17 August 2004
Date of Judgment:	26 November 2004