071843748 [2008] RRTA 37 (20 February 2008)

DECISION RECORD

RRT CASE NUMBER:	071843748
DIAC REFERENCE(S):	CLF2007/136105
COUNTRY OF REFERENCE:	Korea, Republic Of
TRIBUNAL MEMBER:	David Dobell
DATE DECISION SIGNED:	20 February 2008
PLACE OF DECISION:	Sydney
DECISION:	The Tribunal remits the matter for reconsideration with the direction that the applicant satisfies s.36(2)(a) of the Migration Act, being a person to whom Australia has protection obligations under the Refugees Convention.

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

This is an application for review of a decision made by a delegate of the Minister for Immigration and Citizenship to refuse to grant the applicant a Protection (Class XA) visa under s.65 of the *Migration Act 1958* (the Act).

The applicant, who claims to be a citizen of the Republic of Korea (or South Korea), arrived in Australia and applied to the Department of Immigration and Citizenship (the Department) for a Protection (Class XA) visa. The delegate decided to refuse to grant the visa and notified the applicant of the decision and his review rights by facsimile

The delegate refused the visa application on the basis that the applicant is not a person to whom Australia has protection obligations under the Refugees Convention The applicant applied to the Tribunal for review of the delegate's decision. The Tribunal finds that the delegate's decision is an RRT-reviewable decision under s.411(1)(c) of the Act. The Tribunal finds that the applicant has made a valid application for review under s.412 of the Act.

RELEVANT LAW

Under s.65(1) of the Act, a visa may be granted only if the decision maker is satisfied that the prescribed criteria for the visa have been satisfied. In general, the relevant criteria for the grant of a protection visa are those in force when the visa application was lodged although some statutory qualifications enacted since then may also be relevant.

Section 36(2)(a) of the Act provides that a criterion for a protection visa is that the applicant for the visa is a non-citizen in Australia to whom the Minister is satisfied Australia has protection obligations under the 1951 Convention Relating to the Status of Refugees as amended by the 1967 Protocol Relating to the Status of Refugees (together, the Refugees Convention, or the Convention).

Further criteria for the grant of a Protection (Class XA) visa are set out in Parts 785 and 866 of Schedule 2 to the Migration Regulations 1994.

Definition of 'refugee'

Australia is a party to the Refugees Convention and generally speaking, has protection obligations to people who are refugees as defined in Article 1 of the Convention. Article 1A(2) relevantly defines a refugee as any 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; or who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear, is unwilling to return to it.

The High Court has considered this definition in a number of cases, notably *Chan Yee Kin v MIEA* (1989) 169 CLR 379, *Applicant A v MIEA* (1997) 190 CLR 225, *MIEA v Guo* (1997)

191 CLR 559, *Chen Shi Hai v MIMA* (2000) 201 CLR 293, *MIMA v Haji Ibrahim* (2000) 204 CLR 1, *MIMA v Khawar* (2002) 210 CLR 1, *MIMA v Respondents S152/2003* (2004) 222 CLR 1 and *Applicant S v MIMA* (2004) 217 CLR 387.

Sections 91R and 91S of the Act qualify some aspects of Article 1A(2) for the purposes of the application of the Act and the regulations to a particular person.

There are four key elements to the Convention definition. First, an applicant must be outside his or her country.

Second, an applicant must fear persecution. Under s.91R(1) of the Act persecution must involve "serious harm" to the applicant (s.91R(1)(b)), and systematic and discriminatory conduct (s.91R(1)(c)). The expression "serious harm" includes, for example, a threat to life or liberty, significant physical harassment or ill-treatment, or significant economic hardship or denial of access to basic services or denial of capacity to earn a livelihood, where such hardship or denial threatens the applicant's capacity to subsist: s.91R(2) of the Act. The High Court has explained that persecution may be directed against a person as an individual or as a member of a group. The persecution must have an official quality, in the sense that it is official, or officially tolerated or uncontrollable by the authorities of the country of nationality. However, the threat of harm need not be the product of government policy; it may be enough that the government has failed or is unable to protect the applicant from persecution.

Further, persecution implies an element of motivation on the part of those who persecute for the infliction of harm. People are persecuted for something perceived about them or attributed to them by their persecutors. However the motivation need not be one of enmity, malignity or other antipathy towards the victim on the part of the persecutor.

Third, the persecution which the applicant fears must be for one or more of the reasons enumerated in the Convention definition - race, religion, nationality, membership of a particular social group or political opinion. The phrase "for reasons of" serves to identify the motivation for the infliction of the persecution. The persecution feared need not be *solely* attributable to a Convention reason. However, persecution for multiple motivations will not satisfy the relevant test unless a Convention reason or reasons constitute at least the essential and significant motivation for the persecution feared: s.91R(1)(a) of the Act.

Fourth, an applicant's fear of persecution for a Convention reason must be a "well-founded" fear. This adds an objective requirement to the requirement that an applicant must in fact hold such a fear. A person has a "well-founded fear" of persecution under the Convention if they have genuine fear founded upon a "real chance" of persecution for a Convention stipulated reason. A fear is well-founded where there is a real substantial basis for it but not if it is merely assumed or based on mere speculation. A "real chance" is one that is not remote or insubstantial or a far-fetched possibility. A person can have a well-founded fear of persecution even though the possibility of the persecution occurring is well below 50 per cent.

In addition, an applicant must be unable, or unwilling because of his or her fear, to avail himself or herself of the protection of his or her country or countries of nationality or, if stateless, unable, or unwilling because of his or her fear, to return to his or her country of former habitual residence.

Whether an applicant is a person to whom Australia has protection obligations is to be assessed upon the facts as they exist when the decision is made and requires a consideration of the matter in relation to the reasonably foreseeable future.

CLAIMS AND EVIDENCE

The Tribunal has before it the Department's file relating to the applicant. The Tribunal also has had regard to the material referred to in the delegate's decision, and other material available to it from a range of sources.

The applicant arrived in Australia on a temporary visa He then lodged a Protection (Class XA) visa. In the protection visa application, the applicant states the following in relation to his claims of persecution:

> **Q41 Why did you leave that country?**
>
> I left my country because I did not want to undertake military service. Military service is compulsory in my country.
>
> I received a letter when I was around 19 years old asking me to go to some military training Office/Department by a certain date.
>
> [Information deleted under s.431 as it may identify the applicant]
>
> I did not want to do the compulsory military service because I do not want to be trained to use arms and be taught how to shoot people.
>
> I decided to come to Australia to get away from Korea [sic] the sad memories of my family [family circumstances deleted], and the requirement to do compulsory military service which I do not want to be forced to do.
>
> **Q42 What do you fear may happen to you if you go back to that country?**
>
> I fear that I will be forced to undergo compulsory military training and if I refuse to do it then I will be punished by being put in jail for 3 years.
>
> There is no way of avoiding military service.
>
> I do not want to go to jail and spent 3 years in jail. It is not safe to be in jail with prisoners that have committed other crimes.
>
> I do not want to have a criminal record for going to jail.
>
> **Q43 Who do you think may harm/mistreat you if you go back?**
>
> The Korean government by forcing me to undertake military (sic) against my will and if I don't by sentencing me to jail.
>
> **Q44 Why do you think this will happen to you if you go back?**
>
> Because military service is compulsory in my country.
>
> **Q45Do you think the authorities in that country can and will protect you if you go back? If not, why not?**
>
> Authorities in my country will not protect me because military training is compulsory and people who avoid it are punished by authorities- it is a serious offence.

He does not know where his passports are. He does not know where his family are living now. He travelled to country A previously. The first trip to country A was for tourism for several months. The second trip was also for tourism. He claims he can read and write and speak both Korean and English.

The representative provided a written submission prior to the hearing. This contained country information on South Korea and the practice of compulsory military service.

The applicant appeared before the Tribunal to give evidence and present arguments. The Tribunal hearing was conducted with the assistance of an interpreter in the Korean and English languages. The applicant was represented in relation to the review by his registered migration agent.

The applicant confirmed that he had been feeling unwell earlier in the week but was now well and was able to proceed with the hearing. He said that he may need a break for food. The Tribunal said that this not a problem and that he was to advise the Tribunal if and when he required a break.

The Tribunal asked the applicant whether his representative had the protection visa application and statement read back to him in his own language. He eventually confirmed that this had occurred.

The Tribunal asked the applicant for an overview of his fear of harm. He said that he had a belief that he should not kill a person. He had objected to military service as it was compulsory He then said he had to escape Korea. He said he would be subject to a three-year sentence in prison should he return.

As to whether the Korean authorities are looking for him at the moment, he said he had searched the Internet and had found information which named him as a draft avoider. The Tribunal asked the applicant whether he had any other reasons to fear harm should he return to Korea. He said he had political views about Korea. He said that the environment for him is not suitable there.

The Tribunal asked him how his political view related to the issue of compulsory military service and he stated they were inter-related. The Tribunal then asked whether he feared any harm for his political views from the Korean Government or from others. He said he could not be certain on this. He said he could have been prosecuted by different persons. The Tribunal asked him what he would be prosecuted for. He said that the social atmosphere was against him. He said that wherever he goes in the workplace or in society general, people say to him ‘you are human garbage’. The Tribunal asked again how he was prosecuted. He said he was prosecuted in language and in other ways. The Tribunal asked for examples of this. Next he said that when he went to country A and went back to Korea, people made fun of him and prosecuted him mentally.

The Tribunal then asked him about his Korean passport. It noted from the protection visa application that it was not in his possession and that he had stated it had been lost. He told the Tribunal that it would have expired by now.

The Tribunal asked the applicant whether the Korean passport had been issued in his correct name. He said his name was as stated on the protection visa application The Tribunal noted

that his first passport would have expired sometime ago. He said that his first passport would have expired many years ago.

The Tribunal noted that, according to his statement, the applicant travelled to country A previously. He said that he went to country A before his Korean passport expired. The Tribunal asked him whether he had problems with his memory. He said he had a little bit of problem, mainly with dates. The Tribunal asked him why he thought it was that particular year that he went to country A. He said he made a mistake in his memory. He confirmed that the Korean passport he came to Australia on was a genuine passport in his correct name and that he had no difficulty in getting the passport.

The Tribunal asked the applicant about compulsory military service and why he was not prepared to do it. He said that he believed in God and cannot kill persons and does not want to be killed. He opposes exposure to this environment. He has heard of incidents where a number of people have been killed in military service. He says he has a fear because guns and weapons kill people easily.

The Tribunal asked the applicant whether he was of any particular religion. He said that he believed in Christianity. As to when he became a Christian, he said that he had been to church since he was a child and that his parents were the same religion as him.

The Tribunal asked about his church attendance in Korea He said he would attend church on Sundays at around 9 a.m. and that around a hundred people or more attended his church. He said that he normally went to church except where his work did not allow him to fit it in.

As to whether he has attended church in Australia, the applicant said he went to a particular church a number of times. He said he left that church because the people there were not nice to him. As to the last time he attended church, he said it was several months ago.

The Tribunal asked the applicant about the Church and whether he could recall the name of the Minister there. He said that the person was Australian but could not remember their name. He said that he would merely attend the service and leave, so it was unlikely that the Minister would know who he was.

The Tribunal said to the applicant that it would imagine there were a number of churchgoers in Korea like him, but who would, however, be willing to do compulsory military service. The Tribunal asked what made him different to the others. He said he had a different perspective from other people. He said he believed you should not kill and that weapons were the way in which humans were being “neglected”.

He said that because of weapons, life is treated lightly and people become hostile and he would hate to be like that.

The Tribunal put to the applicant that the only reason he did not do compulsory military service was because he was afraid of being killed and of killing others. He said ‘yes’. The Tribunal referred to his earlier evidence regarding his political and religious views. He said that his religious views mostly informed his views on compulsory military service and a bit of them were based on his political views.

The Tribunal asked the applicant when he came to the realisation that he was opposed to compulsory military service. He said he was not sure but he said he had heard of killings of

servicemen and the Korean Government was hiding this news. The Tribunal asked whether he had his beliefs when he was, say, 19, the time when he claimed he was requested to first attend military service. He said he had these views at an earlier age. The Tribunal asked whether he had them as a young teenager. He said that, at that time, his views were not that concrete but that he had a bad impression and fear of military service.

The Tribunal asked him whether he had these views during a certain family crisis. He said that, at that time, he just felt hopeless and felt that he should leave the country because of military service. The Tribunal asked whether this was the reason for him going to country A and he said 'yes'. The applicant said that he thought he could live in country A but that he could not get work. The Tribunal said to him that he had stated in his protection visa application that he went there for tourism. He said that he did go there for tourism but also to have a look at country A as somewhere to live. He said that he eventually gave up and came back to Korea. The Tribunal noted that he went to country A twice. He said that he went back to look for work in other areas of country A the second time and again, found it impossible. He also said that he was not able to obtain permanent residence in country A.

The Tribunal returned to the question of at what age the applicant had come to the view that he did not wish to do compulsory military service. As to whether it was before the age of 17, he said that he thought that it was when he was younger. The Tribunal noted that this was inconsistent with his earlier evidence that he was not concrete in his views then.

The Tribunal asked the applicant whether he was aware of any alternate military service available in Korea. He said he was aware of such service, but thought he was not eligible for this. He said that even if he was entitled, he would still have to go to a training camp. The Tribunal asked him what his understanding was of this service. He said that to be eligible, you needed educational certificates and academic achievement and to know someone in a Company who could help you. He said that money and background helped. The Tribunal asked him whether this was an official alternate service scheme or just a way some people got around compulsory military service. He said he believed it was an official scheme but, practically, it was very difficult for him. As to what people did in this alternate service, he said they utilised their qualifications. He also noted that celebrities try to avoid military service. The Tribunal asked whether he had applied for alternate service. He said 'no', he was not qualified. The Tribunal asked how he knew he would not be qualified if he had not applied. He said he had asked some people who had told him he was not eligible and that he needed close ties to powerful men to succeed. As to why he had not applied, he said that had not thought about it.

The Tribunal then asked the applicant how he came to decide to come to Australia He said he thought he could not live in Korea but could not decide which foreign country to go to. He said he thought about either going to country C or to Australia. He said that he would have needed more money and would have had to attended interviews in order to go to the country C and that it was easier to get a visa to Australia. He said that it was too hard to get a visa to the country C.

The Tribunal noted that the applicant had a transit stop in country B on his way to Australia and asked whether there was any opportunity there for him to seek asylum. He said he had not thought about that but was not sure if they had refugee status there. He confirmed that his aim was to come to Australia to seek safety.

The Tribunal then asked the applicant about his delay in making his protection visa application. He said he did not have legal knowledge of the aspects of refugee law and that it was not until later that he found out that he could apply to become a refugee.

The Tribunal suggested that this was inconsistent with his earlier evidence that he had decided to come to Australia to safety. He said that his only thought was that he had to escape Korea and would come to Australia. He did not know that he could make a refugee application here.

The Tribunal asked the applicant whether he used the Internet in Korea. He said he did but that he could not find any information on how to become a refugee. The Tribunal asked him whether he was sharing with others in Australia, he said 'yes' and confirmed that he was also sharing with foreigners and then Korean speakers at a later stage. The Tribunal said that it found it hard to believe that he did not know that he could apply for refugee status, either before he left Korea, or shortly after arriving here. The Tribunal further said that it thought there would be sufficient information on the Internet for him to know how to go about applying for refugee status in a foreign country and that he most likely would have talked to people after arriving here, either foreigners or Korean speakers, who would have told him about the refugee process.

The applicant said that he could not talk to foreigners much as his English was not that good. He said that the Koreans he talked to neglected to mention that he could apply for refugee status or did not know about this. He said that he only found information about Africa refugee cases and not Korean cases on the Internet. He said that he searched Korean language Internet sites and there was not much there. He said he also searched English Internet sites but his English was so poor that he was not successful in finding any information. The Tribunal referred to his protection visa application where he had indicated that he could read, write and speak English. He said 'yes', but that the vocabulary was beyond his ability.

The Tribunal asked the applicant whether he had anything else to add. He said he was sad to think about the future and his life being ruined because of the wrong approach of the Korean Government to compulsory military service and that the persecution and bad treatment of him in Korea by the Government is not his fault.

The representative then made some comments on the applicant's evidence. She said that even at that time that she was appointed as his agent, he was still quite confused about what he had to do. She said he attempted to fill out another protection visa application form even when she was appointed to assist him to fill out his form. She said he was confused about the difference between bridging visas and protection visas. She said that even with her assistance and with the presence of an interpreter, the applicant found the information given to him quite complex and difficult to understand. He appeared overwhelmed by it all. She said it was a difficult system to understand, especially for someone like him.

The representative then referred to the Tribunal's comments about information being available on the Internet about refugee status. She said she was not sure what was available in Korean language and was not sure if information would come up. She said that the Australian Government's Department of Immigration had only this year put information about protection visas on their website and that the Form 866 was not available on the website.

As to the applicant's comments about the Korean community, the representative referred to his evidence that they either did not know about refugee status or seemed to think that he could not apply. She also referred to his evidence that once the people at his Church found out about his situation, he did not like to attend there and that maybe after this time he would have found it hard to get information. At this stage, the applicant said that the church people told him to 'go back to Korea'.

As to when he became aware of his views on compulsory military service, the representative said that the applicant had said he was not concrete in his views at a young age but was forming a view and that it was only later that his expressed ideas became strongly held beliefs. She said that he had a strong belief that he did not wish to kill or learn how to kill and that this was deeply held, based on his moral values and religious belief. She said this view was difficult to express to the authorities in his country.

Further, the representative said that it was only later when the applicant approached the Department and could access information and was able to be properly assisted. She said he could not negotiate with the Korean Government whether or not to do compulsory military service and could not avoid this on the basis of his beliefs and there would be severe penalties and repercussions for him not doing it.

She said that the penalties for not doing compulsory military services in Korea would constitute persecution and the Tribunal should take into account the likely sentence, discrimination in employment and that he cannot put his case to anyone in regards conscientious objection.

The applicant said that he had difficulty understanding documents. This led him to have fear and then confusion. As to how long he has felt like this, he said he has felt this way since his family were given many documents in relation to a certain family crisis. He said that he would get confused and get headaches when he saw too many forms.

The Tribunal asked the applicant again whether he was making a separate claim in relation to his political beliefs and was claiming that he would be persecuted should he return to Korea because of those views He said 'no', he would not be subject to persecution for this.

The Tribunal requested that the representative provide further website information and a certified translation which identified the applicant has a compulsory military service evader. It noted that it had not asked questions on this as the applicant had said that information confirming his evader status would be easily available.

After the hearing the Tribunal wrote to the applicant as follows:

> …
>
> At the hearing on [date] you told the Tribunal that there was information on a South Korean government website which showed that you were a draft evader. The Tribunal requested that you provide the Tribunal with this evidence and for it to be translated by a certified translator.
>
> [information deleted]
>
> Your additional information should be received at the Tribunal by [date] If the additional information is in a language other than English it must be accompanied by an English translation from an accredited translator.
>
> If you cannot provide the additional information by [date], you may ask the Tribunal in writing for an extension of time in which to provide the additional information. If you make

> such a request, it must be received by the Tribunal before [date] and the request must state the reason why the extension of time is required. The Tribunal will carefully consider any request for an extension of time and will advise whether or not the extension has been granted.
>
> …

Accordingly the representative provided information from a website as requested. This showed the applicant's details. The agent also provided further evidence in relation to the applicant's life in Australia and asked for further time to provide more documents.

INDEPENDENT COUNTRY INFORMATION

Compulsory military service

Conscience and Peace Tax International (CPTI) is an international NGO with consultative status with the UN Economic and Social Council. CPTI provides the following information on military service in South Korea:

> The Republic of Korea has a system of (supposedly) universal male military service. Call up for medical examination (including psychological, physical and general education tests) takes place at the age of 19, followed by the placing of the conscripts concerned in six categories of military suitability. The first three categories are assigned to "active military service", the fourth to "supplementary military service", the fifth is eligible for military service in time of war only, the sixth is completely exempt from military service.
>
> Under the revised Military Service Act of August 2003, all lengths of active military service were reduced by two months, and now stand at 24 months in the Army, 26 months in the Navy and 28 months in the Air Force.
>
> …Articles 26 to 33 of the Act stipulate that "supplementary military service will mainly be performed as public service personnel at national or local government agencies, public organizations, or in social welfare facilities, for the purpose of public interests." "In the public welfare sector, administration and local government (military service) lasts for 28 months. In certain special circumstances, when... performed in regional sectors of the economy, sociological and culture areas and international cooperation, it lasts for 32 months." In all cases it includes four weeks basic military training (reduced from six weeks in 2003).
>
> All those who have completed active military service or supplementary military service are required in each of the following eight years to perform 160 hours of reserve training.
>
> It must be stressed that in order to be assigned to "supplementary military service" a conscript must qualify for exemption from "active military service". There is no element of choice or discretion. Exemption is possible on grounds of "physical or mental deficiencies or special family circumstances".
>
> Under the 1989 Military Service Exemption Control Law, research, technical and public health staff may, after the initial period of military training, be allowed to count five years' continued employment in the appropriate field in fulfilment of the supplementary military service requirement. Similar exemptions are available to some persons with special qualifications.

> …Under Article 88 of the Military Service Act, the penalty for refusal of "active military service" is imprisonment for a maximum of three years; under Article 90 refusal of call-up for reserve training incurs a fine of up to two million won (approximately $2,000) or imprisonment for not more than six months.
>
> …Under Article 76 of the Military Service Law, those who have not satisfied the Military Service requirements are precluded from employment by government or public organisations. Moreover convicted conscientious objectors carry the stigma of a criminal record. As this is available to potential employers, it is alleged that there is consequent discrimination against conscientious objectors in the private labour market as well.
>
> from: Conscience and Peace Tax International 2006, *Briefing Paper for the Human Rights Committee Task Force on the Republic of Korea: Conscientious Objection to Military Service* , February, Office of the United Nations High Commissioner for Human Rights website http://www.ohchr.org/english/bodies/hrc/docs88/CPTI_Republic_of_Korea.doc – Accessed 13 October 2006

International findings on South Korea's compulsory military service

In the report of the International Covenant on Civil and Politcal Rights (ICCPR) Human Rights Committee (UNHRC), Eighty-eighth session in Geneva, 16 October - 3 November 2006, in regards South Korea, it was stated:

> …
> The Committee is concerned that: (a) under the Military Service Act of 2003 the penalty for refusal of active military service is imprisonment for a maximum of three years and that there is no legislative limit on the number of times they may be recalled and subjected to fresh penalties; (b) those who have not satisfied military service requirements are excluded from employment in government or public organisations and that (c) convicted conscientious objectors bear the stigma of a criminal record (art.18).
> The State party should take all necessary measures to recognize the right of conscientious objectors to be exempted from military service. It is encouraged to bring legislation into line with article 18 of the Covenant. In this regard, the Committee draws the attention of the State party to the paragraph 11 of its general comment No. 22 (1993) on article 18 (freedom of thought, conscience and religion).
> …
> from:
> http://daccessdds.un.org/doc/UNDOC/GEN/G06/458/14/PDF/G0645814.pdf?OpenElement
> Accessed 19 February 2008

In January 2007, the Human Rights Committee released its report on two individual complaints from South Korea concerning conscientous objection to compulsory military service. The report, adopted by the vast amjority of the Committee but with two dissenting views, stated in part:

> …
> *Supplementary submissions of the State party*
>
> 6.1 By submission of 6 September 2006, the State party responded to the authors' submissions with supplementary observations on the merits of the communications. The State party notes that under article 5 of its Constitution, the National Armed Forces are charged with the sacred mission of national security and defence of the land, while article 39 acknowledges that the obligation of military service is an important, indeed one of the key, means of guaranteeing national security, itself a benefit and protection of law. The State party notes that national security is an indispensable precondition for national existence, maintaining territorial

integrity and protecting the lives and safety of citizens, while constituting a basic requirement for citizen's exercise of freedom.

6.2 The State party notes the freedom to object to compulsory military service is subject to express permission of limitations set out in article 18, paragraph 3, of the Covenant. Allowing exceptions to compulsory service, one of the basic obligations imposed on all citizens at the expense of a number of basic rights to protect life and public property, may damage the basis of the national military service which serves as the main force of national defence, escalate social conflict, threaten public safety and national security and, in turn, infringe on the basic rights and freedoms of citizens. Hence, a restriction on the basis of harm to public safety and order or threat to a nation's legal order when undertaken in a communal setting is permissible.

6.3 The State party argues that while it is true that the situation on the Korean peninsula has changed since the appearance of a new concept of national defence and modern warfare, as as well as a military power gap due to the disparities in economic power between North and South, military manpower remains the main form of defence. The prospect of manpower shortages caused by falling birth rates must also be taken into account. Punishing conscientious objectors, despite their small overall number, discourages evasion of military service. The current system may easily crumble if alternative service systems were adopted. In light of past experiences of irregularities and social tendencies to evade military service, it is difficult to assume alternatives would prevent attempts to evade military service. Further, accepting conscientious objection while military manpower remains the main force of national defence may lead to the misuse of conscientious objection as a legal device to evade military service, greatly harming national security by demolishing the conscription basis of the system.

6.4 On the authors' arguments on equality, the State party argues that exempting conscientious objectors or imposing less stringent obligations on them risks violating the principle of equality enshrined in article 11 of the Constitution, breach the general duty of national defence imposed by article 39 of the Constitution and amount to an impermissible awarding of decorations or distinctions to a particular group. Considering the strong social demand and anticipation of equality in performance of military service, allowing exceptions may hinder social unification and greatly harm national capabilities by raising inequalities. If an alternative system is adopted, all must be given a choice between military service and alternative service as a matter of equity, inevitably threatening public safety and order and the protection of basic rights and freedoms. The State party accepts that human rights problems are a major reason for evasion of service and substantially improved barracks conditions. That notwithstanding, the two year length of service – significantly longer than that in other countries – continues to be a reason for evasion unlikely to fade even with improved conditions and the adoption of alternative service.

6.5 On the authors' arguments as to international practice, the State party notes that Germany, Switzerland and Taiwan accept conscientious objection and provide alternative forms of service. It had contacted system administrators in each country and gathered information on the respective practices through research and seminars, keeping itself updated on an ongoing basis on progress made and reviewing the possibility of its own adoption. The State party notes however that the introduction of alternative arrangements in these countries was adopted under their own particular circumstances. In Europe, for example, alternative service was introduced in a general shift from compulsory to volunteer military service post-Cold War, given a drastic reduction in the direct and grave security threat. Taiwan also approved conscientious objection in 2000 when over-conscription became a problem with the implementation in 1997 of a manpower reduction policy. The State party also points out that in January 2006, its National Human Rights Commission devised a national action plan for conscientious objection, and the Government intends to act on the issue.

Issues and proceedings before the Committee

…

Consideration of the merits

8.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as provided in article 5, paragraph 1, of the Optional Protocol.

8.2 The Committee notes the authors' claim that article 18 of the Covenant guaranteeing the right to freedom of conscience and the right to manifest one's religion or belief requires recognition of their religious belief, genuinely held, that submission to compulsory military service is morally and ethically impermissible for them as individuals. It also notes that article 8, paragraph 3, of the Covenant excludes from the scope of "forced or compulsory labour", which is proscribed, "any service of a military character and, in countries where conscientious objection is recognized, any national service required by law of conscientious objectors". It follows that the article 8 of the Covenant itself neither recognizes nor excludes a right of conscientious objection. Thus, the present claim is to be assessed solely in the light of article 18 of the Covenant, the understanding of which evolves as that of any other guarantee of the Covenant over time in view of its text and purpose.

8.3 The Committee recalls its previous jurisprudence on the assessment of a claim of conscientious objection to military service as a protected form of manifestation of religious belief under article 18, paragraph 1. (3) It observes that while the right to manifest one's religion or belief does not as such imply the right to refuse all obligations imposed by law, it provides certain protection, consistent with article 18, paragraph 3, against being forced to act against genuinely-held religious belief. The Committee also recalls its general view expressed in General Comment 22 (4) that to compel a person to use lethal force, although such use would seriously conflict with the requirements of his conscience or religious beliefs, falls within the ambit of article 18. The Committee notes, in the instant case, that the authors' refusal to be drafted for compulsory service was a direct expression of their religious beliefs, which it is uncontested were genuinely held. The authors' conviction and sentence, accordingly, amounts to a restriction on their ability to manifest their religion or belief. Such restriction must be justified by the permissible limits described in paragraph 3 of article 18, that is, that any restriction must be prescribed by law and be necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others However, such restriction must not impair the very essence of the right in question.

8.4 The Committee notes that under the laws of the State party there is no procedure for recognition of conscientious objections against military service. The State party argues that this restriction is necessary for public safety, in order to maintain its national defensive capacities and to preserve social cohesion. The Committee takes note of the State party's argument on the particular context of its national security, as well as of its intention to act on the national action plan for conscientious objection devised by the National Human Rights Commission (see paragraph 6.5, supra). The Committee also notes, in relation to relevant State practice, that an increasing number of those States parties to the Covenant which have retained compulsory military service have introduced alternatives to compulsory military service, and considers that the State party has failed to show what special disadvantage would be involved for it if the rights of the authors' under article 18 would be fully respected. As to the issue of social cohesion and equitability, the Committee considers that respect on the part of the State for conscientious beliefs and manifestations thereof is itself an important factor in ensuring cohesive and stable pluralism in society. It likewise observes that it is in principle possible, and in practice common, to conceive alternatives to compulsory military service that do not erode the basis of the principle of universal conscription but render equivalent social good and make equivalent demands on the individual, eliminating unfair disparities between those engaged in compulsory military service and those in alternative service. The Committee, therefore, considers that the State party has not demonstrated that in the present case the restriction in question is necessary, within the meaning of article 18, paragraph 3, of the Covenant.

9. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, concludes that the facts as found by the Committee reveal, in respect of each author violations by the Republic of Korea of article 18, paragraph 1, of the Covenant.

10. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the authors with an effective remedy, including compensation. The State party is under an obligation to avoid similar violations of the Covenant in the future.

11. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant, and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the Committee's Views.

From: Communications Nos. 1321/2004 and 1322/2004 : Republic of Korea. 23/01/2007. CCPR/C/88/D/1321-1322/2004. (Jurisprudence), Human Rights Committee, Eighty-eighth session , 16 October - 3 November 2006
http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/26a8e9722d0cdadac1257279004c1b4e?Opendocument. Accessed 18 February 2008

Developments in relation to an alternative to compulsory military service

The NGO War Resisters' International website provides the following on developments in alternative compulsory military service in South Korea. As at the date of this decision, there is no alternative available. From the website's CO Update No.26, December 2006:

South Korea: United Nations' Human Rights Committee demands recognition of right to conscientious objection

The Human Rights Committee, considered the periodical report of the Republic of Korea during its 88th session this year. The official report of the government of Korea gives some insights into the situation of conscientious objectors in the country. According to the report, the "development of nuclear weapons by North Korea poses a serious threat to the existence and security of the Republic of Korea. Therefore, the Government does not recognise alternative forms of service for conscientious objectors to military service, for it may result in a rapid decline in its defence capability."

The Korean government argues: "In considering a system of alternative forms of service for conscientious objectors, the Government has taken into account the following problems: (a) conscientious objectors may become quite numerous due to the abstract and voluntary nature of religious and personal beliefs, which would make it impossible to maintain the current conscription system essential for the national security and defence; (b) in the context of current universal conscription system, exempting recipients of alternative service from basic military training, training for reserve forces and wartime mobilisation, which the normal conscripts bear as part of their military service, may create a violation of the principle of equality; and (c) as military human resources are ever declining due to a decreasing birth-rate, the introduction of alternative service may prompt a national security crisis."

MINBYUN Lawyers for Human Rights counter this argument in their report: "Considering the fact that annually 300,000-350,000 are potential soldiers on service, and annually 30,000 work as public service workers, 55,000 work as industrial skilled workers, 15,000 are expert research workers, 4,000 are public health workers, 36,000 are full-time reservists, and 50,000 work as on-duty police, totaling approximately 200,000 people who are working in alternative

services annually, it is hard to believe that recognizing alternative service for conscientious objectors will weaken the Republic of Korea's national defense."

….

From: http://www.wri-irg.org/pubs/upd-0612.htm. Accessed 19 February 2008

And from War Resisters' International CO Update No.33 of October 2007:

Important step for the South Korean conscientious objection movement

With the announcement of the South Korean Ministry of Defence on 18 September 2007 that it is to allow conscientious objectors to do substitute services in a turnaround from its previous stance four months ago, the South Korean conscientious objection movement achieved an important victory.

While conscientious objection itself has a long history in South Korea, going back to 1939, for a long time it had been completely hidden from the public. Until 2001, almost nobody had been aware that more than 10,000 Jehovah's Witness conscientious objectors had spent time in prison for their refusal to perform military service, and even that the Constitutional Court for the first time denied that there is a right to conscientious objection in 1969.

With the emergence of the first non-Jehovah's Witness objectors in 2002, and the formation of *Korea Solidarity for Conscientious Objection* (KSCO), things began to change slowly. The movement focused on raising public awareness about the issue - and especially about the large number of imprisoned conscientious objectors, often around 1,000 - and a legal strategy, involving domestic and international channels.

On the domestic level, the legal strategy first seemed to fail, after some initial success, which cut down the time of imprisonment from 3 years to 18 months. In 2004, first the Supreme Court and shortly afterwards the Constitutional Court ruled against the right to conscientious objection (see co-update No 1, September 2004). In response to this defeat, two cases of conscientious objectors were taken as individual complaints to the UN Human Rights Committee.

However, on 15 December 2005, the *National Human Rights Commission of Korea* released its recommendation on human rights issues to the Korean government, also recommending the recognition of the right to conscientious objection. Back then, the Ministry of Defence responded: "*The ministry cannot accept the decision even if the commission finally decides to acknowledge conscientious objection."*

"The ministry might be able to consider approval when tension between North and South Korea eases and if military human resources are plentiful, and the general public agrees to the idea" (see co-update No 17, February 2006).

In November 2006, the UN Human Rights Committee examined South Korea's periodical report under the International Covenant on Civil and Political Rights (ICCPR). It concluded: "*The State party should take all necessary measures to recognize the right of conscientious objectors to be exempted from military service. It is encouraged to bring legislation into line with article 18 of the Covenant. In this regard, the Committee draws the attention of the State party to the paragraph 11 of its general comment No. 22 (1993) on article 18 (freedom of thought, conscience and religion)*" (CCPR/C/KOR/CO/3, 28 November 2006).

In a landmark decision, the Human Rights Committee also decided on the two individual complaints from South Korea. The Committee concluded "*that the facts as found by the Committee reveal, in respect of each author violations by the Republic of Korea of article 18, paragraph 1, of the Covenant*" (CCPR/C/88/D/1321-1322/2004, 23 January 2007).

The recent announcement of the Ministry of Defence caused a debate in the country. The Defence Ministry plans to hold public hearings and opinion polls before revising laws

governing military service for conscientious objectors by the end of next year. The revision is subject to legislative approval.

The move — expected to take effect as early as January 2009 if approved — "*is not to recognize the right to refuse the military duty but, to permit an alternative service as part of social service on the premise of public consensus*," the ministry said, according to a report by Associated Press.

However, the opposition party announced that it would boycott the move. This leaves the prospects for the new policy in doubt, with President Roh Moo-hyun's term set to expire in February. The related legislation may not even be pursued as planned next year if the conservative Grand National Party (GNP)'s candidate, Lee Myung-bak, wins December's presidential election as strongly suggested by current polls, reports Yonhap News agency.

However, according to government surveys, the recognition of the right to conscientious objection now has majority public support. Those who support the move stood at 23.3 percent in 2005 but the figure jumped to 39.9 percent last year. Right after the announcement on July 10 to introduce the social service system, the support rate surged to 50.2 percent, according to a report by The Hankyoreh on 19 September 2007.

Under the government plan, conscientious objectors would be assigned to do the most intensive jobs at social service workplaces. The Sorok Island Hansen's disease facilities, a tuberculosis hospital in South Gyeongsang Province, and around 200 special medical centers are among the candidate workplaces. Currently, there are 19,500 patients are being treated [at these hospitals], and the government is planning to assign a total of 750 such conscientious objectors to care for patients around the clock. Their service term will likely be 36 months, twice as long as those fulfilling their ordinary military service term.

Unlike ordinary social service providers, conscientious objectors will not have to do the one week of basic military training. And after their service term ends, they will also have to do social service during the same time others spend doing reserve force training.

In addition, conscientious objectors will need to be thoroughly screened to be eligible for the substitute services. Their character and any criminal record will also be under consideration regarding whether they can enter the program.

On the same day the Ministry of Defence announced its plan to legalise conscientious objection, the South Korean Cabinet approved a proposal by the Defence Ministry to reduce the compulsory service term for ordinary conscripts by six months by 2014. Under the current law, all physically fit South Korean men ages 18 to 30 must serve at least two years in the military.

Sources: Young-il Hong: Jehovah's Witnesses and conscientious objection in Korea, The Broken Rifle No 59, November 2003; Associated Press: S.Korea may allow alternative service, 18 September 2007, Yonhap News Agency, News Summary 19 September 2007, The Hankyoreh, 19 September 2007

From: http://www.wri-irg.org/pubs/upd-0710.htm. Accessed 12 February 2008.

FINDINGS AND REASONS

While there is no copy of the applicant's Republic of Korea passport on file, based on the oral evidence of the applicant, the Tribunal finds that the applicant is a citizen of South Korea and assesses his claim against that country.

The applicant claims that he does not wish to do compulsory military service in South Korea. He claims that if he returns to South Korea he will be required to undertake compulsory

military service and that if he refuses, he will be imprisoned with 'criminals' for evading his compulsory military service and will receive a criminal record

The independent country information states that this is a 'universal' compulsory military service which applies to all males age 19 and over. There is a medical call-up at age 19 which then allocates people to six categories of service, ranging from active military service to inactive service, which includes the categories of supplementary military service and completely exempt from military service. Exemption is possible on a number of grounds including "physical or mental deficiencies" There is a minimum term of service, ranging from 24 months in the army to 28 months in the airforce. All those who have completed active military service must perform 160 hours of reserve training every 8 years. Punishment for refusing to serve is up to three years in prison.

As to whether compulsory military service law can constitute persecution within the meaning of the Refugees Convention, the dominant view is that where such a law is a 'law of general application' which is 'appropriate and adapted to achieving some legitimate object of the country concerned', and where punishment for refusal to serve is not applied in a selective or discriminatory way, then it will not be seen as persecution under the Convention as it lacks the necessary selective quality. That is, without evidence of selectivity in its enforcement, conscription will generally amount to no more than a non-discriminatory law of general application. This is consistent with High Court authority that the basis for persecution is not to be found in the motivations or reasons of the person refusing but in the motivations of the persecutor: for example, see *MIMA v Haji Ibrahim (2000) 204 CLR 1*.

However, it is observed that the law on this issue has been considered to be "somewhat unsettled" (As North J observed in *SZAOG v MIMIA [2004] FCAFC 316 (*Beaumont, North & Emmett JJ, 26 November 2004) at [19]). It has also been observed more generally that the significance for Convention purposes of an objection to undertaking compulsory military service has been the subject of developing legal treatment in recent years. However, what *is* settled is that the conclusions of this Tribunal will depend on the circumstances in this particular case.

In this case, there was a significant delay in the applicant lodging his protection visa application. It was submitted over several months after his arrival in Australia.

The applicant submitted that the reason for this delay was that he did not know about the refugee system here until much later. Even though he stated in his protection visa application that he could speak, read and write English, he claimed not to speak or read English well enough to find any information about refugee status here. He claimed that, even though he attended Korean church and lived with other Koreans here in Australia, the Koreans *he* spoke to did not know anything of refugee status or could not help him. He claimed to not have been able to find anything out about refugee status on the internet, with which he is familiar.

It is well established that delay in applying for refugee status is a relevant consideration for a Tribunal. In *Selvadurai v MIEA & Anor, (1994) 34 ALD 346*, the Tribunal had taken into account the fact that the applicant did not lodge his refugee status application until some 20 months after he had arrived in Australia and just prior to the expiration of his visa. Heerey J said that this was a legitimate factual argument and an obvious one to take into account in assessing the genuineness, or at least the depth, of the applicant's alleged fear of persecution. It was a rational consideration open on the material.

The Tribunal finds that, without further explanation, the applicant's reasons for the delay in making his application are implausible. The Tribunal considers that, if as claimed, the applicant did not know about seeking asylum in Australia before he arrived here, he would have known about this shortly after his arrival The Tribunal finds that he would have had sufficient English skills to make some enquiries of English-speakers, given his English reading/writing /speaking skills claim in his protection visa application

Further, on his evidence the applicant had contact with the Korean speaking population here, at his residence and at Korean church. The Tribunal finds it likely that either his co-residents or church members would have told him about refugee statue here in Australia. He also states he is familiar with the internet which would also give him access to general Australian refugee information from a number of sources in English, which, given the Tribunal's findings earlier, it finds he would be able to understand.

However, the Tribunal noted the applicant's evidence at hearing that he felt persecuted by the general Korean community, both in the past and also here in Australia. Again, it is difficult for the Tribunal to know whether this perspective was previously held or whether it has only arisen because of his circumstances The Tribunal also noted the oral submission of the representative at the hearing that the applicant was much worse when she first met him than he was at hearing. The applicant's evidence on this was that he had had these types of problems since his family's crisis.

Thus, on the evidence before it, the Tribunal cannot be satisfied that the delay in the applicant lodging his protection visa application was not due to the applicant's circumstance Hence, the Tribunal does not draw any adverse inference on the well-foundedness of the applicant's fear of harm and in regards his credibility generally from his delay to lodge his protection visa application.

The Tribunal now turns to whether the applicant's specific claims in regards his fear of persecution are credible and well-founded.

As to whether the Tribunal accepts that he has not completed, and is required to complete, his compulsory military service, information from a website provided by the applicant does not explicitly state as such.

Essential to the applicant's claim is that he does not want to do compulsory military service because he neither wishes to kill or be killed. From this evidence, the Tribunal concludes he does not want to do any 'active' military service. He states that he is religious and has been a Christian since he was young and that this influenced his views on compulsory military service but he does not claim that compulsory military service is against his chosen religion or that others of his religion refuse such service. At other times he suggests there may be a political reason for his opposition to service.

The Tribunal is prepared to accept that the applicant is a Christian and has a dim view of Korean politics because it causes the retention of compulsory military service The Tribunal also accepts that he does not want to do *active* military service because he neither wishes to

kill or be killed. The Tribunal is also prepared to accept that the applicant is genuinely opposed to active compulsory military service, in that his morality says he should not do it.

However, the fact that the applicant does not wish to do active compulsory military service does not necessarily mean that he will face harm should he return.

While it may be that the applicant does not have a valid right to travel because he has not completed his compulsory military service, this does not automatically mean he will be sought out and charged and imprisoned by the South Korean authorities after his return for a failure to complete compulsory military service. On the applicant's own evidence, he says he will be called up to do compulsory military service and if he is required to do it and fails to, there will be criminal consequences.

However, the Tribunal also considers that it is possible that by travelling overseas, it may be imputed upon the applicant that he has refused to do his compulsory military service. The Tribunal accepts that, in such circumstances, the applicant will refuse to do such service and may be criminally punished as a result. The Tribunal accepts that this would amount to serious harm.

As to whether the applicant faces a "real chance" of serious harm, the Tribunal notes that this must be a substantial chance, as distinct from a remote or far-fetched possibility. However, it may be well below a 50 per cent chance. According to Mason CJ in *Chan v MIEA* (1989) 169 CLR 379, the expression "a real chance":

> … clearly conveys the notion of a substantial, as distinct from a remote chance, of persecution occurring. ... If an applicant establishes that there is a real chance of persecution, then his fear, assuming that he has such a fear, is well founded, notwithstanding that there is less than a fifty per cent chance of persecution occurring. This interpretation fulfils the objects of the Convention in securing recognition of refugee status for those persons who have a legitimate or justified fear of persecution on political grounds if they are returned to their country of origin.

Thus, on the evidence before it, the Tribunal does not consider the possibility of serious harm either far fetched or remote in this case and is prepared to find that there is a real chance of the applicant facing serious harm should he return to South Korea, relating to his failure to undertake active compulsory military service, either now or in the foreseeable future

The Tribunal must now consider whether the serious harm, which it accepts there is a real chance the applicant will face, constitutes persecution for a Convention reason. The potentially relevant Convention reasons in the circumstances of this case are religion, political belief and membership of a particular social group.

The evidence before the Tribunal as to why the applicant's religious or political views would stop him from undertaking compulsory military service was somewhat vague and limited in detail.

The applicant was unable to provide evidence that it was a tenet of his professed religion, Christianity, to refuse compulsory military service or that others of his chosen religion have refused to do compulsory military service, active or otherwise.

The notion of 'community' is usually central to punishment for a chosen religious belief, as witnessed by the treatment of Jehovahs Witnesses in South Korea, who, as conscientious objectors, refuse to do compulsory military service and are imprisoned for this. However, as stated in *Wang v MIMA* (2000) 105 FCR 548, Merkel J, with whom Gray J agreed, observed that for the purposes of the Convention, the Courts have generally taken a broad view of what constitutes the practice of religion. His Honour took into account Article 18 of the *Universal Declaration of Human Rights* (UDHR) which states:

> Everyone has the right to freedom of thought, conscience and religion: this right includes freedom to change his religion or belief, and freedom, **either alone or in community with others** and in public or private, to manifest his religion or belief in teaching, practice, worship and observance. [emphasis added]

Whether an individual applicant has a well-founded fear of being persecuted for reasons of religion requires an assessment in light of all the circumstances in a case, including, where relevant, the "central tenets" of the religion, how the applicant would be likely to manifest his or her religious beliefs and the likelihood of that manifestation attracting a persecutory reaction from the authorities. See *Pei Lan He v MIMA* [2001] FCA 446 (Ryan J, 23 April 2001).

The applicant has said that he has been a Christian since he was young and believes in God. He also said that he does not wish to kill, or be killed. The Tribunal accepts his evidence in this regard. The Tribunal also accepts that 'thou shall not kill' is a central tenet of Christianity, being one of the Ten Commandments.

The Tribunal also accepts that while the applicant may be refusing to do compulsory active military service for reasons of self-preservation or personal morality, he is also doing this for reasons of his religious beliefs, as these are the likely source of his moral beliefs to not kill. It is trite to say that Christianity is a diverse religion with many personal interpretations of what it means to be a Christian. To act as an individual on your religious beliefs does not mean that you are acting outside of your religion or faith.

The Tribunal also refers to the Federal Court case of *Vitalis Ananze Okere v MIMA (1998) 87 FCR 112*, where it was held by Branson J that for the purposes of s.36 of the Migration Act, Article 1A(2) of the Refugees Convention is to be construed according to the rules applicable to the interpretation of treaties. Article 31 of the Vienna Convention calls for a holistic approach in which primacy is to be given to the written text of the Convention but the context, object and purpose of the treaty must also be considered. The case of *Applicant A v MIEA (1997) 190 CLR 225* was referred to.

Justice Branson found that it does not logically follow that individuals are not persecuted for reason of their race or religion if they are persecuted for reason of what they as individuals have done. The protection of the Convention is not intended to be denied to all persons who have a well-founded fear of persecution for reason of what they have done as individuals. The question of whether an individual has a well-founded fear of persecution for reason of his or her race or religion should be answered by "applying common-sense to the facts of each case".

Justice Branson found that the decision in that case was based on a false dichotomy, that within the meaning of Article 1A(2) of the Convention the applicant either faces harm for reason of his religion or he faces harm by reason of what he has done as an individual. The

Convention does not require the imposition of such a dichotomy upon the facts of any particular case. The Tribunal was required in that case to ask itself whether, applying common-sense to the facts which it accepted, the applicant had a well-founded fear of persecution the true reason for which was his religion.

Justice Branson noted that history supports the view that religious persecution often takes "indirect" forms. She states:

> To take only one well known example, few would question that Sir Thomas More 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.

Applying this broad view of religious belief under the Convention to the facts of this case, the Tribunal finds that the applicant has a 'conscientious objection' to compulsory military service for reasons of his religious belief

The Tribunal then considered whether the punishment of the applicant for refusing to undertake compulsory active military service law would, in light of its findings as to the applicant's religious beliefs, constitute persecution for reasons of religion.

As noted earlier, it is argued in cases such as this that, where a law is a 'law of general application' which is 'appropriate and adapted to achieving some legitimate object of the country concerned', and where punishment for refusal to serve is not applied in a selective or discriminatory way, then it will not be seen as persecution under the Convention as it lacks the necessary selective quality.

The Tribunal finds that this is not a 'law of general application', as it only applies to males 19 and over in South Korea. Nevertheless, it can be seen to have a general application to such men as there are no general exceptions to active service, bar for medical and exceptional family circumstances. There is currently no room for objection to active service based on religious or other grounds. The independent country information shows that conscientious objection to compulsory military service is a contentious issue in South Korea at present.

In the Federal Court case of *Erduran v MIMA* (2002) 122 FCR 150, Gray J held 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.** (emphasis added)

His Honour adopted a similar approach in *Applicant VEAZ of 2002 v MIMIA* [2003] FCA 1033, concluding in that case that the Tribunal erred in treating Turkish laws relating to national service as laws of general application. His Honour stated:

> 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.

In *VCAD v MIMIA* [2004] FCA 1005, Gray J's analysis in *Erduran* was accepted by both parties as correct, and accepted by the Court in the absence of argument to the contrary. Accordingly the Court held that the Tribunal had 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. Justice Kenny held that this was "plainly erroneous", adding that 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.

Finally, in *SZAOG v MIMIA* [2004] FCAFC 316, Emmett J (with Beaumont J agreeing) expressed the opinion, consistently with Gray J's opinion in *Erduran*, that:

> [w]hile it may be possible for conscientious objection itself to be regarded as a form of political opinion, the question would still need to be asked whether the conscientious objection to military service had a political or religious basis or whether conscientious objectors, or some particular class of them, could constitute a particular social group. If a person would be punished for refusing to undergo military service by reason of conscientious objection stemming from political opinion or a religious view, or the conscientious objection is itself political opinion, it may be possible to find that the person is liable to be persecuted for a Convention reason.

High Court authority on the nature of persecution suggests that it requires conduct on the part of the persecutor that is motivated by the applicant's possession of Convention related attributes or characteristics. Justice French stated in *Aksahin v MIMA* [2000] FCA 1570, referring to the High Court's decision in *Chen Shi Hai*:

> The [High] Court expressly approved the proposition that the apprehended persecution which attracts Convention protection must be motivated by the possession of the relevant Convention attributes on the part of the person or group persecuted (par 34). The accident that the particular political or ethnic sympathies of a person may cause him or her to disobey a law of general application, does not render the sanction for non-compliance persecution for a Convention reason.

See also *Mehenni v MIMA* [1999] FCA 789. The approach taken in *Erduran, VEAZ, VCAD and SZAOG* does not sit easily with this reasoning However, it appears to have gained acceptance in the Federal Court and the Federal Magistrates Court (see *VWPZ v MIMIA* [2005] FMCA1552).

Following Gray J's suggested approach in *Erduran v MIMA*, the Tribunal has found that the applicant's refusal to undergo compulsory active military service arises from a conscientious objection to such service based on his religious beliefs. The Tribunal has also found that he has a real chance of serious harm for refusing to undergo compulsory military service by reason of his conscientious objection.

It is appropriate at this stage for the Tribunal to consider whether the compulsory military service laws in South Korea are 'appropriate and adapted to achieving some legitimate object of the country concerned'.

The Tribunal refers to the 2006 UNHRC report on South Korea's compliance with the ICCPR and its findings on compulsory military service in South Korea, as referred to in the independent country information. This report notes that there is no legislative limit on the number of times a person may be recalled and subjected to fresh penalties of up to 3 years imprisonment, that those who have not satisfied military service requirements are excluded from employment in government or public organisations and that convicted conscientious objectors bear the stigma of a criminal record. It recommends that the State Party take all measures to recognise the right of conscientious objectors to be exempted from military service.

The Tribunal would also add from the independent country information that there is no system of alternative active military service available in South Korea, such as community or other work, although this has been discussed widely and publicly. Further, from the documentary evidence in this case, it would appear that a person can only leave South Korea under restrictions where they have not completed their compulsory military service.

The South Korean Government's response to the UNHRC report was that the development of nuclear weapons by North Korea poses a serious threat to the existence and security of the Republic of Korea and as a result, the Government does not recognise alternative forms of service for conscientious objectors to military service, as it may result in a rapid decline in its defence capability.

The South Korean Government further argued that it has considered a system of alternative forms of service for conscientious objectors, but it is concerned that such a system may mean that conscientious objectors become quite numerous. It may create a violation of the principle of equality in service and that together with the decreasing birth-rate, the introduction of alternative service may prompt a national security crisis.

The Tribunal then turned to the UNHRC report under the Optional Protocol to the ICCPR concerning two conscentious objectors from South Korea. This report's conclusion, after examining the submissions of the South Korean Government, is that compulsory military service, without recognition of the right of conscientous objection, is a breach of Article 18 of the ICCPR. It notes that most countries with compulsory military service are moving towards, or already have, a form of alternative service. In its view, the South Korean State was under an obligation to provide the complainants with an effective remedy, including compensation, and had an obligation to avoid similar violations of the Covenant in the future.

As to who is to determine whether a country's laws are "appropriate and adapted to achieving a legitimate object...", it would seem clear that it is *not* the country in question. In the Tribunal's view, the country's Government may have many competing interests that it may

have to balance, apart from meeting its international human rights obligations, such as political interests and upcoming elections, perceived public opinion and the like.

Further, the Tribunal is of the view that what is "appropriate and adapted…" depends on the circumstances at the time of consideration. Where such a law may have been "appropriate and adapted…" at the time of the Korean ceasefire and at the height of the Cold War, it may not be appropriate now.

The Tribunal considers that the opinion of the ICCPR Human Rights Committee, as a widely respected and independent UN body with expertise in the application of the ICCPR (to which South Korea is both a signatory under the Convention and to the Optional Protocol), is relevant and persuasive in leading the Tribunal to form the view that the compulsory military service law in South Korea is not 'appropriate and adapted to achieving some legitimate object of the country concerned'. While the compulsory military service law may be directed at achieving a legitimate object of South Korea, the Tribunal does not consider that such law is appropriate and adapted to achieving that object in the current circumstances as it does not allow for conscientious objection.

The Tribunal notes the recent announcement of the South Korean Ministry of Defence on 18 September 2007 that it is considering allowing conscientious objectors to do substitute service However, the Tribunal finds that at the time of its decision, it has not in fact been introduced and, notwithstanding that it may be introduced in the reasonably foreseeable future, the Tribunal is satisfied that at the time of this decision there is a "real chance" that the applicant will be punished for refusing to undertake compulsory military service.

While the law allowing for compulsory military service is, on its face, a non-discriminatory law of general application, following *Erduran*, the Tribunal has found that in truth it indirectly discriminates against the applicant for reasons of religion. Furthermore, it is not currently appropriate and adapted to the achieving a legitimate State object.

The Tribunal has found that punishment of the applicant for refusing to undertake compulsory military service would involve indirect discrimination against the applicant. The Tribunal is satisfied that the essential and significant reason for this is the applicant's religious beliefs (s.91R(1)(a)); that this would involve serious harm (s.91R(1)(b)); and that it would involve systematic and discriminatory conduct (albeit indirectly) (s.91R(1)(c)). The Tribunal is therefore satisfied that the applicant faces a real chance of persecution for a Convention reason.

As to whether the applicant could live safely elsewhere in South Korea, in the Tribunal's view the real risk of serious harm extends to the entire country, because of the nature of this law. Further, there is no material which indicates that the applicant has any right of residence in any third country, being only a citizen of South Korea and being currently physically in Australia.

As a result, the applicant has a real chance of persecution for refusing to undergo compulsory military service by reason of his conscientious objection, for a Convention reason, religion, should he return to South Korea, both now and in the foreseeable future.

The applicant, having a well founded fear of persecution for a Convention reason, is therefore a person owed protection obligations by Australia and this matter should be remitted to the Department with a relevant direction for the consideration of outstanding criteria for the visa sought.

CONCLUSIONS

The Tribunal is satisfied that the applicant is a person to whom Australia has protection obligations under the Refugees Convention. Therefore the applicant satisfies the criterion set out in s.36(2) for a protection visa.

DECISION

The Tribunal remits the matter for reconsideration with the direction that the applicant satisfies s.36(2)(a) of the Migration Act, being a person to whom Australia has protection obligations under the Refugees Convention.

I certify that this decision contains no information which might identify the applicant or any relative or dependant of the applicant or that is the subject of a direction pursuant to section 440 of the Migration Act 1958.
Sealing Officer's I.D. PMRTKS