**NOTE: THE CONFIDENTIALITY OF THE NAME OR IDENTIFYING PARTICULARS OF THE APPELLANT AND OF HIS CLAIM OR STATUS MUST BE MAINTAINED PURSUANT TO S 151 OF THE IMMIGRATION ACT 2009.**

**IN THE HIGH COURT OF NEW ZEALAND**
**AUCKLAND REGISTRY**

**CIV-2013-404-004462**
**[2014] NZHC 2779**

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|---|---|
| UNDER THE | Judicature Amendment Act 1972 |
| IN THE MATTER OF | A decision made by the Immigration and Protection Tribunal pursuant to s 198(1) of the Immigration Act 2009 |
| AND | |
| IN THE MATTER OF | an application for judicial review |
| BETWEEN | X<br>Applicant |
| AND | IMMIGRATION AND PROTECTION TRIBUNAL<br>First Respondent |
| | REFUGEE AND PROTECTION OFFICER<br>Second Respondent |

Hearing: 20 October 2014

Appearances: D Mansouri-Rad for Applicant
M Coleman and R Garden for Second Respondent

Judgment: 7 November 2014

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## JUDGMENT OF VENNING J

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**This judgment was delivered by me on 7 November 2014 at 3.45 pm, pursuant to Rule 11.5 of the High Court Rules.**

**Registrar/Deputy Registrar**

**Date.....**

Solicitors: Mansouri Law Office, Auckland
Crown Law Office, Wellington

[1] X is an Iranian national aged 18. He seeks to review a decision of the Immigration and Protection Tribunal (IPT) declining his appeal against a decision of the Refugee Status Branch of the New Zealand Immigration Service (RSB).[1] The RSB declined his application for refugee status on 23 November 2012.

[2] X was granted leave to bring the review by Faire J in a decision delivered on 14 July 2014.[2]

**Background**

[3] X has been living and studying in New Zealand since the age of 14. Although his parents remain in Iran he has other relatives living in New Zealand.

[4] On 26 July 2012 X applied for refugee status (under s 129 of the Immigration Act 2009 (the Act)). He also applied to be recognised as a protected person under the 1984 Convention against Torture (s 130 of the Act) and the 1996 International Covenant on Civil and Political Rights (the ICCPR) (s 131 of the Act). X's applications were made on the grounds that if he returned to Iran he would be obliged to perform compulsory military service which he objected to. He does not believe in Islam but will be denied the right to renounce it. Also, he will have no opportunity to enter tertiary education in Iran. He is "westernised" to the extent he has lived in New Zealand for four years and attended high school in Auckland from 2010 to 2012.

[5] X's appeal to the IPT was heard on 10 June 2013. The IPT dismissed the appeal in a decision delivered on 16 September 2013. Although accepting X's credibility the IPT considered that his objection to compulsory military service did not give rise to a real chance of persecution. Further, he was not at risk of any breach at the core of his art 18(1) ICCPR right to freedom of religion.[3] Next, although he had lived in New Zealand for the last four years, he had spent the first 14 years of his life in Iran and would be able to re-adapt to its culture and way of life

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1 *X v Immigration and Protection Tribunal* [2013] NZIPT 800452.
2 *X v Immigration and Protection Tribunal & Anor* [2014] NZHC 1647.
3 *X v Immigration and Protection Tribunal*, above n 1 at [61]–[66].

and his "westernisation" did not create a real chance of persecution, either on its own account or as part of the overall assessment of risk to him.[4]

[6] As there was no real chance of persecution, there was no need to consider whether there was a Convention reason for the persecution.[5]

[7] For similar reasons the IPT rejected the claims for protection under the Convention against Torture and the ICCPR.

**Scope of review**

[8] The first issue is the scope of the review. Mr Mansouri-Rad submitted that, as leave had been granted to bring the application for review, it was open for X to challenge all aspects of the IPT's decision in the course of the review.

[9] In response, the second respondent submitted that leave was only granted on the limited issue of whether, in light of the decision of *RT (Zimbabwe) v Secretary of State for the Home Department*, the IPT erred in finding the requirement that X would have to declare himself a Muslim and perform Islamic rituals and prayers while in the military would not constitute serious harm.[6]

[10] Mr Mansouri-Rad submitted that the restriction on review contemplated by s 249 of the Act relates principally to the matters described in subsections (1) and (1A). He also referred to the concluding paragraphs [67] and [68] of Faire J's decision confirming the grant of leave and submitted that there was no express limitation in those paragraphs on the scope of the review.

[11] However, s 249(1C) requires the Court to have regard to whether there are issues which, by reason of their general or public importance, ought to be submitted to the Court for review. Implicit in that requirement is the possibility there may be other issues in the IPT decision which do not meet that criteria. If such issues do not meet the criteria, then they should not form part of the substantive review hearing.

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4 *X v Immigration and Protection Tribunal*, above n 1 at [71].
5 *X v Immigration and Protection Tribunal*, above n 1 at [72].
6 *RT (Zimbabwe) v Secretary of State for the Home Department* [2012] UKSC 38, [2013] 1 AC 152.

[12] Further, the paragraphs identified by Mr Mansouri-Rad in Faire J's decision have to be read in the context of the immediately preceding paragraphs, particularly [54]–[65]. I note that at [55]–[56] the Judge rejected X's submission that the IPT's failure to properly consider evidence as to the consignment of conscripts into the different military forces in Iran could be said to be a matter of public or general importance. It is implicit in that reasoning the Judge would not have granted leave for review in relation to that ground.

[13] At [57]–[65] the Judge then went on to consider whether the Tribunal decided that a refugee claimant can be expected to lie and give false evidence to authorities, and pretend to be a Muslim in order to avoid persecution. The Judge then discussed the case of *RT (Zimbabwe)* in detail before concluding that aspects of the IPT's approach differed from that of the Supreme Court of the United Kingdom in *RT (Zimbabwe)* in two respects: first, it treated the deception X would have to practise as the persecution, and secondly, it approached the margin/core distinction of the right on the basis of the duration of the persecution rather than on the nature of the exercise of the right being circumscribed.[7] It was for those reasons that the Judge granted the application for review. The point is made clear by the Judge's conclusion on those points:

> [66] In my opinion, these two differences are sufficient to consider that the plaintiff has a seriously arguable case that the Tribunal made an error of law. The bounds of the requirement to lie and the core/marginal distinction are both areas of law that are constantly being developed. On the face of the Tribunal's decision there are some differences between its approach and that of the Supreme Court. I therefore consider that it is appropriate to grant leave to seek judicial review of the Tribunal's decision.

[14] Mr Mansouri-Rad also submitted that it was relevant Cooper J had declined the second respondent's request to direct the plaintiff to re-plead following the grant of leave. However, Mr Mansouri-Rad attaches too much significance to what was said during a case management conference. It is apparent from Cooper J's minute that the Judge did no more than hold the issue of the scope of the review over to the substantive hearing.

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7 *X v Immigration and Protection Tribunal & Anor*, above n 2, at [65].

[15] Finally, to interpret the matter in the way Mr Mansouri-Rad advocates would be contrary to the purpose of s 249 which is to place a limit on the extent of review. I proceed with the review on the basis it is limited in scope as identified by Faire J, namely whether the IPT erred in law by its approach to the deception and margin/core issues.

**Approach to the review**

[16] Counsel addressed submissions on the approach the Court should take to the review. The outcome does not turn on whether a "hard look" or "Wednesbury reasonable" approach is taken. I approach this review on the basis that it is not the Court's role on a judicial review to undertake a broad reappraisal of the factual findings of the Tribunal.[8]

**Discussion**

[17] The aspects of the statement of claim for review relevant to the issues on which leave was granted are:

> 15. D) The Tribunal's determination that [X] being required to declare himself as Muslim and perform Islamic rituals and prayers during military service, did not constitute serious harm, is unreasonable. ...
>
> …
>
> 28. The Tribunal found that during his military service [X] would be required to declare himself as "Muslim" and he would also be required to perform Islamic rituals and prayers despite the fact that he did not believe in Islam and was "strongly un-Islamic". …
>
> 29. The Tribunal also found that in order to "avoid the harm which will flow from being seen as an apostate", [X] will need to declare himself as "Muslim" and would also need to perform Islamic rituals and prayers against his beliefs. …
>
> 30. The Tribunal made an unjustifiable assumption that in order to avoid harm [X] would declare himself as Muslim and would also attend the religious ceremonies and prayers during his military service… . There was no evidence before the Tribunal that [X] would do so.
>
> 31. In dismissing [X]'s appeal the Tribunal failed to consider his predicament if [plaintiff] does not declare himself as Muslim and

[8] *Attorney-General v Tamil X* [2010] NZSC 107, [2011] 1 NZLR 721 at [45].

does not attend the religious ceremonies and prayers during his military service.

32. The Tribunal also failed to consider that [X]'s apostasy may come to the military authorities' attention during his military service and the possible consequences.

33. The Tribunal also failed to take into consideration that [X]'s apostasy may come to the military authorities' attention not solely through [X]'s own action or omission but by other means as discussed in *SGKB v Minister for Immigration & Multicultural & Indigenous Affairs* [2003] FCAFC 44 (18 March 2003).

[18] The reasoning of the IPT on the issue of the need for X to record his religion as Islam and to attend prayers and religious instruction to avoid adverse consequences is found in the following passages of its decision:

[57] Military service will require the appellant to engage with the Iranian authorities in a number of ways. He will need to enlist, which will involve providing information which will include confirmation of his religion. During two years of military service, he will likely be required to attend political and religious classes periodically. As to prayers, the anonymous author of the *Tehran Bureau* article reported that conscripts were expected to attend prayers but it was not enforced, even at a *Sepah* base.

[58] We accept that, if the appellant is to avoid adverse consequences during his military service, he would need to record his religion as Islam and periodically comply with Islamic instruction such as classes (and possibly prayers).

…

[60] Applying this to the present proceedings, if the appellant is to avoid the harm which will flow from being seen as an apostate, he will need to pretend to be Muslim on enlistment, and then to engage periodically in instructional classes and possibly prayers. The question which arises is whether this is requiring him to abandon or forego the exercise of a fundamental right, in order to avoid being persecuted.

…

[64] The most direct interference with the appellant's right to manifest his belief will be the need for him to assert that he is a Muslim on enlisting.

[65] It is accepted that such a pretence would amount to a breach of the appellant's right to manifest his religion. The issue, however, is whether the intensity and duration of the breach are such that it can truly be said to go to the core of the right. In contrast to the claimant in *Refugee Appeal No 74665* (7 July 2004), who faced a lifetime of unrelenting self-oppression, the appellant here would face one

> fleeting pretence to an individual who he will never meet again, whose opinion is of no consequence to him and in circumstances in which none of the people who are important to the appellant – be it family, friends, teachers or employers – is a party to the pretence. It is unpleasant and, of course, the appellant ought not to have to do it, but the breach is so transient and inconsequential that it is appropriately described as a breach at the margins of the right to freedom of thought, conscience and religion only. As was stated in *Refugee Appeal No 74665* (7 July 2004) at [124]:
>
> > "The Refugee Convention does not protect persons against any and all forms of even serious harm. Refugee recognition is restricted to situations in which there is a risk of a type of injury that is inconsistent with the basic duty of protection owed by a state to its population."
>
> [66] The modest and fleeting breach occasioned by the appellant needing to assert that he is Muslim on his enlistment falls far short of "being persecuted", which is the standard at which the basic duty of protection owed by the state to its population can be said to have failed.

[19] The reasoning of the IPT, particularly at [65] and [66] of its decision, where it found the requirement for X to declare his religion as Islam (and earlier to attend regular religious instruction and prayers) to not breach his right to freedom of religion as being at the margins is, on its face, contrary to the approach of the Supreme Court of the United Kingdom in *RT (Zimbabwe).* In that case the four claimants were Zimbabwean nationals who claimed asylum in the United Kingdom on the grounds of a fear of persecution if they were returned to Zimbabwe. The Asylum and Immigration Tribunal accepted that anyone in Zimbabwe who could not demonstrate positive support for the ruling party or alignment with its regime would be at risk of persecution but dismissed the appeals on the basis that it found the claimants held no political beliefs but, if necessary, they would be able to demonstrate loyalty to the regime so there was no real risk of them being subjected to ill treatment.

[20] The Court of Appeal allowed the appeals, holding the asylum cases should not be defeated on the ground the claimants would lie about their absence of political beliefs to avoid persecution. The Supreme Court dismissed the Home Secretary's appeals from that decision. In doing so Lord Dyson confirmed the *HJ (Iran)* principle (that it is no answer to a claim for asylum that an applicant could conceal his sexual identity in order to avoid the persecution that would follow if he did not

do so)[9] applied to any person who had political beliefs and was obliged to conceal them in order to avoid persecution that he would suffer if he were to reveal them.[10] He held that it was improper to focus on the strength of any political belief.[11]

[21] That was also the approach taken by Gummow & Hayne JJ in the *Appellant S395/2002 v Minister for Immigration and Multicultural Affairs* case.[12] In a passage under the heading "'Discretion' and 'being discreet'" they said at [80]:

> If an applicant holds political or religious beliefs that are not favoured in the country of nationality, the chance of adverse consequences befalling that applicant on return to that country would ordinarily increase if, on return, the applicant were to draw attention to the holding of the relevant belief. But it is no answer to a claim for protection as a refugee to say to an applicant that those adverse consequences could be avoided if the applicant were to hide the fact that he or she holds the beliefs in question. And to say to an applicant that he or she should be 'discreet' about such matters is simply to use gentler terms to convey the same meaning. The question to be considered in assessing whether the applicant's fear of persecution is well-founded is what may happen if the applicant returns to the country of nationality; it is not, could the applicant live in that country without attracting adverse consequences.

[22] After referring to the above passage, Lord Dyson continued:

> 27 I made much the same point in the *HJ (Iran)* case [2011] 1 AC 596, para 110:
>
> > "If the price that a person must pay in order to avoid persecution is that he must conceal his race, religion, nationality, membership of a social group or political opinion, then he is being required to surrender the very protection that the Convention is intended to secure for him. The Convention would be failing in its purpose if it were to mean that a gay man does not have a well-founded fear of persecution because he would conceal the fact that he is a gay man *in order to avoid persecution* on return to his home country."

[23] The principle also applies to the right not to hold religious views.[13] Lord Dyson confirmed this in rejecting the submission that the *HJ (Iran)* principle did not apply to a person who had no interest in politics because, in their case, false support would be interference at the margin of the right, rather than at the core:

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9 *HJ (Iran) v Secretary of State for the Home Department* [2010] UKSC 31, [2011] 1 AC 596.
10 *RT (Zimbabwe) v Secretary of State for the Home Department*, above n 6, at [42].
11 At [45].
12 *Appellant S395/2002 v Minister for Immigration and Multicultural Affairs* [2003] HCA 71, (2003) 216 CLR 473.
13 *Buscarini v San Marino* (1999) 6 BHRC 638, (2000) 30 EHRR 208 at [34].

42 I would reject this distinction for a number of reasons. First, the right *not* to hold the protected beliefs is a fundamental right which is recognised in international and human rights law and, for the reasons that I have given, the Convention too. There is nothing marginal about it. Nobody should be forced to have or express a political opinion in which he does not believe. He should not be required to dissemble on pain of persecution. Refugee law does not require a person to express false support for an oppressive regime, any more than it requires an agnostic to pretend to be a religious believer in order to avoid persecution. A focus on how important the right not to hold a political or religious belief is to the applicant is wrong in principle. The argument advanced by Mr Swift bears a striking resemblance to the Secretary of State's contention in the *HJ (Iran)* case that the individuals in that case would only have a well-founded fear of persecution if the concealment of their sexual orientation would not be "reasonably tolerable" to them. This contention was rejected on the grounds that (i) it was unprincipled and unfair to determine refugee status by reference to the individual's strength of feeling about his protected characteristic (paras 29 and 121) and (ii) there was no yardstick by which the tolerability of the experience could be measured: paras 80, 122.

43 As regards the point of principle, it is the badge of a truly democratic society that individuals should be free not to hold opinions. They should not be required to hold any particular religious or political beliefs. This is as important as the freedom to hold and (within certain defined limits) to express such beliefs as they do hold. One of the hallmarks of totalitarian regimes is their insistence on controlling people's thoughts as well as their behaviour. George Orwell captured the point brilliantly by his creation of the sinister "Thought Police" in his novel *Nineteen Eighty-Four*.

…

45 There is no support in any of the human rights jurisprudence for a distinction between the conscientious non-believer and the indifferent non-believer, any more than there is support for a distinction between the zealous believer and the marginally committed believer. All are equally entitled to human rights protection and to protection against persecution under the Convention. None of them forfeits these rights because he will feel compelled to lie in order to avoid persecution.

…

55 The application of this principle in any given case raises questions of fact. Persecution on the grounds of imputed opinion will occur if a *declared* political neutral is treated by the regime (or its agents) as a supporter of its opponents and persecuted on that account. But a claim may also succeed if it is shown that there is a real and substantial risk that, despite the fact that the asylum seeker would assert support for the regime, he would be disbelieved and his political neutrality (and therefore his actual lack of support for the regime) would be discovered. It is well established that the asylum seeker has to do no more than prove that he has a well-founded fear that there is a "real and substantial risk" or a "reasonable degree of likelihood" of persecution for a Convention reason: *R v Secretary of State for the Home Department, Ex p Sivakumaran* [1988] AC 958. I do not believe that any of this is controversial. How does it apply to the facts of these cases?
(italics included)

[24] In the present case X's right not to hold any religious beliefs and particularly not to follow Islamic beliefs is a fundamental right recognised by the Convention and confirmed by the authorities cited above. The proper question for the IPT to ask itself in applying the approach suggested by the United Kingdom Supreme Court would be to ask what persecution the plaintiff would suffer if he refused to pretend to be Muslim. That approach can be seen in Lord Rodger's decision in *HJ (Iran)*:[14]

> [82] When an applicant applies for asylum on the ground of a well-founded fear of persecution because he is gay, the tribunal must first ask itself whether it is satisfied on the evidence that he is gay, or that he would be treated as gay by potential persecutors in his country of nationality. If so, the tribunal must then ask itself whether it is satisfied on the available evidence that gay people who lived openly would be liable to persecution in the applicant's country of nationality. If so, the tribunal must go on to consider what the individual applicant would do if he were returned to that country. If the applicant would in fact live openly and thereby be exposed to a real risk of persecution, then he has a well-founded fear of persecution—even if he could avoid the risk by living "discreetly". If, on the other hand, the tribunal concludes that the applicant would in fact live discreetly and so avoid persecution, it must go on to ask itself *why* he would do so. If the tribunal concludes that the applicant would choose to live discreetly simply because that was how he himself would wish to live, or because of social pressures, e g, not wanting to distress his parents or embarrass his friends, then his application should be rejected. Social pressures of that kind do not amount to persecution and the Convention does not offer protection against them. Such a person has no well-founded fear of persecution because, for reasons that have nothing to do with any fear of persecution, he himself chooses to adopt a way of life which means that he is not in fact liable to be persecuted because he is gay. If, on the other hand, the tribunal concludes that a material reason for the applicant living discreetly on his return would be a fear of the persecution which would follow if he were to live openly as a gay man, then, other things being equal, his application should be accepted. Such a person has a well-founded fear of persecution. To reject his application on the ground that he could avoid the persecution by living discreetly would be to defeat the very right which the Convention exists to protect—his right to live freely and openly as a gay man without fear of persecution. By admitting him to asylum and allowing him to live freely and openly as a gay man without fear of persecution, the receiving state gives effect to that right by affording the applicant a surrogate for the protection from persecution which his country of nationality should have afforded him.

[25] Summarising this approach and adopting it to the present case, I consider that the IPT should have determined:

(a) whether X did not believe in Islam;

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[14] *HJ (Iran) v Secretary of State for the Home Department,* above n 9.

(b) whether it was satisfied that people who did not believe in Islam were persecuted when made to undertake military service, particularly in this case, in the likely event he would be conscripted to the Artesh, the regular army; and

(c) whether on the facts of this case X would choose to openly express his non-belief in Islam.

If the answer to (c) is yes, then X has a well-founded fear of persecution, even if he could avoid persecution by lying about his religious persuasion. If the answer to (c) is no, and the plaintiff would lie and pretend to be Muslim then the Tribunal needed to go onto consider:

(d) whether X would lie because of social pressures; or

(e) whether X would lie to avoid persecution.

[26] If the reason that X would pretend to be Muslim was to avoid persecution, then he might have a well founded claim for refugee status.

[27] At [58] of its decision the IPT referred to the "adverse consequences" X would suffer during his compulsory military service. It is not clear whether the Tribunal considered whether these "adverse consequences" amounted to persecution in this case. It is also not clear whether the IPT addressed (c) above, namely, whether X would choose to openly express his non-belief in Islam.

[28] As to what is meant by persecution, that was discussed by Priestley J in *Teitiota v Chief Executive of MBIE*:[15]

> [8] "Persecution" is not defined in the Refugee Convention but clearly encompasses well founded fears to life or freedom on a convention ground, some form of serious harm, or serious violations of civil or human rights. New Zealand has adopted James Hathaway's "human rights" approach to the definition of persecution, which defines persecution as the sustained or systemic violation of basic human rights demonstrative of a failure of state

[15] *Teitiota v Chief Executive of MBIE* [2013] NZHC 3125, [2014] NZAR 162 (footnotes omitted).

> protection. This definition of persecution is also applied in Canada and the United Kingdom.

[29] Section 129(1) of the Act provides that a person must be recognised as a refugee if he or she comes within the meaning of a refugee in terms of the Refugee Convention. Article 1A(2) of the Convention provides that a refugee is a person who:

> ... owing to well-founded fear of being persecuted for reasons of ... religion, … 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; ...

[30] There must be a direct link between the Convention ground and the persecution. A fear of being persecuted is well founded when there is a real as opposed to a remote or speculative chance of it occurring. The standard is objective.[16] Because of its approach as to how X could act to avoid adverse consequences, the IPT did not consider it necessary to determine whether there was a Convention reason for the persecution.

[31] In this case the IPT concluded that X's objection to performing compulsory military service in Iran did not give rise to a real chance of him being persecuted. It was entitled to make that finding on the basis of the material before it, but in going on to find that he was not at risk of any breach of his core right to freedom of religion it fell into error. While it may have been entitled, on the evidence and material before it to conclude that there was no real substantial risk that if X declared his religion as Islam and attended religious instruction he would be discovered, so there would be no adverse consequences to him, it did not address whether there was a real and substantial risk of persecution if he did not. Instead of addressing the harm X would suffer if he did not pretend to be Muslim, the IPT focused on the harm that the plaintiff would suffer through having to pretend to be Muslim. The issue is what might happen to him because he has no belief in Islam when he returned to Iran and was conscripted into the military service, not whether he could live in Iran without attracting adverse consequences by stating his religion as Muslim and attending any prayers and religious instruction while in the military.[17]

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16 *Chan v Minister for Immigration & Ethnic Affairs* (1989) 169 CLR 379 at [16]–[19], and *Refugee Appeal No. 76044* [2008] NZAR 719 at [57].

17 *SGKB v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCAFC 44 at [15], [20]–[23].

[32] To be fair to the IPT, the problem arose in part because X did not directly address the link between his lack of belief in Islam and his potential persecution. In his application he said:

> 11 What do you fear would happen to you if you returned to your home country?
>
> If I return to Iran, I am obliged to do military service for the Islamic regime in Iran. I have fear of Iranian government which is a religious dictatorship. I will be arrested and forced to do military service against my will. I also have fear of "Basij" who treat people so violently.
>
> 12 Why would this happen to you?
>
> As I am almost 18 years old now, I am obliged to serve the Iranian military. The Iranian government is a religious dictatorship and it forces people to believe in Islam. If anyone does not obey them, they will be persecuted. For instance, if someone becomes Christian or has anything to do with Christians, he or she will be [persecuted/arrested] (transcript unclear). Students at school are forced to learn stupid Islamic concepts. ... Due to Islamic rules and ideas, government forces (eg Basij) allow themselves to carry out violent acts against people and *males* in particular. For entry into universities, the government carries out screening tests to check how involved the applicants are in Islamic activities. If they are not involved, they will not be allowed to study at the university. I am opposed to Iranian regime and do not follow Islam. I object to perform military service for this regime. I will explain more in my statement.
>
> 13 What happened to cause this fear?
>
> When I was about 8 years old, I witnessed a government official from the "Basij" producing a big cut on a young lady's arm because her dress was apparently not a full "Hijab".
>
> When I was about 9, I forgot to memorise a few pages of "Quran" as instructed by my teacher, so I got yelled at and they made me to stay out of the class for the whole day.
>
> I remember one of the school staff cutting my hair with scissors in worst possible way because my hair was long and that was not acceptable by school and Islamic standards.
>
> When I was 12 years old, my father got arrested for playing his keyboard in a party He stayed in jail for one night and he got his keyboard confiscated from him.
>
> ...
>
> 17 Do you fear returning to your home country for any other reason?

> Yes
>
> ... for instance, I travelled to Iran in December 2010 to visit my parents. I stayed for about a month. I found it then very hard to adjust to the life in Iran. I had to watch what I was saying, wearing and doing. During the second week I was in Iran, I recall that "Niroye Entezami" forces questioned me while I was sitting in my family car because my hair was long in their view. They mocked me and warned me.

[33] In the course of his statement X expanded on the above but did not provide any further examples of ill treatment. During the IPT hearing X repeated the above and then had this exchange with Mr Treadwell:

> **MR TREADWELL:** Just look at things like prayers and religious classes for a minute. Remember at the beginning I said that you needed to establish that what would happen to you would amount to serious harm – if you have to do your military service and let's say you do need to attend daily prayers and to attend some religious education classes, it might be unpleasant, inconvenient, you may feel that it's a waste of your time. Why would it be serious harm for you?
>
> **MR X:** Well I don't want to serve my government it's a religious dictatorship and it uses the military against its own people, and if I have to go to the military I wouldn't do it even if they put me in a prison, if they beat me up, I wouldn't do it.
>
> **MR TREADWELL:** It's not really –
>
> **MR X**: I don't have –
>
> **MR TREADWELL:** – answering my question. Just park the issue of philosophically not wanting to serve your government. Just deal for the moment with this question of prayers and religious classes. Would they alone amount to serious harm if you had to do those for two years?
>
> **MR X:** In that one, just doing that, if my government was a good government yeah, no, I mean I don't believe in Islam, but if I want to serve my government and help my own people and nation then yeah, but if it was a good government it wouldn't force you to do those religious classes.

[34] Although Mr Mansouri-Rad relied on the references to X being put in a prison or being beaten as supportive of his case of persecution on grounds of religion, in context that is X's assessment of the State's response to his refusal to act against Iranian citizens while in the army, rather than a consequence of him failing to declare his religion as Islam or refusing to attend prayers and instruction. Ms

Coleman properly made the point that it was the claimant's responsibility to establish his claim and to ensure that all relevant information was provided.[18]

[35] On the basis of X's evidence (and the other material before it) it was open for the Tribunal to conclude, as it did, that X's objection to performing military service in Iran did not give rise to a real chance of persecution. The IPT was also entitled to conclude he only faced a remote chance of being drafted into an organisation which carries out human rights violations against civilians. However, it remains the IPT applied the wrong test, and absence of evidence on a relevant consideration cannot be a complete answer to such an error of law.

[36] In coming to that conclusion it is relevant that at [60] of its decision the IPT noted that X could be seen as an apostate. In the case of *SGKB v Minister for Immigration and Multicultural and Indigenous Affairs* the Federal Court of Australia noted the evidence confirmed that:[19]

> …
>
> - Whilst the penalty for apostasy from Islam may be death, it is only rarely imposed. Such a sentence was last passed in early 1992. The offender was granted a reprieve but subsequently murdered.
>
> - Those converts from Islam *"… who go about their devotions quietly are generally not disturbed …"*.
>
> - Harassment by the local mosque is more likely than harassment by the authorities.
>
> - Converts, *"… in almost all cases …"* do not experience problems unless they declare their new religious affiliation upon return to Iran.
>
> …
>
> - Converts working in government and revolutionary organizations face harassment and even dismissal if it becomes known that they have converted.

[37] In light of that authority, there is at least the possibility of serious harm for apostasy. The issue is whether there is a real as opposed to a remote or speculative

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18 Immigration Act 2009, s 135(1) and (2).

19 *SGKB v Minister for Immigration and Multicultural and Indigenous Affairs*, above n 12, at [14] (italics included).

chance of it occurring to X in his circumstances on the basis as found by the IPT that he was more likely to be drafted into the Artesh, the regular army.

[38] The short point is that the IPT did not directly consider the possibility of X being persecuted for religious reasons on his return to Iran if he failed to declare as Muslim. It is no answer to say that X could avoid the risk of persecution by declaring himself to be a Muslim and attend daily prayers and instruction while in the military. The Tribunal should have directly considered what might happen to him if he did not do so in light of the information before it.

[39] The second possible issue identified by Faire J was that the IPT approached the marginal/core distinction on the basis of the duration of persecution, rather than the nature of the exercise of the right being circumscribed. The IPT stated:

> [62] A breach might lie only at the margin of a right because it is tangential, and not fundamental to its exercise. In other cases, a breach might lie only at the margin of a right because it is transient, fleeting or in some other way trivial. The present case can be usefully contrasted with the predicament faced by the appellant in *Refugee Appeal No 74665* (7 July 2004). There, the appellant was faced with the need to hide an integral part of his identity and sense of self-worth, his sexuality, for all time and all persons. Every moment of every day would involve, for him, a pretence without end in which his ability to express himself affectionately and sexually was made impossible. …
>
> [63] In the present case, in the context of a military service which has a finite duration, the appellant will be required to make one assertion that he is a Muslim and will be required to attend period Islamic classes and possibly prayers over what appears to be an eight-month training period (at least, in the *Sepah*). Granted, it will be inconvenient and a waste of the appellant's time to have to sit through classes (and possibly prayers) in which he does not believe. In terms of Article 18(1) of the ICCPR, however, the interference with the appellant's right to freedom of thought, conscience and religion will be minimal because he will not be forced to change his belief (agnosticism) merely because others might voice contrary views to him.

[40] The IPT went on to conclude that any breach of X's right to manifest his religion would be so transient and inconsequential that it is appropriately described as a breach at the margins of the right, and since the breach is on the margins his enlistment in the military would fall short of persecution.

[41] The United Kingdom Supreme Court in *RT (Zimbabwe)* continued to recognise the core/marginal distinction, and approved a decision of the Refugee

Status Appeals Authority that discussed it.[20] However, the examples of rights that would exist at the margin given in *RT (Zimbabwe)* all involved positive acts by the asylum seeker. The examples included the prohibition on a homosexual man adopting a child, denial of the right to marry to post-operative transsexuals, the denial of the right of gay couples to marry, the denial of the right of gay men to engage in sado-masochistic acts, or the fear of persecution if one engaged in a gay rights march.[21] Lord Dyson held that the requirement to lie about political beliefs did not fall on the margins:[22]

> The situation in Zimbabwe… is not that the right to hold political beliefs is generally accepted *subject only to some arguably peripheral or minor restrictions*. It is that anyone who is not thought to be a supporter of the regime is treated harshly. That is persecution.

[42] Also relevant is Lord Kerr's observation at [75]:

> The only basis, therefore, on which denial of their claim to refugee status can be sustained, is that their right not to hold a political opinion lies at the lower end of the core/marginal spectrum. As Mr Dove submitted, such an argument requires to be treated extremely circumspectly. Those instances where the right was found to lie at the marginal end of the continuum all involved a measure of voluntary control over the situation in which the individual who was claiming protection found himself. That is not the position here.

[43] From these comments it would appear that an infringement of a right cannot be seen to be marginal where the situation the asylum seeker finds him or herself in is not of his or her own making. In *RT (Zimbabwe)*, the applicants had no control over whether they would be stopped and forced to demonstrate allegiance to the Zanu PF party. In the present case, X has no control over whether he will be faced with having to declare that he is Muslim when he is conscripted into the army. Thus the imposition on his right to freedom of religion is not marginal, but rather at the core. It is not that he is generally free to disagree with Islam, but cannot do so in particular ways. Rather his freedom of religion is challenged directly, by the requirement that he declare himself to be Muslim when being conscripted. Announcing your faith, or lack of it, when asked, appears to be at the core of the exercise of the right to religious freedom. Therefore it would be a mistake of law to

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20 *RT (Zimbabwe) v Secretary of State for the Home Department*, above n 6 at [20]–[21], [47]–[49], citing *Refugee Appeal No 74665/03* [2005] NZAR 60, [2005] INLR 68.

21 *RT (Zimbabwe) v Secretary of State for the Home Department*, above n 6 at [49]–[50].

22 At [51] (italics included).

consider that because X would only be required to conceal his religious opinion on limited occasions that this would not amount to a violation at the core of his right to freedom of religion.

[44] However, I do nevertheless consider the fact that there will only be limited occasions on which the plaintiff will be required to pretend to be Muslim is relevant. It might be for instance that the limited temporal nature of his requirement to pretend to be Muslim indicates that the level of harm he will suffer if he does not pretend to be Muslim would not amount to persecution. That, however, is not how the IPT approached the problem, and in fact the IPT did not consider whether X would be persecuted if he did not pretend to be Muslim.

**Result**

[45] The application for review is granted. The matter is remitted to the IPT for it to consider whether X might not declare himself as Muslim or might refuse to attend religious instruction and prayers and, if he did, what the consequences could be and whether they could be said to amount to persecution on religious grounds. Can it be said that there would be a real as opposed to a speculative chance of serious harm to X in those circumstances?

**Costs**

[46] X has applied for legal aid. I do not consider this an appropriate case for an order for costs. They are to lie where they fall.

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Venning J