FEDERAL COURT OF AUSTRALIA

VCAD v Minister for Immigration & Multicultural & Indigenous Affairs

[2004] FCA 1005

MIGRATION – protection visas – claim based on conscientious objection to military service – Tribunal found military service law a law of general application – religious basis for conscientious objection – whether Tribunal erred in failing to consider – alternative basis for decision of Tribunal – subsequent change in circumstances – correctness of decision not affected

Judiciary Act 1903 (Cth), s 39B

Migration Act 1958 (Cth), s 36

Migration Regulations 1994 (Cth)

Migration Legislation Amendment (Judicial Review) Act 2001 (Cth)

Plaintiff S157/2002 v Commonwealth of Australia (2003) 211 CLR 476, referred to

Re Minister for Immigration and Multicultural and Indigenous Affairs; ex parte Applicants S134/2002 (2003) 211 CLR 441, referred to

Chen Shi Hai v Minister for Immigration and Multicultural Affairs (2000) 201 CLR 293, referred to

Wang v Minister for Immigration and Multicultural Affairs (2000) 105 FCR 548, referred to

Okere v Minister for Immigration and Multicultural Affairs (1998) 87 FCR 112, considered

Stoljkovic v Minister for Immigration and Ethnic Affairs (1993) 33 ALD 379, referred to

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

Erduran v Minister for Immigration and Multicultural Affairs (2002) 122 FCR 150, followed

Mohamed v Minister for Immigration and Multicultural Affairs [2002] FCA 4, referred to

Appellant S395/2002 v Minister for Immigration and Multicultural Affairs (2003) 203 ALR 112, cited

Re Refugee Review Tribunal; Ex parte Aala (2000) 204 CLR 82, referred to

Re Minister for Immigration and Multicultural Affairs; Ex parte Lam (2003) 195 ALR 502, referred to

VBAC v Minister for Immigration & Multicultural & Indigenous Affairs [2003] FCA 205, referred to

VEAJ v Minister for Immigration & Multicultural & Indigenous Affairs [2003] FCA 678, referred to

Forster v Jododex Australia Pty Ltd (1972) 127 CLR 421, referred to

Zhang v Minister for Immigration, Local Government and Ethnic Affairs (1993) 45 FCR 384,

referred to

Minister for Immigration and Multicultural Affairs v Yusuf (2001) 206 CLR 323, referred to

Minister for Immigration & Multicultural & Indigenous Affairs v VFAI of 2002 [2002] FCAFC 374, considered

Applicant VEAZ of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs [2003] FCA 1033, followed

APPLICANT VCAD OF 2002 v MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS

V 156 of 2002

KENNY J

4 AUGUST 2004

MELBOURNE

IN THE FEDERAL COURT OF AUSTRALIA	
VICTORIA DISTRICT REGISTRY	V 156 OF 2002

BETWEEN:	APPLICANT VCAD OF 2002 APPLICANT
AND:	MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS RESPONDENT
JUDGE:	KENNY J
DATE OF ORDER:	4 AUGUST 2004
WHERE MADE:	MELBOURNE

THE COURT ORDERS THAT:

1. The application be dismissed.

2. The applicant pay the respondent's costs of the application.

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

IN THE FEDERAL COURT OF AUSTRALIA	

VICTORIA DISTRICT REGISTRY	V 156 OF 2002

BETWEEN:	APPLICANT VCAD OF 2002 APPLICANT
AND:	MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS RESPONDENT

JUDGE:	KENNY J
DATE:	4 AUGUST 2004
PLACE:	MELBOURNE

REASONS FOR JUDGMENT

1 This is an application under s 39B of the *Judiciary Act 1903* (Cth) for judicial review of a decision of the Refugee Review Tribunal ("the Tribunal") made on 23 January 2002. The decision affirmed a decision of the respondent's delegate not to grant protection visas to the applicant, his de facto wife and her daughter.

BACKGROUND FACTS

2 The applicant, who is a citizen of the Federal Republic of Yugoslavia, arrived in Australia on 23 October 1998. His wife and her daughter arrived in Australia on 31 March 1999. In May 1999, the applicant applied for a protection visa, including the wife and daughter in his application. On 5 August 1999, the respondent's delegate refused this application. The applicant made an application to the Tribunal, but this was unsuccessful. This proceeding challenges the Tribunal's decision.

LEGISLATIVE FRAMEWORK

3 Section 29(1) of the *Migration Act 1958* (Cth) ("the Act") confers power on the Minister to grant a non-citizen permission, to be known as a visa, to travel to and enter and/or remain in Australia. There are different classes of visas. Section 36(1) makes provision for protection visas. At the relevant time, s 36(2) stated:

A criterion for a protection visa is that the applicant for the visa is a non-citizen in Australia to whom Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol.

Section 5 of the Act defines the expression "Refugees Convention" and "Refugees Protocol" as the Convention relating to the Status of the Refugees done at Geneva on 28 July 1951 and the Protocol relating to the Status of Refugees done at New York on 31 January 1967.

4 Subsection 31(3) of the Act provides that the regulations may prescribe criteria for a visa or visas of a specified class. The criteria for a subclass 866 (Protection) visa are set out in Sch 2 of the *Migration Regulations 1994* (Cth) ("the Regulations"). At the time of application, an applicant for a protection visa must satisfy the criterion in 866.221 which, at the relevant time, stated that:

The Minister is satisfied that the applicant is a person to whom Australia has protection obligations under the Refugees Convention.

As a party to the Refugees Convention and Refugees Protocol (collectively referred to hereafter as the "Refugees Convention"), Australia owes protection obligations to persons who are refugees. Article 1A(2) of the Refugees Convention defines a refugee as any person who:

owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

THE TRIBUNAL'S DECISION

5 The departmental file and other documentary material were before the Tribunal. The applicant and his wife also gave oral evidence.

6 The essence of the applicant's claim was that he feared persecution as a result of his failure to comply with a call-up notice requiring him to attend for military service. He also claimed he feared persecution because of his membership of a political organisation called Srpski Pokret Obnove ("SPO"). Subject to the comments that conclude these reasons, his wife and daughter did not make specific claims under the Refugees Convention. The Tribunal recorded that:

The applicant's de facto wife stated that she had been working in Yugoslavia since 1991 and every year she would renew her business visa. She left Yugoslavia with her daughter in March 1999 and at that time she had a valid visa which was to expire in August 1999. She stated that her relationship with the applicant goes back eight years and that the only way she could return to Yugoslavia is as a tourist, this means that her daughter could not go to school. She also stated that the applicant is in constant fear and is not the same man he used to be; she believes his mental health is not good. She described the disastrous consequences on her daughter's prospects should they need to return to Yugoslavia.

There were numerous testimonials before the Tribunal concerning the musical ability of the daughter.

7 After noting art 8 of the International Covenant on Civil and Political Rights 1996 ("ICCPR"), the Tribunal stated:

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; there may be cases where conscientious objection to military service may 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 may be by virtue of one's political opinion. 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. …

The applicant did imply a Convention reason for not wanting to fight in a war. It is implied in the reading of his claims that he did not agree with the Milosevic regime and its policies. …

Conscription or compulsory military service, does not of itself constitute persecution. As stated in Mijoljevic v MIMA [1999] FCA 834, the Federal Court has on a number of occasions recognised that the enforcement of laws providing for compulsory military service and punishment of those who avoid such service, will not ordinarily provide a basis for a claim of persecution within the meaning of the Convention (Branson J at 23).

8 After referring to paragraphs 167-169 of the *UNHCR Handbook on Procedures and Criteria for Determining Refugee Status*, the Tribunal found:

Draft evasion in Yugoslavia is covered by the Military Code and Federal Criminal Code as evinced in country information CX38460 of 1 October 1999. It is a law of general application and in the present case there is no evidence before the Tribunal that the Applicant would suffer disproportionate punishment on account of his race, nationality, religion, membership of a particular social group or actual or imputed political opinion. Nor is there evidence to suggest that punishment under the code is implied in a discriminatory manner and for Convention reasons.

9 The Tribunal noted that the situation in Yugoslavia had "changed considerably" after the applicant had made his initial claims. Referring to an item of country information, the Tribunal observed that:

The people turned on the Milosevic regime in what some commentators have called a 'bloodless coup' and a number of reforms have already been put into place in the FRY.

The Tribunal found that:

[A]n amnesty was declared for draft dodgers and deserters as indicated in the article below (CX51204) "Yugoslavia pardons draft dodgers, deserters". By Beti Bilandzic Reuters Business Briefing sourced from Reuters News Service 26 FEB 2001.

The Tribunal reproduced this article in its reasons.

10 Referring to DFAT country information No 85/99 of 17 March 1999, concerning calls for military exercises, the Tribunal stated:

The Tribunal notes the discrepancies in the version of his claims in relation to military service prior to the hearing and at the hearing but will not consider these discrepancies as determinative in its findings on these claims.

Even if the applicant were to face some punishment, penalty or sanctions (even though this has been ruled out by the amnesty) such sanctions would be imposed because of his failure to perform military service and not attributable to his political opinion, membership of a particular social group or any other Convention ground. The Tribunal finds that any punishment the applicant may face for refusal to perform military service is not for a Convention reason.

11 In relation to the applicant's claimed political activity, the Tribunal said:

The Tribunal attempted without success to elicit from the applicant a description of any political activity in which he participated which would lead anyone to send a death threat as the applicant claims. He stated that he had been a member of the SPO, when asked what he had done in this party, he stated that he attended rallies in Belgrade. …

The Tribunal notes that the applicant has not indicated anything other than a very low level of political activity, the situation in the FRY has changed dramatically in the last year or so and the credibility of the threat to the applicant's life and its motivation no longer persists, nor did the applicant provide any reason why this threat should have existed at the time it was made or why it would still be an issue now. The Tribunal does not accept that the applicant was ever threatened as claimed and finds that the existence of this threat was concocted, including the provision of the actual paper on which it was written. Having regard to the above discussion the Tribunal finds that there is no real chance that the applicant would be persecuted for reasons of his political opinion should he return to the FRY.

Having examined the applicant's claims individually and cumulatively the Tribunal finds that the applicant does not have a well-founded fear of persecution for any Convention reason, now or in the reasonably foreseeable future should he return to Yugoslavia.

12 The Tribunal found that the applicant did not satisfy the criterion in s 36(2) of the Act. In connection with the applicant's wife and daughter, the Tribunal stated:

No specific Convention claims were made by or on behalf of the applicant's de facto wife and her child, and there is no basis on which the Tribunal can be satisfied that they are refugees. The fate of their application therefore depends on the outcome of the applicant's application. As the Tribunal has found that the applicant does not satisfy the criteria for a protection visa, it follows that his wife and her child cannot be granted a protection visa.

JURISDICTION OF THE COURT

13 The scope of review of this decision is affected by the *Migration Legislation Amendment (Judicial Review) Act 2001* (Cth), as explained by the decisions of the High Court of Australia in *Plaintiff S157/2002 v Commonwealth of Australia* (2003) 211 CLR 476 ("*Plaintiff S157/2002*") and *Re Minister for Immigration and Multicultural and Indigenous Affairs; ex parte Applicants S134/2002* (2003) 211 CLR 441. A decision that is affected by jurisdictional error does not fall within s 474 of the Act, which is a privative provision: see *Plaintiff S157/2002* at 506-508, 511 per Gaudron, McHugh, Gummow, Kirby and Hayne JJ.

THE SUBMISSIONS OF THE PARTIES

(a) The applicant's submissions

14 In written contentions, the applicant argued that:

The Tribunal clearly took a restrictive view of the circumstances in which a conscientious objector to military service might be a person with well-founded fear of persecution for a Convention reason. … [T]his view was wrong in law, and led to the Tribunal not correctly applying the test it was required to apply under s 36 of the Act.

The applicant submitted that the Tribunal did not, in its reasons, mention "the moral and religious objections … specified in his application for review to the Tribunal". He referred to a passage in his application to the Department that read as follows:

Why should I take up arms and kill innocent people? I am a Christian and firmly oppose killing of another human being. Life has been granted to us by God and none has the right to stop it but God. I refuse to pick up a gun and fight and am morally and religiously opposed to war.

15 At the hearing, counsel for the applicant noted that this was not the only reference to the applicant's conscientious objection to military service. For example, in his application to the Tribunal, the applicant said:

I made a conscious moral decision based on my values & beliefs not to participate in the war on Kosovo & take another human life.

The Tribunal also had before it a letter from a priest of the Russian Orthodox Church, which stated that the applicant was "a very religious man" and that he had "avoided compulsory service in the army" "[d]ue to his religious beliefs".

16 In written contentions and at the hearing, the applicant submitted that the Tribunal had "seriously misunderstood the nature of the right to religious liberty protected by the Refugees Convention". In support of this submission, he referred to the decision of the High Court of Australia in *Chen Shi Hai v Minister for Immigration and Multicultural Affairs* (2000) 201 CLR 293 at 304-305 per Gleeson CJ, Gaudron, Gummow and Hayne JJ; the ICCPR (arts 18 and 19); and *Wang v Minister for Immigration and Multicultural Affairs* (2000) 105 FCR 548 ("*Wang*") at 564-565 per Merkel J. Referring to *Okere v Minister for Immigration and Multicultural Affairs* (1998) 87 FCR 112 ("*Okere*") at 117 per Branson J, the applicant submitted that:

If a person, by reason of his religious beliefs, is required to act in a way which is then punished, it must be said that the punishment is incurred and endured for religious reasons.

17 Referring to *Stoljkovic v Minister for Immigration and Ethnic Affairs* (1993) 33 ALD 379, *Murillo-Nunez v Minister for Immigration and Ethnic Affairs* (1995) 63 FCR 150 at 159 per Einfeld J and the *UNHCR Handbook on Procedures and Criteria for Determining Refugee Status*, at pars 167-174, the applicant submitted that:

While compulsory military service, and punishment for refusal, of such service does not ipso facto constitute persecution under the Refugees Convention … a person may be a refugee under the Convention depending on the circumstances and reasons for his refusal to serve and the punishment which may follow.

…

The Tribunal has therefore misunderstood the nature of the limits of persecution for reason of religion, and has thereby failed correctly to apply the test required to determine whether the applicant was a person to whom Australia owed protection obligations under the Refugees Convention. … An error by the Tribunal in relation to the nature of religious freedom and religious persecution is therefore an error which causes the Tribunal to fail properly to ask the question it is required to ask. It is thus a jurisdictional error … .

At the hearing, counsel for the applicant submitted that the Tribunal had failed to consider a significant part of the applicant's claim.

18 The applicant acknowledged that the Tribunal "may be taken to have considered that there had been significant changes in Yugoslavia in relation to those who had evaded the draft or not performed military service", but, according to the applicant, "the error … about the meaning of persecution, and the rights of religion and conscience protected by the Convention, may have affected the Tribunal's decision". The applicant's counsel reiterated this at the hearing.

19 The applicant also submitted that the Tribunal failed to have regard to a relevant consideration when it "failed to advert in its findings and reasons to the fact that the applicant claimed, both in his initial application for a protection visa and in his application to the Tribunal, that his objections to military service [were] motivated on religious and moral grounds".

20 At the hearing, the applicant sought leave to amend his application to support the submission that the Tribunal fell into jurisdictional error and breached the rules of natural justice by failing to notify him that it would not apply the concepts of religious freedom and freedom of expression in accordance with the ICCPR. The respondent did not oppose the giving of this leave, and leave was given.

21 Lastly, in written submissions, the applicant submitted that the Tribunal failed to consider whether the wife and daughter had "any reason to fear persecution themselves". He submitted that:

[T]here was evidence before the Tribunal that the wife of the applicant was refused residence in Yugoslavia and was told "that she picked the wrong husband who belongs to an opposition party". While this element of the claim in the material before the Tribunal was certainly expressed only briefly, nevertheless it did squarely raise a claim on behalf of the wife of the applicant. It would also have raised a question concerning whether the applicant's stepdaughter was at risk of persecution. In the circumstances of the case, the Tribunal was at fault in not dealing with this element of the claim at all.

Counsel for the applicant repeated this submission at the hearing.

(b) <u>The respondent's submissions</u>

22 The respondent accepted that the Tribunal did not deal, directly or explicitly, with the applicant's claim that there was a religious or moral basis for his objection to obeying his call-up notice. The respondent submitted, however, that the Tribunal did not ignore the issue and the possible relevance of a person's religious beliefs in the context of a conscientious objection. The respondent submitted, in written submissions, that:

Given that the Tribunal was aware of the religious aspect of the claim, and its possible relevance to the Convention, … by implication, the Tribunal considered that such a claim was not elevated to a necessary level to warrant further discussion.

> 23 In support of this contention, the respondent specifically relied on the Tribunal's conclusion as to military service. Because the claim was "not elevated to a necessary level to warrant further discussion", the Tribunal considered only what it thought to be an implied political objection based upon the applicant's disagreement with the Milosevic regime. The respondent added, in written submissions, that:

It is inconceivable that the Tribunal simply forgot to deal with the religious component of the claim. In this regard it is contended that the reasons of an administrative decision-maker are not to be read overzealously with an eye finely attuned for the perception of error. A fair reading of the decision suggests that the Applicant was not articulating a forceful claim in this regard.

> 24 At the hearing, counsel for the respondent reiterated these submissions, affirming that the Tribunal was alive to the religious basis of the applicant's claimed conscientious objection, although counsel was unable to explain why the Tribunal confined its finding to the political aspect of the applicant's opposition. According to the respondent's counsel, the Tribunal's approach to the religious aspect of the applicant's conscientious objection claim was consistent with the decision of Gray J in *Erduran v Minister for Immigration and Multicultural Affairs* (2002) 122 FCR 150 ("*Erduran*"), which stated the appropriate approach in this context.

> 25 The respondent further submitted, in written submissions, that:

If the Court were to find against the Respondent on this point, it is nevertheless submitted that, for a number of reasons, no appellable error is made out. The Tribunal correctly concluded that conscription itself does not amount to persecution. It considered relevant paragraphs of the UNHCR Handbook. It found that conscription in the Federal Republic of Yugoslavia was a law of general application, that there was no evidence that the Applicant would suffer disproportionate punishment for any Convention reason, and that there was no evidence that the law of general application was applied in a discriminatory manner. There was no suggestion by the Applicant that he was specially targeted or singled out … for discriminatory treatment. There was no evidence that the requirement for military service was other than universal, or that only persons in his position, or with his beliefs, were punished.

The respondent submitted that, on the basis of these findings, it was open to the Tribunal to find that the applicant was not facing punishment for a Convention reason and that any punishment was not "by reason of" a Convention ground.

> 26 The respondent contended that the Tribunal did not, when assessing the claims of the applicant as at January 2002, act in breach of the ICCPR. Referring to *Mohamed v Minister for Immigration and Multicultural Affairs* [2002] FCA 4 at [13]-[14] per Stone J, the respondent added:

Further, as the decision of the Tribunal was non-discretionary, any legitimate expectation which may have arisen, was of no application.

> 27 The respondent also contended that, on a fair reading of the Tribunal's decision, the decision "was ultimately based upon the significant or material changes which had taken place since the Applicant had left the country (i.e. since October 1998)". The respondent observed that the country information relied upon by the Tribunal was "directly relevant to the Applicant's position". The respondent submitted that:

The effect of the amnesty, the operation of which the Tribunal obviously accepted, was to remove any risk of punishment. The Tribunal was assessing the position more than three years after the Applicant's departure. Ample time had passed in which to assess whether the changes were substantial, effective and durable. It does not appear that the Applicant was putting forward a contrary view. In these circumstances, it was open to the Tribunal to accept the combined effect of the information quoted.

> 28 Counsel for the respondent submitted at the hearing that, even if the Court were persuaded that the Tribunal had failed to consider part of the applicant's claim, the decision was defensible because of the Tribunal's finding about the amnesty, and the Court should therefore refuse the applicant the relief that he sought.

> 29 In written submissions, the respondent contended that there was no claim put forward on behalf of the daughter. Further, since the applicant did not challenge the Tribunal's findings regarding his own political activity, it was, so the respondent submitted, "difficult to see how, in these circumstances, the Applicant's de facto wife or stepdaughter could have a claim based upon their association with him".

> 30 The parties made submissions, with leave, following the hearing. Both parties accepted that the decision in *Appellant S395/2002 v Minister for Immigration and Multicultural Affairs* (2003) 203 ALR 112 had no bearing on the present matter. In these supplementary submissions, however, the applicant submitted that, although the Court has "a measure of discretion" if jurisdictional error is shown, "it would be a rare case where relief would not be granted". The applicant contended that:

While bearing in mind [Re Refugee Review Tribunal; Ex parte Aala (2000) 204 CLR 82 at 116-117 per Gaudron and Gummow JJ] and [Stead v State Government Insurance Commission (1986) 161 CLR 141 at 147], … as a decision made without jurisdiction is no decision at all, and certainly not a decision under the Migration Act 1958 … (Cf Plaintiff S157/2002 v Commonwealth of Australia (2003) 195 ALR 24 … at [28]-[33], [36] to [37] per Gleeson CJ, [65] per Gaudron, McHugh, Gummow, Kirby and Hayne JJ), there would need to be very strong reasons for withholding relief, as to do so would forever leave the Tribunal with a statutory obligation to conduct a review (section 414 of the Act) which would never be conducted, and the applicant with a Bridging visa (Part 3 of Schedule 1 and items 010, 020, 030, 040, 050 and 051 of Schedule 2 to the Migration Regulations 1994), which would be treated as non-

existent such that he could be treated as an unlawful non-citizen liable to detention (sections 189 and 196 of the Act).

31 In supplementary submissions, the respondent submitted that:

Prior to the advent of the privative clause regime, judges of the Federal Court would not infrequently decline relief where there was found to be an error of law, but there was an alternate and unimpeached basis upon which the decision was made.

The privative clause regime and S157 should not be interpreted as disturbing this practice and the long line of authority to the effect that the error must affect the exercise or purported exercise of power. The error must be of such magnitude as to deprive the decision maker of jurisdiction. As such, relief should only be available to the applicant if, in the absence of the error, the decision could have been different: see Australian Broadcasting Tribunal v Bond [(1990) 170 CLR 321] at 384.

If jurisdictional error is now found, the practical effect of S157 is that the privative clause is rendered nugatory. The review reverts to a normal s 39B application. Then, if the jurisdictional error is reflected in the ultimate decision, such that it is fundamental to the decision and/or infects the balance of the reasoning process, there is in reality no alternative or independent strand on which the decision can be sustained. The decision must, subject to the exercise of discretion, fail. However, if the decision is supportable on another basis, it follows that relief can be denied.

In support of this contention, the respondent referred to *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82; *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* (2003) 195 ALR 502; *VBAC v Minister for Immigration & Multicultural & Indigenous Affairs* [2003] FCA 205 at [23]; *VEAJ v Minister for Immigration & Multicultural & Indigenous Affairs* [2003] FCA 678 at [55]; *Forster v Jododex Australia Pty Ltd* (1972) 127 CLR 421; and *Zhang v Minister for Immigration, Local Government and Ethnic Affairs* (1993) 45 FCR 384.

CONSIDERATION

Both parties accepted that the decision of Gray J in *Erduran* set out the correct approach to a claim for refugee status based on a claim of conscientious objection to military service. For present purposes and in the absence of argument to the contrary, I accept his Honour's analysis in that case.

> 32 In *Erduran* at 153-4*,* Gray Jheld that the Tribunal erred in failing to consider whether the applicant had a conscientious objection to military service, which was based on his religious or political convictions. His Honourobserved that, whilst there was "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", there was "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". Turning to the consideration by the High Court of the case of Mr Israelian, which is reported

as *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323, Gray J said at 156:

Nothing in those passages suggested that the High Court was intending to overrule the second line of authority to which I have referred … . 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. …

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) 105 FCR 548 at 563 [65] per Merkel J. Forcing a conscientious objector to perform military service may itself amount to persecution for a Convention reason. [Emphasis added]

33 In *Minister for Immigration & Multicultural & Indigenous Affairs v VFAI of 2002* [2002] FCAFC 374, the Full Court reversed Gray J's decision in *Erduran* only because, when the Court had regard to the transcript of the hearing before the Tribunal (which was not before Gray J) it was clear that the Tribunal had in fact dealt with the case that had been made to it (see [12]). In *Applicant VEAZ of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCA 1033 at [21] - [22], Gray J said of his own decision and the decision of the Full Court:

In Erduran v Minister for Immigration & Multicultural Affairs [2002] FCA 814 (2002) 122 FCR 150 at [18] - [28], I attempted a survey of the authorities relating to the relevance of conscientious objection to the Convention. At [28], I concluded that conscientious objection might be relevant if it arises from a political opinion or from a religious conviction, and also that it might itself be regarded as a form of political opinion. I also expressed the view that conscientious objectors, or some particular class of them, might constitute a particular social group for the purposes of the Convention.

I do not regard anything said by the Full Court in Minister for Immigration & Multicultural & Indigenous Affairs v VFAI of 2002 [2002] FCAFC 374 at [6] - [7] as contradictory of the views I expressed in Erduran.

34 His Honour continued at [23] –[27]:

In the present case, therefore, the Tribunal was in error in suggesting that Australian Courts have diverged from the view that conscientious objection might be the basis for a refugee claim, without anything further. Conscientious objection might demonstrate that a person is a member of a particular social group. As I suggested in Erduran at [28], the very process of being forced to perform military service might itself amount to persecution for a Convention reason.

This is not to say that the error on the part of the Tribunal necessarily affected the result in the present case. …

It does not appear that the applicant placed before the Tribunal any evidence to suggest that his conscientious objection extended beyond the fighting of fellow Kurds. There is no suggestion that he was a conscientious objector to all wars, or to wars of a particular kind or particular kinds. His objection was to being forced to do harm to those of his own race. The Tribunal found as fact that, in accordance with the policies of the Turkish military, the applicant would not be sent to the south-east and would not be compelled to fight against Kurds. Given this finding, it is apparent that the Tribunal was justified in reaching the conclusion that the applicant would not be persecuted for a Convention reason by being required to perform national service. The error that the Tribunal made in its approach to the relevance of conscientious objection was not such as to affect the result of the applicant's case. …

I am also of the view that the Tribunal made an error in treating the Turkish laws relating to national service as laws of general application. The error is not so much in the characterisation of such a law, as in the assumption that the Tribunal appears to have made as to the consequences of the characterisation. The Tribunal seems to have assumed that, because a law of general application applied to all Turkish citizens, regardless of their ethnic origins, it could not result in persecution of any such citizen for a Convention-related reason. It was made clear in Wang v Minister for Immigration & Multicultural Affairs [2000] FCA 1599 (2000) 105 FCR 548 at [63] and [65] per Merkel J, that the equal application of the law to all persons may impact differently on some of those persons. The result of the different impact might be such as to amount to persecution for a Convention reason. An obvious example is a law forbidding the practice of a particular religion which, while it forbids the practice of that religion equally by all persons, only impacts on those who wish to practice that religion. In a similar way, a law relating to compulsory military service has no Convention-related impact on those who have no conscientious objection to such service, but may have a very significant impact in relation to those who do. Simply to

regard the case as closed because there is in place a law of general application is to misapply the Convention.

Again, however, the Tribunal's error in the present case does not entitle the applicant to the relief he seeks. This is because the Tribunal's finding of fact that the applicant will not be sent to the south-east to fight against Kurds removes the case from the ambit of the Convention as a matter of fact. The result might have been different if the applicant had disclosed a conscientious belief based on something other than an unwillingness to fight against those of his own race.

> 35 As noted above, whilst the Tribunal in the present case referred to the applicant's claim that he was "religiously opposed to war", it made no finding as to whether his avoidance of military service arose from a conscientious objection and, if so, whether that objection was a religious one. The Tribunal apparently proceeded on the mistaken basis that a law of general operation, which did not expressly discriminate or inflict disproportionate punishment, could not support a well-founded fear of persecution for a Convention reason. This is plainly erroneous, and involved the Tribunal asking itself the wrong question. There may well be a well-founded fear of persecution because a law, neutral on its face, has an indirect discriminatory effect or indirectly inflicts disproportionate injury, for a Convention-related reason. As Branson J said in *Okere* at 118, in a passage quoted with approval in *Wang* at 564 per Merkel J:

History supports the view that religious persecution often takes "indirect" forms. To take only one well known example, few would question that Sir Thomas Moore was executed for reason of his religion albeit that his attainder was based on his refusal to take the Succession Oath in a form which acknowledged Henry VIII as head of the Church of England.

As we have seen, Gray J made the same point, in *Applicant VEAZ of 2002,* in the passage quoted above. Because the Tribunal misstated the law, it also failed properly to address the applicant's claim that he had avoided military service for religious reasons.

> 36 I do not consider, however, that the Tribunal's error in this regard entitles the applicant to relief. This was not a case in which a conscientious objector was a claimant for refugee status because he or she feared military conscription into active combat if returned to a country of origin. The applicant's claim that, on account of his religious beliefs, he had a conscientious objection to military service was relevant only because he claimed to fear punishment as a deserter if he returned to Yugoslavia. The Tribunal found, as a fact, that the situation in that country had "changed considerably" since the applicant first sought a protection visa. The Tribunal found that there had been a "bloodless coup" against the Milosevic regime and that an amnesty had been declared for "draft dodgers and deserters". Given this finding, the Tribunal was justified in concluding that the applicant would not be persecuted in Yugoslavia for any Convention reason that included his

religious or political objections to military service. I accept that, as the respondent submitted, the applicant is not entitled to relief in a case where the decision must have been made regardless of an identified error in the decision-maker's reasons for decision.

37 I am also of the view that there was error in the Tribunal's statement that, even if the applicant were "to face some punishment, penalty or sanctions", this would "not [be] attributable to his political opinion, membership of a particular social group or any other Convention ground". This statement followed from the Tribunal's misunderstanding of the law, as discussed above, and of the question that it was, in consequence, to address in a conscientious objector case such as the present. Again, however, because of the Tribunal's finding that an amnesty had been declared, any error on the Tribunal's part does not entitle the applicant to the relief he seeks.

38 I reject the applicant's submissions that the Tribunal fell into jurisdictional error and breached the rules of natural justice by failing to notify him that it would not apply the concepts of religious freedom and freedom of expression in accordance with the ICCPR. This submission finds no support in the authorities and misconceives the obligations of the Tribunal.

39 I accept the respondent's submission that there was no independent claim for refugee status made on the daughter's behalf. Further, I accept that any application made by the wife was dependent on the applicant's claims and, as the applicant failed, then so too did the wife. Moreover, at the hearing the applicant did not challenge the Tribunal's findings regarding his political activity and, in consequence, any claim by the wife and child that was based on their association with them was bound to fail.

40 For the reasons stated, I would dismiss the application, with costs.

I certify that the preceding forty (40) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Kenny.

Associate:

Dated: 4 August 2004

Counsel for the Applicant:	Mr A Krohn
Solicitor for the Applicant:	Zeljko Stojakovic
Counsel for the Respondent:	Mr G Gilbert
Solicitor for the Respondent:	Blake Dawson Waldron
Date of Hearing:	11 December 2003
Date of Judgment:	4 August 2004