FEDERAL COURT OF AUSTRALIA

VSAI v Minister for Immigration & Multicultural & Indigenous Affairs

[2004] FCA 1602

MIGRATION – judicial review – protection visa – whether Tribunal correctly applied the *Chan* test by finding that the incidence of rape and sexual abuse by military officers of female draftees did not occur on a sufficient scale to constitute persecution – whether Tribunal erred in law by not asking itself the right question - whether rape and sexual abuse of female draftees by military officers was "systematic" – appeal allowed - ss 91R(1)(b) and (1)(c) of the *Migration Act 1958* (Cth).

Convention Relating to the Status of Refugees. Opened for signature 28 July 1951. (vol. 189, p. 137 UN Treaty Series) (entered into force 22 April 1954) Art 1A(2)
Migration Act 1958 (Cth) ss 91R(1)(b) and (1)(c)
Migration Legislation Amendment Act (No. 6) 2001 (Cth)

Abedi v Minister for Immigration & Multicultural & Indigenous Affairs (2001) 114 FCR 186 referred to
Applicant A & Anor v Minister for Immigration & Ethnic Affairs & Anor (1997) 190 CLR 225 referred to
Applicant S v Minister for Immigration & Multicultural & Indigenous Affairs [2004] HCA 25 followed
Applicant VEAZ of 2002 v Minister for Immigration & Multicultural & Indigenous Affairs [2003] FCA 1033 referred to
Australian Broadcasting Tribunal v Bond (1990) 170 CLR 321 referred to
Chan Yee Kin v Minister for Immigration & Local Government & Ethnic Affairs (1989) 169 CLR 370 applied
Chen Shi Hai v (2000) 201 CLR 293 referred to
Erduran v Minister for Immigration & Multicultural & Indigenous Affairs [2002] FCA 814 referred to
Htun v Minister for Immigration & Multicultural & Indigenous Affairs (2001) 194 ALR 244 referred to
Mehenni v Minister for Immigration & Multicultural & Indigenous Affairs [1999] FCA 789; 164 ALR 192 considered
Minister for Aboriginal Affairs v Peko-Wallsend Ltd (1986) 162 CLR 24 referred to
Minister for Immigration & Ethnic Affairs v Guo (1997) 191 CLR 559 referred to
Minister for Immigration & Ethnic Affairs v Kord [2002] FCA 334 referred to
Minister for Immigration & Ethnic Affairs v Rajalingam (1999) 93 FCR 220 followed
Minister for Immigration & Ethnic Affairs v Wu Shan Liang (1996) 185 CLR 259 applied
Minister for Immigration & Multicultural Affairs v Al Miahi [2001] FCA 744 referred to
Minister for Immigration & Multicultural Affairs v Haji Ibrahim (2000) 204 CLR 1

considered
Minister for Immigration & Multicultural Affairs v Hamad (1999) 87 FCR 294 at 297 [17] followed
Minister for Immigration & Multicultural Affairs v Khawar (2002) 210 CLR 1 referred to
Minister for Immigration & Multicultural Affairs v Respondents S152/2003 [2004] HCA 18; 205 ALR 487 referred to
Minister for Immigration & Multicultural Affairs v Thiyagarajah (2000) 199 CLR 343 referred to
Minister for Immigration & Multicultural & Indigenous Affairs v Yusuf (2001) 206 CLR 323 followed
Periannan Murugasu v Minister for Immigration & Ethnic Affairs (unreported; Federal Court of Australia; 28 July 1987) referred to
Puerta v Minister for Immigration & Multicultural & Indigenous Affairs [2001] FCA 309 referred to
Ram v Minister for Immigration & Ethnic Affairs (1995) FCR 565 referred to
SBAS v Minister for Immigration & Multicultural & Indigenous Affairs [2003] FCA 528 referred to
SRBB v Minister for Immigration & Multicultural & Indigenous Affairs [2003] FCA 1387 considered
Wang v Minister for Immigration & Multicultural Affairs (2000) 105 FCR 548 referred to

VSAI V MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS

V 655 of 2003

CRENNAN J
8 DECEMBER 2004
MELBOURNE

GENERAL DISTRIBUTION

IN THE FEDERAL COURT OF AUSTRALIA

VICTORIA DISTRICT REGISTRY **V 655 OF 2003**

BETWEEN: **VSAI**
APPLICANT

AND: **MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS**
RESPONDENT

JUDGE: **CRENNAN J**

DATE OF ORDER: **8 DECEMBER 2004**

WHERE MADE: **MELBOURNE**

THE COURT ORDERS THAT:

1. The decision of the Refugee Review Tribunal of 1 July 2003 be set aside.
2. The Refugee Review Tribunal is to hear and determine the application for review of the decision of the delegate of the respondent of 5 December 2000 according to law.
3. The respondent pay the applicant's costs.

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

GENERAL DISTRIBUTION

IN THE FEDERAL COURT OF AUSTRALIA

VICTORIA DISTRICT REGISTRY **V 655 OF 2003**

BETWEEN: **VSAI**
APPLICANT

AND: **MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS**
RESPONDENT

JUDGE: **CRENNAN J**

DATE: **8 DECEMBER 2004**

PLACE: **MELBOURNE**

REASONS FOR JUDGMENT

1 The applicant is a twenty-two year old citizen of Eritrea of Seraye ethnicity and her first language is Tigrinya. She arrived in Australia on 12 September 2000 as one of two Eritrean delegates chosen to participate in the Olympic Youth Camp in Sydney. On 26 October 2000 the applicant lodged an application for a protection visa. The applicant included her mother and her four brothers and a sister on the application. The applicant's mother is still in Asmara, where the applicant was born and lived all her life before coming to Australia.

2 On 5 December 2000 a delegate of the Minister refused to grant the applicant a protection visa under the provisions of s 36 of the *Migration Act 1958* (Cth) ("the Act"). This section provides that there is a class of visas to be known as protection visas, the criterion for which is set out in s 36(2). Such visas are available to an applicant who is "a non-citizen in Australia to whom Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol". The applicant sought review of the delegate's decision before the Refugee Review Tribunal ("the Tribunal") on 21 December 2000. The Tribunal affirmed the delegate's decision on 1 July 2003. The applicant then filed an application under s 476 of the Act for review in the Federal Court on 18 August 2003.

Applicant's claims

3 The substance of the applicant's claims before the Tribunal is briefly set out in the written submissions in these proceedings filed on her behalf. According to those submissions before the Tribunal she claimed:

> "*(a) . . . to fear persecution because she had a conscientious objection to military service, conscription and being forced to participate in widespread human rights violations and has concerns for her safety due to her religious beliefs;*
>
> *(b) . . . to fear (persecution by) being raped, abused and harassed by reason of being a woman conscripted to serve in the army . . ;*
>
> *(c) . . . to fear persecution because she had not reported for military service and would therefore be regarded as a deserter and would be killed;*
>
> *(d) . . . to fear persecution by government officials in Eritrea because she had made an application for asylum in Australia; and*
>
> *(e) to fear persecution because of her religion (the applicant also claimed to be a new convert of the Pentecostal faith)."*

Tribunal's findings

4 In regards to claims (a) and (e) the applicant originally claimed to be a member of the Orthodox Christian religion as practised in Eritrea however she made a late amendment to that claim and instead submitted that she was a member of the Pentecostal church having recently converted to that church in Australia. The Tribunal accepted that she had attended church in Eritrea but it was not satisfied that the applicant was "a genuine member of the Pentecostal church". It also considered that being an Orthodox Christian did not suggest that she would refuse to take up arms for her country on the basis of her religious beliefs. Thus it concluded that the applicant's fear of persecution based on her religion was not made out.

5 As to her claims to fear of persecution by reason of being a woman and thereby exposed to rape, abuse and harassment when conscripted to the army (claim (b)), the Tribunal generally referred to materials submitted by the applicant's adviser, evidence given by and on behalf of the applicant and country information including a US Department of State report. Although this report made reference to reports of women draftees being subjected to sexual abuse and harassment, the Tribunal was not satisfied that "the report was particularly helpful

in reaching a judgment about the applicant's prospects of facing a real chance of being persecuted in military service as a woman." It noted that "it is instructive to note that other international organisations made no mention of the prospect of women being discriminated against in military service." In dismissing the applicant's claim on this basis, the Tribunal accepted that there may be instances of sexual abuse and harassment of women in military training but that on the evidence before it, it was unable to accept that incidence of such was sufficient to suggest the applicant faced a real chance of persecution for reason of being a woman should she undertake military service on her return.

6 As to claim (c), the Tribunal accepted that the applicant had not fulfilled compulsory national service obligations and therefore would be required to fulfil those obligations and to undertake military service when she returned to Eritrea. The Tribunal noted the applicant was unwilling to undertake national service for a number of stated reasons. Each of the applicant's brothers and sisters born respectively in 1972, 1974, 1976, 1978 and 1980 was called up between 1993 and 1998 to perform compulsory military service from which they have never returned. They have all been missing, without any news of their whereabouts, since that time. However, the Tribunal determined that there was "no evidence before the Tribunal to suggest that Eritrean laws governing military service are applied in a discriminatory manner". It was not satisfied that the "applicant would be regarded as a draft dodger as a consequence of having overstayed in Australia when other possibilities are available, such as seeking a better economic situation or trying to improve her education." Alternatively, it found that even if the applicant were considered a draft dodger by reason of overstaying in Australia, there was no persuasive evidence that the applicant would be subject to anything other than the laws of general application to draft dodgers.

7 The Tribunal in its reasons for decision accepted the applicant's claims regarding her family and her account of how she arrived in Australia. In relation to claim (d) it found that her selection as a Youth delegate to the Eritrean Olympic Team in Sydney suggested that the applicant is well regarded by the Eritrean officials. The Tribunal also considered an independent country report concerning the return of Eritrean nationals who had been living abroad and concluded that it was unlikely that the applicant would be persecuted as a result of having applied for protection in Australia.

Application before this Court

8 The amended application before the Federal Court identified sixteen grounds to support the application for judicial review and for the issue of constitutional writs and declaratory relief. Many were expressed in a formulaic manner, noting that particulars would be provided in accordance with directions of the Court. One of the grounds, B(f), was that the Tribunal "asked the wrong question" when making the decision, the subject of the application for review. Pursuant to directions of the Court a written document "Applicant's Contentions of Fact and Law" provided particulars of the applicant's claims without any reference back to the grounds for review already described. The grounds of her claims, as particularised, provided the framework for oral submissions made on behalf of the applicant. These grounds were as set out below:

(1) Failure to properly assess the applicant's fear of persecution arising from draft evasion;

(2) Failure to apply the 'real chance' test in assessing the applicant's fear of persecution because of having applied for a protection visa in Australia;

(3) Failure to consider the applicant's fear of persecution based on the grounds of religion;

(4) Failure to consider all the evidence in assessing the mistreatment of women in the military; and

(5) Failure to properly assess the applicant's conscientious objection to military service.

There was some overlap in the presentation of submissions but each ground will be considered separately below.

Draft evasion – ground 1

9 The applicant's evidence was that "there is no escaping army service for me if I returned to Eritrea. . . . If I am forced to return to Eritrea I would face prison because I did not return with the officials." It was claimed that it was "a prosecutable offence" to apply to Australia for protection and to reveal "the political situation in Eritrea and the breach(es) of human rights within the military service."

10 The applicant relied on certain country information on the issue of draft evasion as follows:

> *"The Government continued to deploy military police throughout the country using roadblocks, street sweeps, and house-to-house searches to find deserters and draft evaders. The Government continued to authorize the use of deadly force against anyone resisting or attempting to flee. There were reports of resistance, especially of parents of draft-age girls, which resulted in the deaths of both soldiers and civilians . . .*
>
> *During the year, the police severely mistreated and beat army deserters and draft evaders. The police subjected deserters and draft evaders to various military disciplinary actions that included prolonged sun exposure in temperatures of up to 113 degrees Fahrenheit and to the tying of the hands and feet for extended periods of time . . .*
>
> *During the year, the Government deployed military police throughout the country using roadblocks, street sweeps, and house-to-house searches to find deserters and draft evaders . . . The military police detained persons who had not completed their national service requirement, and those who had evaded previous drafts . . . There was a general public perception that these round-ups were directed particularly at female draftees. This perception caused significant anxiety and individual complaint throughout society but no organized protests. In some instances, authorities arrested and detained for several hours or even days individuals, including pregnant women, children under age 18, and citizens of other countries, who were not subject to national service obligations or had proper documentation showing they had completed or were exempt from national service.*
>
> *The army resorted to various forms of extreme physical punishment to force objectors, including some Jehovah's Witnesses, to perform their military service."*

(US State Department Country Reports on Human Rights Practices – 2002, for Eritrea, published March 31, 2003).

11 The respondent relied on a DFAT Country Information Report No 250, published almost three years earlier dated 4 May 2000. That report noted:

> *"While the Eritrean Government is active in rounding up deserters from the Eritrean military, when caught, deserters face lenient treatment. Deserters are returned to the military, and at worst, punishment might consist of an extra month of training. This lenient treatment does not have any deterrent value, and accordingly, deserting is an option many have taken. However, this has not prompted the Eritrean Government to alter its handling of deserters."*

It also needs to be noted that the Tribunal had evidence before it that all women between the ages of 18 – 40 were liable for compulsory national service and that draft evasion was a crime under Eritrean law punishable by three year's imprisonment. Further the claims in

respect of draft evasion include both claims dependent on imputed political opinion which is part of the applicant's *sur place* claim and claims dependent on religiously based conscientious objection.

12 The Tribunal's conclusions in relation to the claim based on draft evasion were:

> *"The Tribunal accepts that the applicant would be required to undertake military service. It is not satisfied that she would be regarded as a draft dodger as a consequence of having overstayed in Australia when other possibilities are available, such as seeking a better economic situation or trying to improve her education. . . .*
>
> *Even if the applicant feels she may be regarded as a draft dodger in the particular circumstances of her case she would not face punishment other than that mandated by laws of general application . . .*
>
> *There is no material to satisfy the Tribunal that the motivation for any punishment of her would be essentially 'by reason of' any Convention ground."*

13 The applicant advanced three arguments in support of the claim that the Tribunal committed a jurisdictional error by failing to properly assess the applicant's fear of persecution based on draft evasion. The applicant contended the Tribunal had not applied the "real chance" test because some language used in the decision was more appropriate to a "balance of convenience test." The reference to the "real chance" test was a reference to consideration by the High Court of what is meant by the definition of refugee particularly in the context of determining whether an applicant for refugee status has a "well-formed fear of being persecuted" as set out in Art 1A(2) of the 1951 Convention Relating to the Status of Refugees ("the Convention"). The cases include *Chan Yee Kin v Minister for Immigration & Local Government & Ethnic Affairs* (1989) 169 CLR 379 (*"Chan"*); *Applicant A & Anor v Minister for Immigration & Ethnic Affairs & Anor* (1997) 190 CLR 225 (*"Applicant A");* *Minister for Immigration & Ethnic Affairs v Guo* (1997) 191 CLR 559 ("*Guo"*); *Chen Shi Hai v Minister for Immigration & Multicultural Affairs* (2000) 201 CLR 293 ("*Chen"*); *Minister for Immigration & Multicultural Affairs v Haji Ibrahim* (2000) 204 CLR 1 ("*Ibrahim"*); and *Minister for Immigration & Multicultural Affairs v Khawar* (2002) 210 CLR 1 (*"Khawar"*). Next it was argued that the Tribunal failed to take into account all the relevant country information including that which indicated female draftees were singled out in "round-ups" during which some members of the military police and the army used "deadly force." Military disciplinary actions including physical torture and "extreme physical

punishment" were used against both army deserters and draft dodgers. Finally, it was submitted the Tribunal should have considered the possibility that it was wrong in accordance with judicial observations made in a number of cases: see *Minister for Immigration & Ethnic Affairs v Rajalingam* (1999) 93 FCR 220 ("*Rajalingam*") at 240 and 241 per Sackville J and *Htun v Minister for Immigration & Multicultural Affairs* (2001) 194 ALR 244. In *Rajalingam* Sackville J. stated at 240:

> *"When the* [Tribunal] *is uncertain as to whether an alleged event occurred, or finds that, although the probabilities are against it, the event might have occurred, it may be necessary to take into account the possibility that the event took place in considering the ultimate question. Depending on the significance of the alleged event to the ultimate question, a failure to consider the possibility that it occurred might constitute a failure to undertake the required reasonable speculation in deciding whether there is a 'real substantial basis' for the applicant's claimed fear of persecution. Similarly, if the non-occurrence of an event is important to an applicant's case (for example, the withdrawal of a threat to the applicant) the possibility that the event did not occur may need to be considered by the decision-maker even though the latter considers the disputed event probably did occur."*

14 The respondent submitted the "real chance" test had been stated correctly, the reasons should not be scrutinized over zealously and in any event, on this issue, the Tribunal made an adverse finding of fact against the applicant, which rendered any loose language in respect of the test irrelevant. Next it was argued the relevant country information had been taken into account and in the absence of uncertainty about its conclusions, the Tribunal was not required to ask: "What if I am wrong?"

15 The respondent's submission that the reasons are to be construed beneficially and not with an eye keenly attuned to the perception of error is correctly based on established principle: *Minister for Immigration & Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 272, 290-293 ("*Wu Shan Liang's* case").

16 In considering Art 1A(2) of the Convention, the Tribunal correctly stated the principle that a person has a "well-founded fear" of persecution under the Convention if the person has a genuine fear founded upon a "real chance" of persecution for a reason under the Convention. A "real chance" is one that is not remote, insubstantial or far-fetched and can exist even though the evidence does not show that the persecution is more likely than not to eventuate.

17 The language used by the Tribunal when it applied the test, as set out in paragraph [12] above, is similar to language used in *SRBB v Minister for Immigration & Multicultural & Indigenous Affairs* [2003] FCA 1387 ("*SRBB*").

18 In the particular circumstances of that case, Mansfield J. found that a Tribunal which stated that it was not satisfied that the applicant "would be regarded as a draft dodger as a consequence of having overstayed in Australia when other possibilities are available . . ." was using language which suggested the Tribunal was not applying the proper legal test but was applying a "balance of probabilities" measure to the applicant's claims. The applicant's counsel relied on *SRBB* as an authority in support of the submissions on this aspect of the case.

19 In relation to this claim, the Tribunal similarly used language suggesting that it was applying a "balance of probabilities" test contrary to *Chan's* case. However, the Tribunal went on to consider that if the applicant "were to be regarded as a draft evader" there was "no persuasive material" to indicate that she would face punishment other than that mandated by the laws of general application, namely three years of imprisonment. The respondent conceded that the Tribunal used language very similar to the language used in *SRBB* when refusing to make the findings urged by the applicant that she would be regarded as a draft dodger but the Tribunal nevertheless applied the "real chance" test correctly when, in the alternative, it accepted her claims for the purpose of applying the test. This distinguishes this case from *SRBB*. The respondent's submission that any error committed in this regard was therefore not a material error and hence does not attract relief, appears to me correct and is squarely within established principles: *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 353, 384 per Toohey and Gaudron: see also *Minister for Immigration & Multicultural Affairs v Thiyagarajah* (2000) 199 CLR 343 at 350 per Gleeson CJ, McHugh, Gummow and Hayne JJ.

20 In relation to the applicant's claim that the Tribunal failed to deal with the country material referred to above in paragraph [10] and failed to deal with the evidence that female draft dodgers were victimised, the Tribunal did not, in the context of the claim, weigh or discuss those passages relied on by the applicant. The applicant's case, as I understand it, was that she accepted the inevitability of compulsory national service on her return. The possibilities on her return were:

(i) she would be imprisoned immediately for reasons of her imputed political opinions evidenced by her application for protection in Australia (the *sur place* claim); or

(ii) she would be imprisoned immediately as a draft evader, her status as draft evader being based either on overstaying in Australia beyond her eighteenth birthday when she became liable for the draft or, alternatively, on her conscientious objection based on religious conviction; or

(iii) she would be immediately required to undertake her military service.

Her main argument in relation to draft evasion was that she would be characterised as a draft evader by reason of overstaying in Australia and would be imprisoned on her return for draft evasion because she had turned eighteen during her stay in Australia and her draft notice had been sent. It will be appreciated this was a narrow case. The applicant's risk of being imprisoned for three years for draft evasion exposed the applicant to the Eritrean laws of general application to draft evaders. It is well recognised that a draft evader exposed to laws of general application may nevertheless by considered to be a refugee if it can be shown that such a person would suffer disproportionately severe punishment or discriminatory application of the laws of general application for the offence, or if the draft evasion were motivated by or related to a Convention reason, namely religious conviction, political opinion (including conscientious objection) or membership of a particular social group: *Applicant S v Minister for Immigration & Multicultural & Indigenous Affairs* [2004] HCA 2 (*"Applicant S"*); see also *Mehenni v Minister for Immigration & Multicultural & Indigenous Affairs* [1999] FCA 789; 164 ALR 192 at [169] per Lehane J.; *Wang v Minister for Immigration & Multicultural Affairs* (2000) 105 FCR 548 at [63] and [65] per Merkel J.; *Erduran v Minister for Immigration & Multicultural & Indigenous Affairs* [2002] FCA 814 at [9] per Gray J.; *Applicant VEAZ of 2002 v Minister for Immigration & Multicultural & Indigenous Affairs* [2003] FCA 1033 at [26] per Gray J..

The applicant did not claim that upon her return she would or could go into hiding or flee the draft or act in a way which would give rise to the possibility she would be subject to "round-ups" or military "discipline" described in the U.S. State Department Report set out above, which described unlawful and discriminatory punishments for draft evasion. That is, she did not give any evidence that would have supported a claim, that on her return, she

would be exposed to the unlawful and disproportionately severe punishment for draft evasion (including those evading the draft for reasons of religious conviction) directed to persons at large in the community. Thus, the evidence which she claims is relevant evidence, which the Tribunal cannot exclude without falling into jurisdictional error does not appear probative in respect of the narrow way in which she put her claim on draft evasion, namely that she would be subject to imprisonment on her return: *Abedi v Minister for Immigration & Multicultural Affairs* (2001) 114 FCR 186; *SBAS v Minister for Immigration & Multicultural & Indigenous Affairs* [2003] FCA 528. In any event, failure to weigh or discuss a piece of evidence, even when the Court finds it is probative in respect of a claim, does not amount to an exclusion of relevant evidence giving rise to jurisdictional error: *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24*; Minister for Immigration & Multicultural & Indigenous Affairs v Yusuf* (2001) 206 CLR 323. The Tribunal's conclusions on this aspect of the claim were open to it and were responsive to the narrow way in which the claim was put. The Tribunal is the body charged with dealing with the merits of the claim.

21 In relation to the question of whether the Tribunal ought to have considered the possibility it might be wrong, counsel for the respondent correctly cited the decision in *Rajalingam* to support the proposition that it is not enough that there is conflicting information available; rather it must be apparent from the Tribunal's reasoning that it had doubts and failed to ask itself any questions in relation to those doubts. In my view, the Tribunal considered the narrow way in which the case on draft evasion was put, the relevant information before it and came to its own conclusions based on that material. The fact that there was evidence before the Tribunal which may have been relevant or led to a different result, if the applicant's claim based on draft evasion had been put differently, or based on different evidence, cannot give rise to jurisdictional error. There is nothing to suggest that the Tribunal had any doubts about the decision it had reached.

Political opinion and *sur place* claim – ground 2

22 It was also claimed by the applicant that the "real chance" test had not been properly applied in assessing her *sur place* claim, namely that her act in applying for a protection visa in Australia exposed her to a risk of persecution for political opinion. It was claimed that applying for protection in Australia and revealing the political situation in Eritrea was regarded 'as betrayal and a prosecutable offence'.

23 On this aspect the Tribunal concluded that:

> *"there is no convincing independent country information which suggests the applicant will be persecuted as a result of having applied for protection in Australia and for not having returned to Eritrea with the rest of the Olympic team."*

24 The applicant submitted this language suggests a standard different from (and implicitly more onerous than) the standard appropriate to the real chance test as explicated in *Minister for Immigration & Ethnic Affairs v Guo* (1997) 191 CLR 559.

25 A Tribunal can use language other than "real chance" when applying the test, as recognised in several decisions of the Full Court of this Court. *Puerta v Minister for Immigration & Multicultural & Indigenous Affairs* [2001] FCA 309 at [9]-[11]; *Wade of 2001 v Minister for Immigration & Multicultural Affairs* [2002] FCAFC 214 at [18]; *NABB of 2002 v Minister for Immigration & Multicultural & Indigenous Affairs* [2002] FCAFC 225 at [25]. In my view, applying the principle established in *Wu Shan Liang's* case and considering all the language the Tribunal used in the reasons as a whole, there is no reason to conclude that the Tribunal was applying a standard other than a standard consistent with proper consideration of the "real chance" test.

Religious conviction relating to draft evasion and other claims – grounds 3 and 5

26 The applicant also claimed that she was at risk of persecution because of her religious convictions. This was put two ways. First, she claimed draft evaders or conscientious objectors whose evasion or objection was based on religious convictions were more harshly treated by the military and the police in Eritrea than draft evaders or conscientious objectors whose evasion or objection was based on other grounds thus raising the issue that the laws of general application to draft evaders were implemented in a discriminatory fashion against a person such as herself. The principles established in *Applicant S*, which authority was not available to the Tribunal at the time of its decision, are relevant to this part of her claims. Second, she claimed that if she did undertake national service, she would be at risk of persecution whilst in the military on the basis of her religious convictions (or a perception that she had them) and that in the wider Eritrean community she would also be at risk of persecution by reason of her religious beliefs (or a perception that she had them).

27 The applicant gave evidence that six months prior to the Tribunal hearing she became a member of the Pentecostal Church. A letter from the Minister of her congregation was before the Tribunal. There was also the evidence in the 'country information' that conscientious objection based on religion was punished by 'extreme physical punishment.' The applicant relied on the conscientious objection of adherents to the Pentecostal faith to partaking in war or any incidents of war such as the killing of combatants.

28 During the course of the hearing the Tribunal asked the applicant about the hymns sung at the Pentecostal Church. It adjourned the hearing for a period and noted that 'when the hearing resumed the applicant could not name any hymns sung at the Church in English although she claimed to know some in the Tigrinya language.'

29 The Tribunal's conclusions on this part of the claim were:

> *". . . the Tribunal does not accept that the applicant has a detailed or sophisticated knowledge of the* [Pentecostal] *Church or has sought to learn more about it which would allow the Tribunal to reach a finding that the applicant is a genuine member of the Pentecostal faith . . . The applicant originally claimed that her religion (Orthodox Christian) prevented her from undertaking military service.* [The Tribunal went on to find there was not such a population of Orthodox Christians in Eritrea refusing to take up arms as to suggest that doing so was in contravention of Orthodox Christian beliefs] *. . . Nor does the Tribunal accept, given the Tribunal's findings that the applicant's understanding of and commitment to the Pentecostal faith is by no means firm that the belief in this religion – which does not allow its members to bear arms – provides a sound basis for the applicant's fear of national service for the Convention reason of her religion. Even if she does not want to undertake military service, the Tribunal is not satisfied that the applicant would choose conscientious objection to military service."*

30 The written submissions made on behalf of the applicant in relation to this claim appeared to accept the Tribunal's findings in relation to conscientious objection based on religious convictions. However, a narrower complaint was still pressed. Although the Tribunal did not accept the applicant was a 'genuine member' of the Pentecostal Church, for the purposes of the applicant's claims that she would be at risk of persecution for reasons dependent on her religious convictions, it was submitted that the Tribunal was required to consider the questions:

- Will the applicant face persecution in the army because of her support (or perceived membership) of the Pentecostal faith?

- Will the applicant face persecution in the Eritrean community and by the Government because of her support (or perceived membership of the Pentecostal Church)?

31 It was submitted on behalf of the applicant that the Tribunal's failure to consider those two questions constituted a failure by it to deal with the case raised by the material before it and that such a failure constituted jurisdictional error.

32 It is appropriate to refer, as Lehane J. did in *Mehenni* at [18], to the section on "deserters and persons avoiding military service" in the 1992 edition of the UNHCR publication *Handbook on Procedures and Criteria for determining Refugee Status* ("the Handbook") which as his Honour observed "speaks for itself". Paragraph 174 is particularly apposite to the facts here:

> *"The genuineness of a person's . . . religious or moral convictions, or of his reasons of conscience for objecting to performing military service, will of course need to be established by a thorough investigation of his personality and background."*

While I seriously doubt that the inability of a Tigrinya speaker (who has been attending a particular church for six months) to give the title of hymns in English could give rise only to an inference that that person was not a "genuine member" of a particular faith, there was other evidence on this issue and the task referred to in the Handbook is a task committed to the Tribunal. A conclusion on this issue which is open and not perverse, as here, cannot be said to give rise to jurisdictional error. That question of fact was a relevant fact in respect of all the claims based on a risk of persecution based on religious conviction or faith. It does not constitute a refusal to deal with the case raised not to return to every alternative way in which it might be claimed that persecution for reasons of religion may arise when adverse findings in respect of the relevant fact, namely whether the applicant was a genuine member of the Pentecostal faith preclude success on any of the possible alternatives.

33 If the Tribunal does not accept the applicant is a genuine member of the Pentecostal faith, the Tribunal is not required to further consider whether she will face persecution arising out of her alleged membership of the Pentecostal Church in the context of military service or more widely in the Eritrean community because it was claimed she is (or is perceived to be) a member of the Pentecostal faith. Accordingly, the Tribunal did not commit any jurisdictional

error by not going on to consider separately the questions identified above.

Persecution based on treatment of female draftees

34 The applicant claimed that she would face a real chance of persecution if forced to undertake military service on return to Eritrea by reason of being a woman. This claim was made and considered separately from her claims to fear persecution based on draft evasion.

35 First, the applicant gave evidence that women who undertake military service are raped and abused sexually and left with children to cope with. She stated any woman with such a child will be shunned by her own family. She stated she had witnessed many cases of young girls returning home after becoming pregnant while in military training camps. She also stated it was widely known amongst the community that the girls had been subjected to sexual abuse by the officials at the training camp. It is worth noting that these statements were given against a background of evidence, extracted below, of "state-tolerated and state-sanctioned gender discrimination", to employ a phrase of Lord Steyn's from *Regina v Immigration Appeal Tribunal; Ex parte Shah* [1999] 2 AC 629 at 646.

36 Secondly, a witness who visited Eritrea the previous year also gave evidence before the Tribunal. She gave evidence that on that occasion she had spoken with women who had become pregnant in Sawa (the military training camp to which the applicant would be assigned). She stated that the women to whom she spoke were unwilling to talk of their experiences apart from referring to the power and position of the officials at the camp.

37 Thirdly, the Tribunal also had before it country information, the US State Report extracted above, which reported instances of parents of draft age girls, fatally resisting their daughters being "rounded-up" for military service and noted reports of sexual abuse and harassment of female draftees. It was this document which contained evidence of the institutional discrimination against women in Eritrean society as follows:

> *"The Government has not taken a firm public stance against domestic violence and generally has ignored the problem. Violence against women was pervasive. Spousal abuse is a crime; however, spousal abuse, especially wife beating, was common. Domestic violence seldom was discussed openly by women because of societal pressures. Such incidents more commonly were addressed, if at all, within families or by religious clergy. It was estimated that more than 65 percent of women in the Asmara area were the victims of domestic violence during the year. The Government response to domestic*

> *violence was hindered by a lack of training, inadequate funding, and societal attitudes.*
>
> *Rape is a crime; however, no specific information was available on its prevalence in the country."*

The reports of sexual abuse of female draftees and parents risking death to avoid having daughters drafted fell to be assessed against this social and cultural milieu.

38 Fourthly, the applicant also relied on an article published in "The Age" newspaper on 12 May 2002 by Xavier La Canna entitled "When rape is a requirement of military service."

39 That article noted that Sawa is 315 kilometres North-West of Eritrea's capital, Asmara. It purported to report commentary from the former Eritrean ambassador to Sweden, Hebret Berhe, and United Nations staff, all of whom were said to be aware of rape in military camps and the fact that it was not isolated but was in the words of the former Swedish ambassador "wholesale". The article also purported to quote a former Eritrean diplomat who had been granted asylum in Australia as follows:

> "*Always beautiful girls are the target of officers . . . They (the women) are always pressured by punishment, and given privileges if they agree* [to sexual relations],".

40 That article also reported that the Eritrean ambassador to Australia said the article contained false information. The Tribunal noted that there was a rebuttal of the article by the Eritrean Embassy on 12 December 2002 and that The Age had subsequently withdrawn the article from its website "for bias". There is no evidence before this Court as to what facts are covered by the Tribunal's reference to bias. The Tribunal did not indicate whether it gave no, or any, weight to this article.

41 Fifthly, there was other country information to which the Tribunal said it made reference, including a Human Rights Watch World Report for 2003, Amnesty International, the U.K. Country Information and Policy Unit of the Home Office Asylum and Appeals Policy Directorate Report on Eritrea and a report from the Immigration and Refugee Board of Canada. The Tribunal noted none of those reports of international organisations made mention of the prospect of women being discriminated against in military service. It might be observed in passing that the Amnesty International Human Rights Watch Report for 2002, which constituted part of the evidence relied on by the applicant and which is contained in the

Court Book, was a report on Eritrea's violations of the human rights of Government critics, especially focussing on persons in detention for criticising the Government. The subject matter of this report is neither national service generally nor female draftees in particular. It was not surprising it did not deal with the subject matter which the Tribunal was considering.

42 At the hearing before me "country information" entitled "Amnesty International Report – 2003 – Eritrea" said to be relevant to this issue was sought to be tendered. The respondent's counsel objected to this course. It was not clear from the face of the document whether this was in fact evidence to which the Tribunal was referring or fresh evidence. For reasons which will become clear it will not be necessary for me to rule on that application.

43 There is no evidence before me of any document answering the other descriptions of country information of international organisations to which the Tribunal referred.

44 The Tribunal's conclusions on this aspect of the applicant's claims were as follows:

> *"The Tribunal is prepared to accept that there may be instances of sexual harassment and abuse of women in military training as noted in the US Department of State report and by the applicant's witness. However, the Tribunal is unable to accept, on the evidence before it, that the incidence of such actions is sufficient as to suggest the applicant faces a real chance of being persecuted should she undertake military service or return to Eritrea, for reasons of being a woman."*

Because the Tribunal made a finding about the incidence of sexual harassment and abuse of women in military training, I do not take the use of the auxiliary verb "may" to imply any improbability in the accounts; no adverse findings were made in respect of witnesses credit on these issues.

45 It is convenient to isolate issues relevant to this aspect of the applicant's claims which were not seriously contested before me. In accepting the oral evidence and the US Department of State Report the Tribunal accepted as fact that there may be many cases of young girls returning home pregnant from military camp and that the local community knew this was the result of sexual abuse and/or rape by "officials" at military camp (sexual abuse in that context connoted consensual relations which originated in some exploitation of the hierarchy of power as between officials and female draftees).

46 The Tribunal accepted the applicant was a member of a "particular social group" as

that phrase is used in Art 1A(2) of the Convention. In this case, the particular social group was female draftees identifiable by two characteristics common to the group, namely being female and liable to the draft. Those two common attributes were independent of any shared fear of persecution and distinguished the group from society at large. On the evidence, it was possible to treat female draftees as a social group by reference to the legal, social and cultural norms prevalent in Eritrean society. The Tribunal's analysis of the facts was thus correct as they fell within the principles to be applied in determining a "particular social group" established in *Applicant S* at [36]. Further, it was not disputed that the conduct feared was feared "for reasons of" being directed at that particular social group: *Ram v Minister for Immigration & Ethnic Affairs* (1995) FCR 565; *Applicant A v Minister for Immigration & Ethnic Affairs* (1997) 190 CLR 225 at 257 per McHugh J..

47 Rape or sexual abuse by an official or a military superior and impregnation whilst on national service is distinguishable from rape occurring as a random incident of civil disturbance or unrest. cf *Minister for Immigration & Multicultural & Indigenous Affairs v Ibrahim* (2000) 204 CLR 1. Rape, sexual abuse and impregnation whilst on military service is capable of being characterised as "serious harm" within the meaning of ss 91R(1)(b) and 2(b) and (c) of the Act and depending on the evidence, such acts are also capable of constituting "systematic and discriminatory" conduct within the meaning of s 91R(1)(c). Any unwillingness by the State of Eritrea to protect young female draftees from rape, sexual abuse or impregnation by military superiors is relevant when determining whether a fear of persecution is well-founded: see *Khawar*; see also *Minister for Immigration & Multicultural & Indigenous Affairs v Respondents S152/2003* (2004) HCA 18; 205 ALR 487. It was not argued that the conduct feared did not constitute serious harm or that it was trivial or that it might have minimum impact on the applicant.

48 The issues discussed above did not appear to be in contest. The Tribunal having proceeded on a basis consistent with the propositions and authorities set out above. The contested issue for me was whether there was any jurisdictional error in the Tribunal's finding that it was not satisfied on the evidence before it that the "incidence" of sexual harassment and abuse, rape and impregnation of female draftees by officials was "sufficient" to suggest the applicant faces a real chance of being persecuted should she undertake military service on return.

49 The applicant's representative submitted that the Tribunal failed to properly consider all the relevant evidence in assessing mistreatment of women in the military. Against the backdrop of a submission that the Tribunal asked itself the wrong question, it was submitted that the Tribunal's analysis of this part of the applicant's claim constituted a failure to consider all the evidence and constituted a misrepresentation of the material giving rise to jurisdictional error.

50 The argument advanced on behalf of the respondent was narrow and simple. It was that the Tribunal had formed an adverse conclusion on the evidence as to the "sufficiency" of the "incidence" of sexual abuse, rape and impregnation of female draftees in respect of a fear of persecution based on that conduct and accordingly there was no jurisdictional error. This argument appeared to me to be based on treating the Tribunal's assessment as a qualitative assessment of the conduct feared, that is as a question of fact rather than a question of law: *Minister for Immigration & Multicultural & Indigenous Affairs v Kord* [2002] FCA 334 at [3] per Heerey J. It was not argued on behalf of the respondent that sexual abuse, rape and impregnation by officials or superiors, while on national service, could not constitute persecution of female draftees with the meaning of s 91R of the Act. This was a responsible position adopted on behalf of the Minister. On this aspect, it was submitted for the respondents that the Tribunal does not commit a jurisdictional error because it makes erroneous findings of fact, attributes weight to some pieces of evidence and not others or adopts unsound and questionable reasoning and finding error in such circumstances amounts to impermissible merits review: *Rajalingam*; *Minister for Immigration & Multicultural Affairs v Al-Miahi* [2001] FCA 744 at 34.

51 There is a line of authority from *Chan's* case to *Ibrahim* which deals with a difficult aspect of the definition of refugee as set out in Article 1A(2) of the Convention and as also covered in s 91R of the Act which was inserted into the Act under the *Migration Legislation Amendment Act (No. 6) 2001* (Cth). The line of authority deals with the correct meaning of persecution by reference to conduct which is "systematic and discriminatory".

52 In *Ibrahim,* McHugh J explains that the phrase "systematic conduct" has its origins in a decision of Wilcox J, in *Periannan Murugasu v Minister for Immigration and Ethnic Affairs* (unreported; Federal Court of Australia; 28 July 1987). His Honour went on to state at [95] and [99/100]:

> *"The use of the term "systematic conduct" has proved unfortunate. Tribunals have read it as meaning that there can be no persecution for the purpose of the Convention unless there was a systematic course of conduct by the oppressor. That was not what I meant by using that expression in* Chan. *I used it as a synonym for non-random, and I think in* Murugasu *Wilcox J intended its use in the same way . . .*
>
> *It is an error to suggest that the use of the expression "systematic conduct" in either* Murugasu *or* Chan *was intended to require, as a matter of law, that an applicant had to fear organised or methodical conduct, akin to the atrocities committed by the Nazis in the Second World War. Selective harassment, which discriminates against a person for a Convention reason, is inherent in the notion of persecution. Unsystematic or random acts are non-selective. It is therefore not a prerequisite to obtaining refugee status that a person fears being persecuted on a number of occasions or "must show a series of co-ordinated acts directed at him or her which can be said to be not isolated but systematic." The fear of a single act of harm done for a Convention reason will satisfy the Convention definition of persecution if it is so oppressive that the individual cannot be expected to tolerate it so that refusal to return to the country of the applicant's nationality is the understandable choice of that person.*
>
> *Given the misunderstanding that has arisen from using the term "systematic conduct", it is probably better to refrain from using it in a Convention context. But if it is to be used, those who use it should make it clear that they are referring to "non-random" acts; otherwise, they run the risk of making a legal error."*

53 There can be no doubt that a single act or rape or sexual abuse resulting in impregnation of a female draftee by a military officer (resulting in being shunned thereafter by family) when many such examples have occurred before with female draftees, is "systematic" in that it is non-random and so oppressive that the applicant could not be expected to tolerate it. "Systematic" has quite separate shades of meaning. It can mean habitual or regular; equally it can mean deliberate or pre-meditated. A Full Court of this court has recognised this: *Minister for Immigration & Multicultural Affairs v Hamad* (1999) 87 FCR 294 at 297 [17]. The epithet "non-random" is apposite to cover the different shades of meaning. Accordingly, to determine conduct is not "sufficient" for the purposes of the *Chan* test because the "incidence" is not sufficiently widespread can result in error where the seriousness of the harm is not in dispute. Where harassment can be described as minimal or low level, it can be appropriate to ask whether the incidence of such harassment is sufficient to constitute serious harm or "significant detriment" as expressed by Mason CJ in *Chan* at 389. Questions of whether the extent of harassment can be characterised as persecution in the Convention sense are questions of fact: see for example *NABB* at [16]. However, cases

turning on factual matters such as the qualitative assessment of harassment to determine whether or not certain harassment amounts to serious harm are distinguishable from cases dealing with whether harm, the seriousness of which is not challenged, constitutes "systematic conduct" for the purposes of the meaning of persecution. Where the harassment shown on the facts to be serious harm falls to be assessed as to whether it is systematic conduct, legal error can occur if the applicant is required to show anything more than that the seriously harmful conduct feared is deliberate or pre-meditated, that is motivated. It is not necessary for an applicant to show that the seriously harmful conduct has occurred on a scale which might answer to the description of an atrocity. This is particularly so when a single instance of the feared harm will be oppressive to the applicant.

54 Having been satisfied that rape, sexual abuse and impregnation by military officers was committed against female draftees, including at Sawa, the camp to which the applicant would be assigned, and having accepted country information which cited incidents of parents being killed whilst resisting the drafting of their daughters, the Tribunal should have asked whether the conduct in question was deliberate or pre-meditated, then applied the *Chan* test, which it had correctly described, to the applicant. Such an approach may have led to a different result. Instead, it asked a question relevant to a qualitative assessment of whether the harm was serious, namely it asked whether the incidence of rape, sexual abuse and impregnation by military officers occurred on a significant scale to constitute persecution.

55 In a decision otherwise free of jurisdictional error, the Tribunal misdirected itself by not asking whether rape, sexual abuse and impregnation by military officers (of which facts it was satisfied) was deliberate or pre-meditated conduct, exposure to which the applicant could not be expected to tolerate. The Tribunal was attempting to apply what has been a most problematic aspect of the relevant tests. It asked itself the wrong question which affected its exercise of power. It therefore made an error of law of the kind which was referred to in the joint judgment of McHugh, Gummow and Hayne JJ (with whom Gleeson CJ expressed agreement) in *Minister for Immigration & Multicultural & Indigenous Affairs v Yusuf* [2001] HCA 30; (2001) 206 CLR 323 at [82].

Conclusion

56 The applicant has succeeded in establishing that there was an error of law on the part of the Tribunal. It was clearly an error which affected the decision. Accordingly, the

applicant is entitled to have the decision of the Tribunal set aside and to have the matter referred back to the Tribunal for further consideration according to law. The respondent must pay the applicant's costs.

I certify that the preceding fifty-six (56) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Crennan.

Associate:

Dated: 8 December 2004

Counsel for the Applicant:	N Karapanagiotidis (*pro bono*)
Solicitor for the Respondent:	Australian Government Solicitor
Date of Hearing:	8 July 2004
Date of Judgment:	8 December 2004