FEDERAL COURT OF AUSTRALIA

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

MIGRATION – protection visa – whether liability to compulsory military service can give rise to well-founded fear of persecution – whether conscientious objection to military service can give rise to persecution for a Convention reason – whether necessary to show likelihood of differential punishment, based on race, religion or political opinion – effect of law of general application – claim to fear persecution based on unwillingness to fight people of applicant's own race – whether Tribunal's finding of fact that he would not be forced to do so conclusive.

Migration Act 1958 (Cth) s 36

Judiciary Act 1903 (Cth) s 39B

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

Erduran v Minister for Immigration & Multicultural Affairs [2002] FCA 814 (2002) 122 FCR 150 considered

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

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

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

V 440 of 2002

GRAY J

2 OCTOBER 2003

MELBOURNE

IN THE FEDERAL COURT OF AUSTRALIA	
VICTORIA DISTRICT REGISTRY	V 440 of 2002

BETWEEN:	APPLICANT VEAZ OF 2002 APPLICANT
AND:	MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS RESPONDENT
JUDGE:	GRAY J
DATE OF ORDER:	2 OCTOBER 2003
WHERE MADE:	MELBOURNE

THE COURT ORDERS THAT:

1. The application be dismissed.

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

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

IN THE FEDERAL COURT OF AUSTRALIA	
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AND:	MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS RESPONDENT

JUDGE:	GRAY J
DATE:	2 OCTOBER 2003
PLACE:	MELBOURNE

REASONS FOR JUDGMENT

The nature of the proceeding

1 The applicant has invoked the jurisdiction conferred on the Court by s 39B of the *Judiciary Act 1903* (Cth) in respect of a decision of the Refugee Review Tribunal ('the Tribunal'), made on 11 June 2002. The Tribunal affirmed a decision of a delegate of the Minister for Immigration and Multicultural Affairs (now the Minister for Immigration and Multicultural and Indigenous Affairs) (in both cases, 'the Minister'), refusing to grant a protection visa to the applicant.

2 By s 36 of the *Migration Act 1958* (Cth) ('the Migration Act'), there is a class of visas to be known as protection visas. A criterion for a protection visa is that the person applying for it be a non-citizen in Australia to whom the Minister is satisfied that Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol. Section 5(1) of the Migration Act defines 'Refugees Convention' to mean the Convention

relating to the Status of Refugees done at Geneva on 28 July 1951 and 'Refugees Protocol' to mean the Protocol relating to the Status of Refugees done at New York on 31 January 1967. It is convenient to call these two instruments, taken together, the 'Convention'. For present

purposes, it is sufficient to note that, pursuant to the Convention, Australia has protection obligations to a person who:

'owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country'.

3 The applicant is a citizen of Turkey. He arrived in Australia as the holder of a valid visa on 21 March 2000. On 5 May 2000, he made an application to the Department of Immigration and Multicultural Affairs for a protection visa. On 30 October 2000, a delegate of the Minister refused this application. The applicant applied to the Tribunal for review of that decision. The Tribunal conducted a hearing at which the applicant gave evidence and was assisted by a solicitor, who was also a registered migration adviser. Two friends of his also gave evidence on his behalf. On 11 June 2002, the Tribunal published its written decision and its reasons for decision. Its decision was to affirm the decision not to grant a protection visa to the applicant. In this proceeding, the applicant seeks to have the Court quash that decision of the Tribunal and order the Tribunal, differently constituted, to hear and determine the application for review of the delegate's decision according to law.

The applicant's claims

4 The applicant claimed to fear persecution, if he should be returned to Turkey, for reasons of his race and his political opinion, and also because of his liability to compulsory national service. He is a member of the Kurdish race. He claimed to have had an affiliation with a Kurdish political organisation known as HADEP and to have assisted with arranging speeches and Kurdish cultural events and helped organise student boycotts on behalf of HADEP. He claimed to have been arrested in 1992, after attending a demonstration to protest against the assassination of some Kurds, and to have been tortured and interrogated for three days. He was asked for information about HADEP and also about his connections with the Kurdistan Workers Party, known as PKK, an organisation led by a man called Ocalan, which was then attempting, by a political and military campaign, to establish a

separate Kurdish State. He was released after signing a document that he was not permitted to read.

5 The applicant claimed that, upon his return to Turkey from overseas in August 1998, he was taken off a bus at a checkpoint at the start of the Kurdish area in Turkey and questioned. He was accused of returning from overseas to Turkey to bomb installations. He said that he was known for having taken part in a hunger strike and a demonstration to protest against the arrest of Ocalan in the late 1990s. He alleged that he suffered police harassment. He moved to Istanbul to live. He claimed that he subsequently attended a Kurdish new year rally and was detained and beaten for two days and released with a warning that he would be killed if he was found again. He claimed his apartment was twice raided and, on one occasion, the police found printed and audio Kurdish political materials and questioned the applicant about his activities.

6 The applicant's claim to fear persecution on the ground of political opinion, was therefore based both on his actual political opinion and activities and on political opinion attributed to him by the authorities (connections with the PKK). Further, his claim to fear persecution on the ground of political opinion related to his activities outside Turkey, including those since he has been in Australia (his *sur place* claim). He has been a member of the Committee of a Kurdish association, keeping people abreast of developments for Kurds in Turkey and other countries, promoting Kurdish rights and independence, helping to attract members, arranging cultural evenings and arranging assistance for members in need.

7 Finally, the applicant claimed to fear persecution on the ground that he is liable to perform military service in Turkey and has a conscientious objection to fighting fellow Kurds.

The Tribunal's reasoning

8 In its written reasons for decision, the Tribunal described the applicant's claims as follows:

'His claims disclose that his fears are for a combination of his Kurdish race / nationality/ ethnicity and political opinions that he actually holds or are imputed to him by others. He also fears punishment as a conscientious objector.'

9 The Tribunal accepted that the applicant harboured the subjective fears he expressed, but concluded that his fears of persecution were not well-founded. The Tribunal relied on substantial quantities of material from a variety of sources, referred to as 'country information', to make an overall finding that there has been significant improvement in the human rights of

Kurds in Turkey. It accepted that the applicant had engaged in activities the Turkish authorities perceived to be dissident, and that he had been detained and mistreated for that reason in the early 1990s and harassed on a couple of occasions later in the same year. It found that the Turkish authorities had no further adverse interest in him, on the basis that he had been released quickly, had been provided with a certificate barring further proceedings, had returned from overseas to Turkey on three or four occasions and had been provided with travel documents and permitted to exit and re-enter Turkey on numerous occasions without attracting the attention of Turkish authorities. The Tribunal also found that the applicant was not a member of HADEP, although he participated in some of its activities. It found that he was detained, interrogated and roughly treated for a few days and was then released because the Turkish authorities were satisfied that he was not connected with any opposition movement or party. He did not harbour a genuine fear of persecution when he made several returns to Turkey and to his family home in the location where he was previously mistreated. The interest shown in him when he was first detained in the early 1990s was a consequence of his political activities and not because he is Kurdish.

10 The Tribunal again relied on the applicant's return to Turkey, passage through border controls and other internal security checkpoints, renewal of his passport and uninterrupted departure from Turkey, as indications that his political activity while abroad had not made him of adverse interest to Turkish authorities.

11 In relation to the applicant's claims of more recent problems with the Turkish authorities, the Tribunal pointed to the fact that he was not arrested as a result of a hunger strike in which he participated, even though he was in his local area and his participation would have been known. Neither his participation in Kurdish new year celebrations in 1999, nor the alleged raids on his house and the finding of Kurdish political materials, led to anything more than questioning. The applicant remained in Turkey for the following year without encountering any further harassment. He then left the country without hindrance, using his own passport and passing through security checks at the major international airport. The Tribunal found that he left the country legally and was of no adverse interest to Turkish authorities when he left and that any fears of persecution he harboured at that time were not well-founded.

12 The Tribunal then dealt with the applicant's *sur place* claim. It accepted that, while in Australia, he had promoted material critical of the Turkish government and had actively participated in Kurdish cultural events. It found that his name had been distributed as a supporter of the rights for students to be instructed in Kurdish. It found it to be plausible that the applicant's activities had been monitored by Turkish consular officials and proceeded on that basis. Relying on 'country information', the Tribunal found that the applicant would not be in danger in Turkey from promoting the views of others, as distinct from being the author of them. It found that the issues he discussed publicly are discussed in Turkey without a real chance of attracting adverse attention, unless the proponent of them is suspected of espousing Kurdish separatism or terrorism, and the applicant would not be suspected of such views.

13 The Tribunal then turned its attention to the applicant's claims based on his conscientious objection. It did so in the following terms:

'The Applicant states that he is a conscientious objector to serving in the battle between the Turkish government and the PKK and its supporters. He provided an Amnesty International report (EUR 44/55/99 of 27 August 1999) that reports on the deaths of four Kurdish men in service in 1997 – 1999 and suggests they were killed because they objected to the war, although the evidence to that effect is fairly scant. The Amnesty report explains that the military has a policy of sending conscripts to areas away from their native region but some, who have previously migrated to urban areas in the west from the war-torn southeast, were sent to their former residential area. That is not the case for the Applicant, who has lived in Istanbul at times but has always returned to his home area in the southeast. If he is conscripted, it is likely he would be sent out of that area. The Tribunal finds accordingly. The Applicant has also provided an account of a returned draft evader who had written to the Turkish authorities from abroad to state he would not serve in the Army. That is not the case with the Applicant.

The instances of mistreatment he has referred to are isolated and, on the flimsy available evidence, might have been perpetrated by unidentified soldiers. They are

clearly not part of a systematic pattern of discrimination as required by section 91R of the Act. Furthermore, they occurred before the arrest of Ocalan, whose PKK has since renounced the armed struggle and a separate state and sought to rejoin the political process.'

14 The Tribunal then referred to 'country information', indicating a decrease in fighting since the arrest of Ocalan and the absence of discrimination on ethnic grounds in the military and civil courts in Turkey. It continued:

'The Tribunal finds that the Applicant, if he is conscripted, is most unlikely to be sent to the southeastern emergency zone, as that is where he comes from and it would be a break in government policy if he was sent there. More to the point, for the purpose of assessing his refugee status, his fears about the consequences of objecting to military service are not Convention-related. If he refuses to join the military the Tribunal is satisfied, on the basis of the above information (Cisnet CX31285), that he will not encounter any excess punishment because he is Kurdish. It is satisfied that whatever sanctions might be applied will result from the imposition of laws that apply to all Turkish citizens, regardless of their ethnicity. In those circumstances, such punishment does not fall within the Convention, even if it would otherwise be sufficiently serious as to amount to persecution.

In arriving at that conclusion, the Tribunal refers to Federal Court decisions that have held that whether or not the Applicant is a conscientious objector, per se, is irrelevant in assessing his refugee status. That is, unless the Applicant could show that punishment for avoiding military service is imposed for Convention reasons, such punishment would not bring him within the ambit of the Convention. Australian courts have diverged from the view held by Professor Hathaway and the UNHCR that conscientious objection might be the basis for a refugee claim, without anything further'.

15 The Tribunal then quoted from *Trpeski v Minister for Immigration & Multicultural Affairs* [2000] FCA 841 at [27] – [29]. It continued:

'In the present Applicant's case, even if he does object to serving with the Turkish armed services for reasons of conscience, such a philosophical view would not necessarily bring him within the ambit of the Convention. That would require that he be treated differently from other conscientious objectors in being called up and serving or in being punished for failure to respond to a call up notice. That is not the policy of the Turkish authorities and the Tribunal is not satisfied he faces any Convention-related [sic] at the hands of those authorities in respect of military service. Nor is the Tribunal satisfied that the Applicant faces a real chance of encountering persecution at the hands of soldiers who might act outside the law. As mentioned above, those incidents have been very few and isolated and unsystematic, and are far less likely to occur now than occurred before Ocalan's arrest.'

16 On this basis, the Tribunal expressed its lack of satisfaction that the applicant faced Convention-related punishment in respect of military service. It also drew attention to the possibility that, if anxious about returning to the south-eastern part of Turkey, the applicant could reasonably relocate to Istanbul, where he had already lived.

The applicant's case

17 In his amended application, filed on 2 September 2002, the applicant complained of jurisdictional error on the part of the Tribunal, in relation to the manner in which it dealt with his claim to be a conscientious objector. The argument put by his counsel at the hearing was also limited to attacking this aspect of the Tribunal's decision. It was said that the Tribunal failed to consider the applicant's case as it was put, but pursued the irrelevant issues of whether the applicant was liable to be treated differently from other defaulting conscientious objectors, because of his Kurdish origin, or for some other Convention-related reason. Counsel for the applicant also made submissions concerning the Tribunal's characterisation of the issue as involving a law of general application. It was said that the Tribunal's approach was based on a finding of fact that lacked any foundation in the evidence before the Tribunal. This erroneous finding of fact caused the Tribunal to misapply the Convention to the applicant. It is convenient to deal with these issues separately.

The finding of fact

18 As the Tribunal recited in its reasons for decision, the applicant claimed to have been born in the administrative region of Mardin in Turkey. He completed school there and then went overseas (to St Petersburg in Russia) to study for several years, graduating in business management. He returned to his home village to work in the family business and then went to

Istanbul in the late 1990s, where he remained until he left for Australia. Despite this evidence, the Tribunal made a finding, in the passage quoted above, that the applicant has lived in Istanbul 'at times but has always returned to his home area in the southeast'. This finding was the basis for the Tribunal's conclusion that the applicant would not be required to do his national service in his home area.

19 It has long been recognised that an error of fact within a decision-maker's jurisdiction will not justify relief of the kind sought by the applicant. The facts of the case were for the Tribunal to determine, and not for the Court. It is not open to the Court to say that a finding of fact was incorrect and to use this to undermine the conclusion of the Tribunal.

20 In any event, I am not convinced that the Tribunal was in error in the manner suggested by counsel for the applicant. For the Tribunal to phrase its finding in terms that the applicant has lived in Istanbul 'at times' was not necessarily for it to be taken to have found that the applicant lived in Istanbul for more than one period. The expression 'at times' is apt to describe the single period during which the Tribunal recognised that the applicant had lived in Istanbul. The point that the Tribunal was making was that the Turkish government's policy of not forcing Kurdish conscripts from the south-east of Turkey to fight in that area would be applicable to the applicant. It cannot be said that the Tribunal made any error in reaching this conclusion. The applicant did come from the south-east. If the policy were as the Tribunal found it to be, and if it were applied to the applicant, he would not be forced to fight against Kurdish rebels in the south-east.

The conscientious objection issue

21 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.

22 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*.

23 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.

24 This is not to say that the error on the part of the Tribunal necessarily affected the result in the present case. On the material before the Tribunal, the best statement of the basis of the applicant's conscientious objection is to be found in a statutory declaration, declared on 8 May 2000, for the purpose of consideration by the delegate of the Minister. In that statutory declaration, the applicant said:

'I applied for a student visa as I had no other way to escape and national service was coming up. I was not prepared to do national service, because it meant being sent to fight fellow Kurds. I could not do this.'

25 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.

A law of general application

26 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.

27 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.

Conclusion

28 For these reasons, the applicant's application must be dismissed. In accordance with the usual rule, that costs follow the event, the applicant should be ordered to pay the Minister's costs of the proceeding.

I certify that the preceding twenty-eight (28) numbered paragraphs are a true copy of the

Reasons for Judgment herein of the Honourable Justice Gray.

Associate:

Dated: 2 October 2003

Counsel for the Applicant:	J Gibson
Solicitor for the Applicant:	Victoria Legal Aid
Counsel for the Respondent:	S Moore
Solicitor for the Respondent:	Clayton Utz
Date of Hearing:	30 April 2003
Date of Judgment:	2 October 2003