NOTE: THE CONFIDENTIALITY OF THE NAME OR IDENTIFYING PARTICULARS OF THE APPELLANTS/APPLICANTS AND OF THEIR CLAIMS OR STATUS MUST BE MAINTAINED PURSUANT TO S 151 OF THE IMMIGRATION ACT 2009.

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2014-404-001421
[2015] NZHC 510

IN THE MATTER OF	the Immigration Act 2009
AND	
IN THE MATTER OF	an appeal under s 245 of the Immigration Act 2009
BETWEEN	"CV" Appellant
AND	THE IMMIGRATION AND PROTECTION TRIBUNAL First Respondent
	REFUGEE AND PROTECTION OFFICER Second Respondent

Proceedings continued over

Hearing: 18 and 19 November 2014

Counsel: D Mansouri-Rad for the Appellants / Applicants
M G Coleman for the Respondents

Judgment: 18 March 2015

JUDGMENT OF DUFFY J

This judgment was delivered by Justice Duffy
on 18 March 2015 at 2.00 pm, pursuant to
r 11.5 of the High Court Rules

Registrar/Deputy Registrar
Date:

Solicitors: Mansouri Law Office, Auckland
Crown Law, Wellington

CIV-2014-404-001423

IN THE MATTER OF	the Immigration Act 2009
AND	
IN THE MATTER OF	an appeal under s 245 of the Immigration Act 2009
BETWEEN	"CW" Appellant
AND	THE IMMIGRATION AND PROTECTION TRIBUNAL First Respondent
	REFUGEE AND PROTECTION OFFICER Second Respondent

CIV-2014-404-001427

UNDER	the Judicature Amendment Act 1972
IN THE MATTER OF	a decision made by the Immigration and Protection Tribunal pursuant to Section 198(1) of the Immigration Act 2009
AND	
IN THE MATTER OF	an application for Judicial Review
BETWEEN	"CW" Applicant
AND	THE IMMIGRATION AND PROTECTION TRIBUNAL First Respondent
	REFUGEE AND PROTECTION OFFICER Second Respondent

CIV-2014-404-001430

UNDER	the Judicature Amendment Act 1972
IN THE MATTER OF	a decision made by the Immigration and Protection Tribunal pursuant to Section 198(1) of the Immigration Act 2009
AND	
IN THE MATTER OF	an application for Judicial Review
BETWEEN	"CV" Applicant
AND	THE IMMIGRATION AND PROTECTION TRIBUNAL First Respondent
	REFUGEE AND PROTECTION OFFICER Second Respondent

[1] The applicants are two brothers who each received adverse decisions on their respective appeals to the Immigration and Protection Tribunal ("the Tribunal") regarding a refusal to grant them refugee status. They now come to this Court seeking to engage the next steps that are available to them under the Immigration Act 2009 ("the Act").

[2] The second respondent, the Refugee and Protection Officer, takes an active role in opposing the applicants. The first respondent, the Tribunal, has taken no active part in the proceedings before this Court.

[3] The applicants' cases raise procedural and substantive issues of some complexity. The procedural issues go to the jurisdiction of this Court to entertain the applicants' plea for redress. The substantive issues are equally serious; they concern the applicants' rights to manifest their religious beliefs, and to be free from being coerced to conform to religious beliefs which they have renounced. In this regard, the second respondent has conceded that if the applicants can overcome the procedural barriers it contends they face, then leave should be granted to them on a more limited basis than they seek to run one of their substantive arguments before this Court.

Jurisdiction

[4] The proceedings that the applicants have filed in this Court are an attempt to appeal and to judicially review the Tribunal's decisions refusing their appeals against decisions to refuse their applications for refugee status. Since 19 June 2013, leave of this Court is required to bring either an appeal against, or a judicial review of such decisions.[1]

[5] In these proceedings, the applicants have sought leave of this Court to appeal and to judicially review. However, the second respondent argues that the appeal is out of time. If it is, that will preclude the Court from dealing with the appeal as the Act makes it clear that this Court has no power to extend time for bringing an appeal

[1] See s 245 and s 247 of the Immigration Act 2009.

once the initial time limit has expired.[2] The first question, therefore, is whether the appeal is still live. If it is not, the second question is whether the applicants can pursue their challenges to the first respondent's decision in the context of the judicial review proceedings.

Appeal time limits

[6] Section 245 of the Act provides for appeals to this Court against decisions of the Tribunal:

> **245 Appeal to High Court on point of law by leave**
>
> (1) Where any party to an appeal to, or matter before, the Tribunal (being either the person who appealed or applied to the Tribunal, an affected person, or the Minister, chief executive, or other person) is dissatisfied with any determination of the Tribunal in the proceedings as being erroneous in point of law, that party may, with the leave of the High Court (or, if the High Court refuses leave, with the leave of the Court of Appeal), appeal to the High Court on that question of law.
>
> (2) Every appeal under this section must be brought—
>
> (a) not later than 28 days after the date on which the decision of the Tribunal to which the appeal relates was notified to the party appealing; or
>
> (b) within such further time as the High Court may allow on application made before the expiry of that 28-day period.
>
> (3) In determining whether to grant leave to appeal under this section, the court to which the application for leave is made must have regard to whether the question of law involved in the appeal is one that by reason of its general or public importance or for any other reason ought to be submitted to the High Court for its decision.
>
> (4) On the appeal, the High Court must determine the question or questions of law arising in the proceedings, and may then—
>
> (a) confirm the decision in respect of which the appeal has been brought; or
>
> (b) remit the matter to the Tribunal with the opinion of the High Court, together with any directions as to how the matter should be dealt with; or

2 Section 245(2).

(c) make such other orders in relation to the matter as it thinks fit.

(5) Subject to subsection (2), every appeal under this section must be dealt with in accordance with the rules of the court, with any modifications necessary to reflect the provisions of this Act, including any ancillary general practices and procedures developed under section 260.

[7] Key points of note in s 245 are that appeals to this Court are by leave and not as of right.[3] Secondly, the provision expressly stipulates a time limit for when the appeal is to be brought,[4] but not for when the leave application is to be brought. Thirdly, appeals to this Court are to be dealt with in accordance with the procedural rules of this Court, subject to necessary modifications to ensure conformity with s 245.[5] Finally, applications for extensions of time in which to bring an appeal must be made before the expiry of the specified time limit.[6]

[8] As appeals under s 245 are appeals subject to leave of the Court, the relevant procedural provision of the High Court Rules is r 20.3, which provides:

20.3 Application for leave to appeal to court

(1) An application for leave to appeal in a case when an enactment provides that an appeal to the court against a decision may not be brought without leave must be made—

(a) to the decision-maker or, as the case requires, the court; and

(b) within 20 working days after the decision is given.

(2) An application for leave to appeal must be made within 20 working days after the refusal of the decision-maker if—

(a) an enactment provides that the court may grant leave to appeal to it against a decision after the decision-maker refuses leave; and

(b) the decision-maker refuses leave.

(3) The appeal must be brought—

3 Section 245(1).
4 Section 245(2).
5 Section 245(5).
6 Section 245(2)(b).

(a) by the date fixed when the decision-maker or the court grants leave; or

(b) within 20 working days after the grant of leave, if the decision-maker or the court does not fix a date.

(4) Any date fixed by the decision-maker is to be treated as a determination for the purposes of rule 7.50.

(5) The decision-maker or, as the case requires, the court may, on application, extend the period for bringing an application under this rule, if the enactment under which the appeal is sought to be brought—

(a) permits the extension; or

(b) does not limit the time prescribed for making the application.

(6) A party may apply for the extension of a period before or after the period expires.

(7) An application under this rule must be made on notice to every party affected by the proposed appeal and, if made to the court, must be made by interlocutory application.

(8) In this rule, leave includes special leave.

[9] Key points of note for r 20.3 are that the rule provides for a two-stage approach, with specific time limits imposed for making an application for leave to appeal, and then for the appeal itself, if leave to appeal has been granted. Unless there is provision to the contrary in the enabling enactment, extensions of time for bringing an application under r 20.3 can be given before or after the specified time limit.

[10] Under r 20.5, the commencement of time for appeal runs from when the decision is delivered. The date of the decision is excluded from the time limit.[7]

[11] Given the serious consequences that can flow from getting a time limit or some other step in the appellate process wrong, it might be expected that time limits and the like would be clearly stated and so be readily ascertainable. However, compliance with time limits can be tricky. *Attorney-General v Howard*[8] is a case in point where the Attorney-General fell foul of an appellate time limit which mandated

---

7 High Court Rules, r 1.17.

8 *Attorney-General v Howard* [2011] 1 NZLR 58 (CA).

that the appeal be filed and served on all parties within a specified period. In that case, two of the parties (one of whom was the tribunal whose decision was to be appealed) were not served with the notice of appeal within the mandated time limit. As there was no power to extend the time limit, the appeal was out of time. Accordingly, it failed for that reason.[9]

[12] The appellate provisions in issue here are similar to the legislation in *Howard* insofar as s 245(2) mandates the time for bringing an *appeal* under that section and restricts the Court's power to extend the time for doing so to those occasions where the extension is sought before the expiry of the specified limit. Thus, as with *Howard*, the powers in r 20.3(5) and (6) of the High Court Rules that allow for extensions of time after the specified time limit has expired are not available to this Court.

[13] The problem in the present case that the second respondent has highlighted is that the applicants' notice of appeal was not served on the Tribunal within the 28 day time limit prescribed by s 245(2). In *Howard*, the failure to serve within the appeal time limit meant that the appeal was out of time. This finding, in part, turned on the statutory language of the appeal provision in question. The issue for the Court here, therefore, is whether the applicants' failure to serve notice of appeal on the Tribunal will have the same consequences as those in *Howard*. Before dealing with this issue, it is important to note that the Tribunal has raised further concerns for the Court regarding its jurisdiction to hear the appeal. I propose to deal with each jurisdictional issue in order, starting with the filing of the appeal, and then turning to service requirements.

[14] The decisions under appeal were delivered on 15 May 2014. The appellants filed a "notice of motion for orders on appeal" and points on appeal on 12 June 2014, being 15 days after the decisions were delivered. However, their interlocutory applications for leave to appeal were not filed until 23 June 2014, which was 19 days after the decisions were delivered.

---

9 At [125] and [158].

[15] Despite the imposition of a requirement for leave to be obtained for bringing an appeal in this Court,[10] nothing is expressly said in s 245 about a time limit for making an application for leave to appeal to this Court. There is an issue, therefore, as to whether it will be enough if no more than a notice of appeal is filed within the 28 day period, or whether something more is required. Relevant here is the 20 day time limit specified in r 20.3(1) for making an application for leave to appeal. Also relevant is the practice under r 20.3 when leave is being sought from the High Court to hear the application as "an application on an intended appeal".[11]

[16] Section 245(5) requires appeals to be dealt with in accordance with the rules of the Court, with any modifications necessary to reflect the provisions of the Act. Being a leave appeal, the relevant rule must be r 20.3, but subject to any necessary modification. As s 245 is silent when it comes to imposing time limits for making an application for leave to appeal, this can be read as meaning either that Parliament intended the time limit in r 20.3(1) to apply,[12] or that no time limit was imposed because Parliament did not intend for there to be a separate application for leave to appeal. Following the latter view, whilst the appeal right in s 245 is conditional on leave to appeal being granted, there would nonetheless be no need to follow the requirement in r 20.3 to make a separate application for leave to appeal. Rather, leave would be dealt with as part of the appeal. However, this approach would tend to remove the purpose of a leave requirement, as, unless the Court directed that argument on the question of leave be heard in advance, argument on the appeal would proceed along with the argument for leave.

[17] In practice, the application for leave is heard in advance of the appeal hearing. Though on occasion, such as here, the arguments for leave and on the appeal are heard at the same time.

[18] The relationship between s 245 and r 20.3 was not something that was raised at the hearing. The answer is by no means clear. As finding the answer will not be a complete solution to the issues raised in this appeal, I propose to leave it to another occasion when the parties concerned can fully address the issue.

---

[10] See s 245(1).
[11] High Court Rules, r 20.3(02).
[12] 20 working days after the decision.

[19] The time limit in s 245(2) mandates when every appeal under the section "must be brought". The next step is to determine when that is satisfied. There is nothing in the section itself which specifies, or suggests when an appeal is brought. In accordance with s 245(5), therefore, it is necessary to revert to the High Court Rules.

[20] Rule 20.6 deals with when an appeal is brought:

> **20.6 When appeal brought**
>
> (1) An appeal is brought when the appellant—
>
> a) files a notice of appeal in the court; and
>
> (b) files a copy of the notice of appeal in the administrative office; and
>
> (c) serves a copy of the notice of appeal on every other party directly affected by the appeal.
>
> (2) Service at the address for service stated in the proceedings to which the appeal relates is sufficient service for the purposes of subclause (1).

The rule is clear and its application is straightforward; until all three steps are completed, an appeal will not qualify as brought when it comes to calculating a time limit. This is how the former r 706 was read,[13] and since the language of r 20.6 is the same as r 706, there is every reason for r 20.6 to be read in the same way.

[21] In *Inglis Enterprises Ltd v Race Relations Conciliator*, a failure to file a notice of appeal within the specified time in the office of the body appealed from resulted in the Court finding that the appeal was out of time. The same omission led French J in *Stoves v Commissioner of Police* to the same conclusion. In both cases, the Court went on to find that it lacked jurisdiction to cure the error and so to hear the appeal, which accordingly was struck out.

---

[13] See *Inglis Enterprises Ltd v Race Relations Conciliator* (1994) 7 PRNZ 404 (HC); and *Stoves v Commissioner of Police* (2009) 19 PRNZ 334 (HC) at [27].

[22] In *Howard*, the Court of Appeal was dealing with s 123 of the Human Rights Act. Section 123(4) provided that an appeal was "made" "by giving notice of it", but nothing was said further as to the correct recipients of the notice.[14] This caused Joseph Williams J in the High Court to opine that:[15]

> One can either infer the correct class of recipients by adopting a purposive approach to construction of the relevant provision, or look for more express supplementary direction in the Rules. Whichever approach is taken, the answer appears to be the same.

[23] The Court of Appeal agreed with Joseph Williams J, finding that:[16]

> Absent indications to the contrary, it is difficult to read the term "give notice" in s 123(4) as meaning simply "file with the High Court".

[24] However, Glazebrook J then stated:[17]

> Where I differ slightly from Joseph Williams J in the interpretation of s 123 is that I consider that, as the legislation is silent on the issue of who to serve, the High Court Rules provide that information (although as Joseph Williams J points out, the result is the same). This means that I agree with Joseph Williams J that the obligation to file and serve within the statutory timeframe derives from the statute, but consider that the list of who to serve derives from the High Court Rules. … In this case, the High Court Rules limit filing and service to the Tribunal, the High Court and "every other person affected by the appeal". This would obviously include the respondent (but not in my view the Human Rights Commission or the Attorney-General, despite their ability to intervene in an appeal).

[25] The Court of Appeal also found that:[18]

> As the timeframes for filing and service are set out in the [Human Rights Act], they are mandatory. They cannot be extended by the Courts as there is nothing in the [Human Rights Act] authorising such an extension.

[26] Section 245 of the Immigration Act refers to an appeal being brought, without saying how it is to be brought. Section 245 differs from s 123 of the Human Rights Act insofar as the latter provision specifies that an appeal is made by giving notice of it, whereas here, no such requirement is embedded in s 245. Here, the requirement

---

14 *Attorney-General v Howard*, above n 8, at [97] and [98].
15 *Attorney-General v Howard* (2009) 19 PRNZ 324 (HC) at [44].
16 At [97].
17 At [99] per Glazebrook J.
18 At [100] (references omitted).

to serve and whom to serve derives from the High Court Rules. Thus, the present circumstances are analogous to those in *Inglis* and in *Stoves*.

[27] In *Inglis* and in *Stoves*, this Court refused to use the former rule equivalent of r 5 to cure the irregularity in bringing the appeal. The same conclusion was reached by the Court of Appeal in *Howard*. More importantly for present purposes, in *Howard*, the Court of Appeal went on to state that if it was wrong to find that s 123 of the Human Rights Act determined when an appeal under that Act came to life, and that this was instead something to be determined by reference to the High Court Rules, the outcome would still be the same.[19] This was because the approach then to be followed would run into the same problems that were faced in *Inglis* and in *Stoves*.

[28] Rules 20.3(6) and 20.4(4) enable a Court to extend time for bringing an application for leave to appeal or an appeal, as the case may be, so where the procedural requirements for appeal are to be found in the Rules, a failure to comply fully with r 20.6 is ordinarily curable by extending the time for taking those steps. But those powers are not available when the enactment providing the appeal right sets the time for commencing an appeal and limits the Court's power to extend time for bringing an appeal, which is the case here.[20] In *X v Immigration and Protection Tribunal*, Faire J also concluded that there was no escaping the mandatory time limit in s 245(2).[21]

[29] Rule 20.7 permits a Court to order that service of the notice of appeal be dispensed with. There is nothing in s 245 that would expressly preclude the Court from exercising this power. However, in *Stoves*, French J found that the former rule equivalent of r 20.7 was of no help to an appellant who had failed to give notice to the body whose decision was intended to be appealed as it was not a *party* to the appeal, and so this circumstance did not qualify.[22] I agree with this reasoning and so take the same view.

---

19 See *Attorney-General v Howard*, above n 8, at [105]–[106].

20 Section 245(2).

21 *X v Immigration and Protection Tribunal* [2014] NZHC 1647 at [6] [*X v Immigration and Protection Tribunal (leave decision)*].

22 *Stoves v Commissioner of Police*, above n 13, at [42].

[30] So, when it comes to calculating compliance with the time limit for bringing an appeal, the timing of the filing/service of a copy of the notice of appeal on the tribunal whose decision is intended to be appealed is an essential factor. If this has not been done within the time limit for bringing an appeal, the High Court Rules permit either an extension of the time limit, or if the irregularity lies in service on a party, an order dispensing with service on that party. But if those powers have been excluded by the enactment providing the right of appeal, the failure to file/serve notice of appeal in time will be fatal to the appeal. Here, the applicants' failure to file/serve the Tribunal with a copy of their notice of appeal within the 28 day time limit means that they have not complied with r 20.6, and so their appeals are out of time.

[31] For completeness, I note that the second respondent's concession that the applicants' substantive arguments based on religious discrimination raise the type of questions that would ordinarily qualify for leave to be granted cannot help them here.

[32] However, it is not clear to me that the failure to file notice of the appeals on the Tribunal is the only procedural irregularity here; it may well be that the applicants' failure to file an application for leave to appeal at the same time as they filed their notice of appeal is a further irregularity that would disqualify their appeals. The earlier concerns that I have identified regarding how a would-be applicant/appellant is to go about exercising the limited right of appeal given to him or her by s 245 lead me to conclude that procedurally the appellate provisions of this Act are something of a minefield. They should not be,[23] especially when the resulting errors can lead to loss of appeal rights. In this regard, I agree with the comment of French J in *Stoves*:[24]

---

[23] There is a further bewildering problem that involves service; in the annotation to r 20.3 the authors of *McGechan on Procedure* state that when it comes to an application for leave to appeal it must be filed within the time limit but it is not necessary for the application for leave to be served within the time limit as well: see Andrew Beck and others *McGechan on Procedure* (looseleaf ed, Brookers) at [HR20.3.03]. Since appeals under s 245 are leave appeals, it would be hard for a would be-appellant to reconcile how to properly commence exercising the rights given by s 245 with what the Rules say about how to bring an application for leave to appeal in a timely fashion.

[24] *Stoves v Commissioner of Police*, above n 13, at [34].

> To deny someone his or her day in Court purely on the grounds of a procedural technicality, which has not prejudiced anyone, is hardly a desirable outcome.

[33] A similar sentiment was expressed by Thorp J in *Inglis*:[25]

> The construction which I have placed on [the relevant appellate provision in the Human Rights Commission Act 1977] runs contrary to any Judge's natural inclination to try to support rights of appeal and to read statutory provisions which set up rights in a liberal fashion. But, of course, the section must be read in a fashion which does not disregard its ordinary grammatical meaning.

[34] Here, the applicants have also commenced judicial review proceedings making the same challenges to the first respondent's decisions.[26] So the next question is whether those proceedings meet the Act's special requirements for judicial review.

> **247 Special provisions relating to judicial review**
>
> (1) Any review proceedings in respect of a statutory power of decision arising out of or under this Act must be commenced not later than 28 days after the date on which the person concerned is notified of the decision, unless the High Court decides that, by reason of special circumstances, further time should be allowed.
>
> (2) Where a person intends to both appeal against a decision of the Tribunal under this Act and bring review proceedings in respect of that same decision,—
>
> (a) the person must lodge both the application for appeal and the application for judicial review together; and
>
> (b) the High Court must endeavour to hear both matters together, unless it considers it impracticable in the particular circumstances of the case to do so.
>
> (3) In this section, **statutory power of decision** has the same meaning as in section 3 of the Judicature Amendment Act 1972.
>
> (4) Nothing in this section limits the time for bringing review proceedings challenging the vires of any regulations made under this Act.

---

25 *Inglis Enterprises Ltd v Race Relations Conciliator*, above n 13, at 408.

26 The concerns I have expressed regarding the procedural difficulties associated with s 245 are relevant when it comes to assessing the applicants' other challenge based on judicial review see discussion at [35] to [36] herein.

[35] Here, the applicants filed their notices of proceeding and statements of claim in this Court on 13 June 2014, which is 20 days after delivery of the Tribunal's decisions, and thus within the 28 day time limit imposed by s 247(1) of the Act. I do not know when the proceedings were served on the respondents. However, service of proceedings is separate from their commencement.

[36] The application for leave to commence judicial review proceedings was filed later, on 24 June 2014. In *Allada v Immigration and Protection Tribunal New Zealand*, Asher J found that the Act's 28 day time limit for filing judicial review proceedings was satisfied "on the filing of a statement of claim and complying notice of proceeding".[27] Further, there was no requirement for an application for leave to commence judicial review proceedings to be filed at the same time; that could come later.[28] I agree with and adopt the reasoning of Asher J in *Allada*.

[37] The second respondent has conceded that leave can be granted to the applicants to argue the Tribunal's decision is flawed when it comes to religious discrimination.[29] The remaining questions are whether the applicants' other grounds of review satisfy the restrictions on judicial review that are imposed by s 249 of the Act.

> **249 Restriction on review**
>
> (1) No review proceedings may be brought in any court in respect of a decision where the decision (or the effect of the decision) may be subject to an appeal to the Tribunal under this Act unless an appeal is made and the Tribunal issues final determinations on all aspects of the appeal.
>
> (1A) No review proceedings may be brought in any court in respect of any matter before the Tribunal unless the Tribunal has issued final determinations in respect of the matter.]
>
> (1B) Review proceedings may then only be brought in respect of a decision or matter described in subsection (1) or (1A) if the High Court has granted leave to bring the proceedings or, if the High Court has refused to do so, the Court of Appeal has granted leave.]

---

[27] *Allada v Immigration and Protection Tribunal New Zealand* [2014] NZHC 953, [2014] NZAR 880 at [18].

[28] At [18] and [19].

[29] Here the second respondent makes no concession as to the merits of the applicants' arguments regarding religious discrimination.

> (1C) In determining whether to grant leave for the purposes of this section, the court to which the application for leave is made must have regard to—
>
> (a) whether review proceedings would involve issues that could not be adequately dealt with in an appeal against the final determination of the Tribunal; and
>
> (b) if paragraph (a) applies, whether those issues are, by reason of their general or public importance or for any other reason, issues that ought to be submitted to the High Court for review.
>
> (2) Nothing in this section limits any other provision of this Act that affects or restricts the ability to bring review proceedings.

[38] The decision whether to grant leave or not under s 249(1B) is to be made taking into account the two non-exhaustive requirements in s 249(1C). The first consideration involves having regard to whether or not the issues raised by the review proceedings could be adequately dealt with on appeal. In principal, the nature of the issues that can be raised in an appeal under s 245 are going to be much the same as those that can be raised in judicial review proceedings.[30] It is hard to envisage an argument that would not qualify as a ground of appeal under s 245 but still qualify as a ground of review under s 249. Certainly that is the case here where the issues raised in the judicial review proceeding could just as readily have been raised in an appeal under s 245.

[39] If s 249(1C)(a) were interpreted to preclude claims that in principle were capable of being run as appeals under s 245, it would exclude cases like the present where the only reason the applicants' arguments are not being heard in the context of an appeal is because they brought their appeals out of time. In such circumstances, a procedural purist may well take the view that the fact an appeal is out of time does not necessarily mean the issues it may have raised could not be adequately dealt with on appeal. The problem lies with the time-bar and not the means of appeal. On this approach, there would be an argument for saying that review proceedings should not become a refuge for those who have been dilatory in exercising their appeal rights under s 245. Further, on this approach, the only way in which a review proceeding

[30] This is particularly so since the introduction of the leave requirement in s 249(1C)(b) which imposes a similar restriction on leave being granted to that imposed by s 245(3).

would qualify under s 249(1C)(a) would be if it raised an issue that in principle fell outside the bounds of a s 245 appeal.

[40] On the other hand, seeing judicial review as an available alternative procedure for circumstances where an applicant can no longer exercise s 245 appeal rights allows the Court some room for responding to meritorious arguments that would otherwise be excluded due to technical irregularities. Courts exercising supervisory jurisdiction over tribunals and courts of inferior jurisdiction have always been loath to see citizens' rights of access to judicial review removed.[31] I consider, therefore, that the interpretation of s 249(1C)(a) that has the least restrictive outcome for citizens' access to judicial review is the interpretation to be preferred. Here, for example, irrespective of the strength of the applicants' arguments, appeal is closed to them and, other than by judicial review, the Court is helpless to overcome that outcome.

[41] With s 249(1C)(a), there is a further reason to read this provision in a way that least restricts access to judicial review. I refer here to the concerns mentioned earlier about the ability of an applicant to fulfil the procedural requirements of s 245. I consider that until there is a clearer procedural pathway for commencing an appeal under s 245, judicial review offers a safer and more reliable form of challenging a decision of the Tribunal.

[42] I find, therefore, that the issues raised by the judicial review proceedings are issues that could not adequately be dealt with in the appeals.

[43] The next question is whether the applicants' judicial review grounds raise issues that qualify under s 249(1C)(b). As the leave application and the review are being heard together, they can be assessed together. This is helpful as the strength of an applicant's case can influence whether it raises matters of public or general interest. For example, in *Allada*, Asher J stated that:[32]

---

[31] See discussion in JF Burrows and RI Cater *Statute Law in New Zealand* (4th ed, LexisNexis, Wellington, 2009) at 323–324 and the authorities cited therein.

[32] *Allada v Immigration and Protection Tribunal New Zealand*, above n 28, at [36] citing *Waller v Hider* [1998] 1 NZLR 412 (CA) at 413.

> If the application has "little or no prospect of success" it follows that the issues are of limited general or public importance, and this points towards not granting leave.

It would follow, therefore, that if the converse were established, that is a judicial review application has strong prospects of success, this may indicate that the issues it raises are of general or public importance. I now turn to consider the relevant facts and the Tribunal's decision.

Factual background

[44] The applicants are aged 21 ("CV") and 27 ("CW"). They are Iranian nationals who arrived in New Zealand in 2011 to study English.

[45] CV left Iran for New Zealand in January 2011. CW decided to leave Iran in early 2011. As he had not undertaken military service, he obtained a passport on the premise that he wished to visit religious sites in Iraq. His father had to deposit a large sum of money as "bail" and gave a guarantee that CW would return to Iran. CW arrived in New Zealand in June 2011.

[46] The applicants say that Iran is an Islamic state to which they are opposed and they do not believe in Islam. They are of Azeri ethnicity, which is an ethnic minority group in Iran.

[47] In 2012, the applicants' family was unable to fund the applicants' education in New Zealand and they faced the prospect of having to return to Iran. They applied for refugee and protection status. CV's application was declined on 13 April 2012. CW's application was declined on 15 October 2012.

[48] If the applicants return to Iran, they will be obliged to perform military service, which is compulsory for all Iranian males of their age. Their family in Iran has advised them that they are being sought by the conscription authorities. The applicants do not want to serve in the Iranian Army. Both applicants state that if they are called upon to undertake military service, they will refuse because of their opposition to the Iranian state. They have the additional concern that the Iranian Army is a religious army that follows the Muslim faith. As conscripts in the

Iranian Army, they will be obliged to participate in Islamic worship. They would find this offensive. Neither of them has a belief in any religion.

[49] The Tribunal heard the applicants' appeals on 31 January 2013 and 1 February 2013. Separate decisions dismissing the appeals were issued on 15 May 2014. Of importance is the fact that the Tribunal found the accounts given by both applicants to be credible.

Tribunal's decision

[50] In dismissing the appeals, the Tribunal's reasoning in respect of both applicants was essentially the same.[33]

[51] First, the Tribunal correctly had regard to the approach on appeal under s 198 of the Act, which is that the Tribunal must determine, in the following order:

(a) Whether to recognise the person as a refugee under the Refugee Convention; and

(b) Whether to recognise the person as a protected person under the Convention against torture; and

(c) Whether to recognise the person as a protected person under the International Covenant on Civil and Political Rights ("ICCPR").

[52] Secondly, the Tribunal correctly set out what the principal issues for it to determine, namely:

(a) Objectively, on the facts as found, is there a real chance of the appellant being persecuted if returned to the country of nationality?

(b) If the answer is yes, is there a Convention reason for that persecution?

---

[33] See *CV* [2014] NZIPT 800343; and *CW* [2014] NZIPT 800440.

[53] The Tribunal then set out the accepted definition of being persecuted which is:[34]

> … the sustained or systemic violation of core human rights, demonstrative of a failure of state protection … Put another way, persecution can be seen as the infliction of serious harm, coupled with the absence of state protection.

[54] In regards to CV, the Tribunal found that he had difficulties during his schooling years because of his Azeri ethnicity. In mid-2010, he was detained for one week by the *Entezami* (police enforcement services) because of his "western" clothing and hairstyle, and was beaten. He had problems enrolling at university due to problems with the *Herasat*, the representatives of the security and intelligence services.

[55] The Tribunal accepted evidence that the applicants' cousin had been detained, beaten and tortured for deserting his military service.

[56] The Tribunal cited the decision *Refugee Appeal No 75378*, which set out the grounds under which a valid claim for refugee status on the basis of conscientious objection to military service may be made:[35]

(a) Conscription is conducted in a discriminatory manner based on one of the Convention grounds;

(b) Prosecution or punishment for evasion or desertion is biased in relation to one of the Convention grounds; or

(c) The objection relates to being required to participate in military actions where the military engages in internationally condemned acts.

[57] The Tribunal found there was no evidence that conscription in Iran is conducted in a discriminatory manner.

---

34 *CV*, above n 33, at [41]; and *CW*, above n 33, at 41.

35 *Refugee Appeal No 75378* RSAA Auckland, 19 October 2005.

[58] In considering whether the applicants were at risk of prosecution and punishment for refusing to perform military service in Iran, the Tribunal noted that information on the punishment of "draft evaders" is scant. It referred to the United Kingdom Home – *Country of Origin – Iran Report*, which noted at that a War Resisters' International Report written in 1998 ("the WRI 1998 report") included reference to possible punishments for evasion and desertion).[36] The Tribunal noted that more recent information on possible penalties was not available at the time of writing its decision.[37] The WRI 1998 report stated:[38]

> Draft evasion and desertion are punishable under the 1992 Law and Punishment of Crimes Concerning the Armed Forces which prescribes different penalties for permanent and for temporary members of the armed forces. The following information concerns a possible punishment for temporary members of the armed forces (conscripts).
>
> Absent without leave for more than 15 days without a valid reason is punishable by six months to two years' imprisonment and/or 12 months extension of military service.
>
> Desertion is punishable by two to 12 months' imprisonment in case the deserter surrenders himself to the authorities.
>
> Those who avoid call up for military service are considered deserters.

[59] The Tribunal went on to note that draft evaders and deserters may also be punished under the Islamic criminal code. The WRI 1998 report noted that it was difficult to obtain detailed information about draft evaders and deserters. However, the Tribunal noted the report's reference to Amnesty International's Dutch office for the proposition:[39]

> Draft evaders and deserters are particularly apt to face punishment if they have deserted for political reasons, if they have been politically active in the past or if they have deserted previously during the war with Iraq.

[60] The Tribunal also noted that the information provided in the WRI 1998 report was consistent with the Public Military Service Act of 1984. The Tribunal referred to an informal translation of that document, which was attached to the Immigration

---

[36] United Kingdom Home Office *Country of Origin Report – Iran* (26 September 2013) at [10.11].

[37] Being 2 December 2012.

[38] War Registers' International Report *Iran* (5 April 1998) at 3, available at www.wri-irg.org. This was cited in the Tribunal's decision in *CV*, above n 33, at [64].

[39] War Registers' International Report, above n 40, as cited in Tribunal's decision in *CW*, above n 33, at [65].

and Refugee Board of Canada report titled *Information on the Procedures for an Officer to Resign his Position in the Military after Four years of Service.*[40] The Tribunal cited Art 58, which provides:

> Article 58 – draftees for the military service (exigency, precautionary, reserve) who are summoned for consideration and/or despatch to service but do not report by the dates are specified by the public military services […] shall be henceforth regarded as absentees. If they report or are arrested, they are, under the regulations of this law and on the condition of being capable to render service, sent to service and after the completion of the service period, on the basis of the declaration of the military services officers, they will be tried in competent courts for having been absent. If they can offer no sound excuses, the following decision shall be taken:
>
> (a) Peace-time absentees who report in peace-time. After having their case determined and/or completion of the exigency service, shall not receive service completion card or exemption card for a period of six months to one year. Those absentees who are arrested shall be deprived from receiving exemption or completion card for a period of one to two years.
>
> […]
>
> Clause 1 – The judge can, at his own discretion, sentence the absentee to other punishments other than those mentioned above.

[61] The Tribunal referred to the age of the WRI 1998 report and its references to legislation and regulations which pre-date the report. The Tribunal noted that it had not been possible to determine whether the provisions relied on remained part of the law relating to military service in Iran. The applicants were not able to find any additional information concerning punishment for draft evasion. The Tribunal concluded, therefore:[41]

> In the circumstances, it is presumed that the law, as reported in the WRI 1998 report, remains the same.

[62] The Tribunal went on to note other material before it that confirmed that a failure to perform military service in Iran would result in punishment:

> [71] Counsel was unable to direct the Tribunal to any country information concerning the extra-judicial mistreatment of draft evaders. Nor could the Tribunal find any. The Tribunal does not overlook the appellant and his

---

40 Immigration and Refugee Board of Canada *Information on the Procedures for an Officer to Resign his Position in the Military after about Four Years of Service* (12 April 1995) as cited in *CV*, above n 33, at [66].

41 *CV*, above n 33 at [67].

> brother's evidence concerning the mistreatment of their cousin, [X], who deserted during active service and was recaptured in the aftermath of the June 2009 elections … However, in the absence of any country information about extra-judicial punishment meted out to deserters or draft evaders, it is speculative to conclude that he appellant faces a real chance of similar mistreatment.

[63] Regarding whether CV and CW would be required to engage in internationally condemned acts, the Tribunal considered that there was no basis to depart from an earlier decision in *CP (Iran)*[42] and found that here, the applicants only face a "remote and speculative" chance of being drafted into an organisation which carries out human rights violations.

[64] The Tribunal then turned to consider the applicants' right to freedom of religion and accepted that attendance at political and religious classes and prayers are a component of military service in Iran. The Tribunal also accepted that the applicants did not believe in Islam, were opposed to the Islamic religion in Iran, and if called upon to undertake military service, would refuse to do so.[43] However, it considered that the applicants could pretend to be Muslim on enlistment in the military. Further, following the reasoning in *CP (Iran)*, the Tribunal opined that attendance at Islamic classes:[44]

> … would be tedious and possibly even unpleasant for the appellant but they would not amount to a breach of his right to hold his own beliefs because such attendances would not force him to change his beliefs.

The Tribunal's reasoning in relation to this ground was referenced back to its decision in *CP (Iran)*. Therefore, it is helpful to focus on the decision in *CP (Iran)*.

[65] The claimant in *CP (Iran)* was also a non-believer in Islam, who did not want to perform military service in Iran because of the need to pretend to be Muslim while a conscript in the Iranian Army. In *CP Iran*, the Tribunal recognised the claimant's right to reject Islam, and to reject belief in religion. The Tribunal acknowledged that

---

42 *CV*, above n 33, at [74]. In *CP (Iran)* the Tribunal found that recruitment into ideologically-driven organisations within the Iranian Army (such as "the *Sepah* and the *basij*") is not a "random and unpredictable lottery". The Tribunal was also of the view that the less devout conscripts would be more likely to be placed in the *Artesh* where there was less focus on religious participation: *CP (Iran)* [2013] NZIPT 800452 at [52]–[54].

43 *CV* above n 33, at [37]; and *CW*, above n 34, at [37].

44 *CV* at [87]–[89]; and *CW* at [80]–[82].

military service in Iran would require a non-believer to confirm his religion and during the two years of military service to attend political and religious classes periodically. The Tribunal accepted that if a claimant was to avoid adverse consequences during his military service, he would need to record his religion as Islam and periodically comply with Islamic instructions such as classes and possibly prayers. The Tribunal acknowledged that it was no answer to a risk of being persecuted to require a claimant to avoid harm by being discrete.

[66] In *CP Iran*, the Tribunal purported to apply the approach set out by the Tribunal at [114] of *Refugee Appeal No 74665/03*. It posed the question in this way:

> If the [claimant] 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 whether this is requiring him to abandon or forego the exercise of a fundamental right, in order to avoid being persecuted.[45]

[67] In answering the above question, the Tribunal noted that it was important to recognise that not all breaches lie at the core of a right and that a breach was at the margins of a right would not suffice.[46]

[68] The Tribunal in *CP Iran* then stated that:[47]

> A breach may lie only at the margin of a right because it is tangential and not fundamental to its exercise. In other cases a breach may lie at the margin of a right because it is transient, fleeting or in some other way trivial.

[69] Having stated these principles, the Tribunal in *CP Iran* went on to say that the case before it could be contrasted with the predicament faced by the appellant in *Refugee Appeal No 74665*, where the claimant was faced with the need to hide an integral part of his identity and self-worth, namely his sexuality, for all time and from all persons. The Tribunal accepted that having to daily deny one's sexuality was corrosive oppression and degrading of self-worth. This was contrasted with the circumstances of the claimant in *CP (Iran).* Here it was said that in the context of military service, which has a finite duration, the claimant would be required to make

---

[45] At [60].

[46] It described this limitation on the general principle as being expressly recognised in *Refugee Appeal No 74665/03* [2005] NZAR 60 (RSAA) at [115].

[47] At [62].

one assertion that he was a Muslim and would be required to attend periodic Islamic classes and possibly prayers over what appeared to be an eight month training period. The Tribunal recognised that this would be inconvenient and a waste of the appellant's time to have to sit through classes and possibly prayers in which he did not believe. However, the Tribunal concluded:

> In terms of Article 18(1) of the ICCPR … the interference with the [claimant'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).

[70] Then, the Tribunal concluded that:[48]

> 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.

[71] The Tribunal accepted that the pretence of being a Muslim would amount to a breach of the claimant's right to manifest his religion but that the intensity and duration of the breach did not go to "the core of the right". In this respect:[49]

> In contrast to the claimant in *Refugee Appeal No 74665* … 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 [claimant] – 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 disclosed as a breach at the margins of the right to freedom of thought, conscience and religion only.

[72] In *CP Iran* the Tribunal then referred again to *Refugee Appeal No 74665*:[50]

> 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.

[73] The Tribunal in *CP Iran* applied that statement in the following way:[51]

> The modest and fleeting breach occasioned by the [claimant] needing to assert that he is a Muslim on his enlistment falls far short of "being

---

48 At [64].
49 At [65].
50 At [124].
51 At [66].

> persecuted" (which is the standard at which the basic duty of protection owed by a State to its population can be said to have failed.

[74] Regarding the other grounds in the applicants' appeals for refugee status, the Tribunal concluded that the applicants did not have a well-founded fear of being persecuted under the Refugee Convention. As regards the Convention against torture, the Tribunal decided that:

> [94] Having found that the appellant is not at risk of serious harm if he returns to Iran, it follows that he is not at risk of torture, let alone torture at the hands of a public official, or with the consent or acquiescence of a public official or other person acting in an official capacity.

[75] For the claim under the ICCPR, the Tribunal was satisfied that there were no substantial grounds for believing that the applicants would be in danger of being subject to arbitrary deprivation of life, or cruel treatment in Iran.

Grounds of review

[76] The applicants advance six grounds of review proceedings. They are that the Tribunal:

(a) Failed to apply the test in *Refugee Appeal 75378* in determining the applicants' respective refugee claims as conscientious objectors to military service*;*

(b) Made a false assumption that the applicants will pretend to be Muslim and that they would attend Islamic classes, rituals and prayers against their honestly held beliefs;

(c) Failed to ascertain whether the applicants would comply with the military requirements to pretend to be Muslim against their honestly held beliefs;

(d) Erred in finding it acceptable that a refugee could falsely declare a religion that he or she did not believe;

(e) Erred in finding it acceptable that a refugee could falsely pretend to follow a religion in order to avoid persecution; and

(f) Failed to consider that the applicants may be detained, possibly indefinitely, upon return to Iran for draft evasion and refusing to perform military service.

[77] For their judicial review proceedings to qualify for a grant of leave under s 249(1C)(b), the applicants must show that the proceedings raise a question in law of general or public importance, or which for any other reason should be submitted to this Court for its decision. This requirement imposes a high threshold on the grant of leave. In *LMN v Immigration and Protection Tribunal New Zealand*, as regards the first two categories, it was said:[52]

> … factual errors or legal errors that are no more than a misapplication of existing legal principle to the particular facts of the case will not qualify. The effect of s 245 is to grant the Tribunal authority to misapply settled law to the facts of a case before it. Only if the legal errors have a wider significance that extends beyond the applicant will the Court have jurisdiction to grant leave to appeal. The key issue for determination, therefore, is whether the applicant has identified legal errors on the part of the Tribunal that extend beyond the individual case. Consideration also needs to be given to whether the applicant falls into the remaining category of providing "any other reason" for his appeal to be submitted to this Court for determination.

[78] When it comes to the remaining category "any other reason", the bar is set equally as high. In *Taafi v Minister of Immigration*, Kós J stated:[53]

> In my view it would only be in exceptional circumstances, involving individual injustice to such an extent that the Court simply could not countenance the first instance decision standing, that this alternative requirement will be met.

[79] Regarding challenges to factual findings, Heath J in *X v Chief Executive of the Ministry of Business, Innovation and Employment* stated:[54]

---

52 *LMN v Immigration and Protection Tribunal New Zealand* [2013] NZHC 2077 at [2]; this approach was subsequently applied by Faire J in *X v Immigration and Protection Tribunal (leave decision)*, above n 21, at [31] and [32].

53 *Taafi v Minister of Immigration* [2013] NZAR 1037 (HC) at [19(c)]; the decision has since been followed by Faire J in *X v Immigration and Protection Tribunal (leave decision)*, above n 21, at [34].

54 *X v Chief Executive of the Ministry of Business, Innovation and Employment* [2013] NZHC 642, [2013] NZAR 513 at [18] (references omitted).

(b) Findings of fact cannot be impugned unless the factual errors were of such significance, extent and nature that they would render the decision legally flawed.

(c) Value judgments made by the Tribunal, in balancing and weighing competing factors arising in any given case, will seldom amount to an error of law.

[80] In *Minister of Immigration v Jooste*, the Court of Appeal noted that the test under s 245 is similar to that applying to second appeals to the Court of Appeal under s 67 of the Judicature Act 1908.[55] The Court of Appeal referred to the earlier decision in *Waller v Hider* where it was said:[56]

> Upon a second appeal this Court is not engaged in the general correction of error. Its primary function is then to clarify the law and to determine whether it has been properly construed and applied by the Court below. It is not every alleged error of law that is of such importance, either generally or to the parties, as to justify further pursuit of litigation which has already been twice considered and ruled upon by a Court.

[81] On the other hand, Asher J's comment in *Allada* to the effect that an application with little or no merit must necessarily raise little in the way of issues of general or public importance[57] may provide an opening for the argument that where there is a strong, and so meritorious case based on a clear misapplication of settled law, there is an issue of general or public importance: namely, that in meritorious cases, the importance of the Tribunal applying the law to individual cases correctly by giving proper recognition to a claimant's eligibility for refugee status is a matter of general and/or public importance. For this is one of the ways that New Zealand discharges its obligations as a signatory to the Convention.

Second respondent's argument

[82] The second respondent submits that, save for the limited topic on which it concedes leave should be granted, the questions raised in the review proceedings are not capable of serious argument; they are not of general or public importance; nor do they warrant attention for "any other reason".

---

55 *Minister of Immigration v Jooste* [2014] NZCA 23 at [5]. The same can be said about s 249(1C)(b).
56 *Waller v Hider*, above n 32, at 413.
57 See *Allada v Immigration and Protection Tribunal New Zealand*, above n 27, at [36].

[83] The second respondent does not oppose leave to appeal being granted in relation to the Tribunal's finding that the applicants could pretend to be Muslim. The respondent cites *X v Immigration and Protection Tribunal* where leave to appeal was granted in a similar factual circumstance. Faire J said:[58]

> [64] The plaintiff relies on *RT (Zimbabwe) v Secretary of State for the Home Department* for the proposition that an individual should not be expected to lie, give false evidence or pretend to be something that they are not to avoid persecution. That case concerned several individuals applying for asylum in the United Kingdom on the basis that they faced persecution if they returned to Zimbabwe. This issue for the Supreme Court was whether the principle from *HJ (Iran) v Secretary of State for the Home Department* applied to individuals who were politically neutral. *HJ (Iran)* confirmed that an applicant who would factually live discreetly in order to avoid persecution for being gay, has a legitimate claim for asylum. *RT (Zimbabwe)* held that this principle could apply to individuals who had no strong political belief, but who would be forced to lie and demonstrate allegiance to the ruling Zanu PF party in order to avoid being persecuted. The Supreme Court held that it was improper to focus on the strength of any political belief. This meant that it was unnecessary to show that the individuals were strongly committed to political neutrality. It was enough that if they expressed their true political beliefs they would be persecuted. It was also irrelevant that the individuals would only need to lie when they were confronted by militia. Thus even though the lies would be required on a less frequent basis than a gay man being required to live his life discreetly, the lies required could still engage the principle.
>
> [65] The Tribunal recognised that it is no answer to a risk of being persecuted that an individual could avoid this persecution by living discreetly. However, I consider that some aspects of the Tribunal's approach differ from that of the Supreme Court. First, it treats the deception that the plaintiff would have to practice as the persecution. Second, it approaches the marginal/core distinction on the basis of duration of persecution, rather than on the nature of the exercise of the right being circumscribed.

[84] In the substantive decision in this case, Venning J considered that the Tribunal had erred:[59]

> [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.

---

58 *X v Immigration and Protection Tribunal (leave decision)*, above n 21 (references omitted).

59 *X v Immigration and Protection Tribunal* [2014] NZHC 2779 [*substantive decision*].

[85] The Judge granted the application for review on the following basis:

> [45] 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?

[86] However, in the present case, the second respondent contends that when the Court comes to assess the merits of the argument based on religious persecution, it will see that the crux of the applicants' claims rested on the fact they are facing compulsory military service in Iran and will *refuse* to serve a regime to which they are opposed, rather being based upon a fear of being persecuted for not being Muslim.

[87] Regarding compulsory military service as a ground for refugee status, the second respondent submits that the Tribunal correctly applied the recognised tests for when military conscription can support a claim for refugee status, and was right to find they were not established.[60]

[88] The second respondent argues that it is for an applicant to make his or her case for refugee status. The second respondent asserts that the applicants did not argue that: (a) conscription into the Iranian Army would require them to falsely declare themselves Muslim; (b) that such conduct would be seriously harmful to them; or (c) that it was a reason for them not to attend military service. So there can be no complaint about what the Tribunal found regarding religious persecution.

[89] The second respondent accepts that the Tribunal's view of what constitutes religious persecution differs from that of Faire J and Venning J in their respective decisions in *X v Immigration and Protection Tribunal*.[61] However, the second respondent essentially argues that the findings by the Tribunal in this regard are obiter, and therefore any error on the Tribunal's part does not warrant the appeal

---

[60] If compulsory military service is not imposed in a discriminatory manner and if punishment for refusing to perform such service is not imposed in a discriminatory manner it will not support a claim for refugee status.

[61] *X v Immigration and Protection Tribunal (leave decision)*, above n 21, at [64]–[66] per Faire J; and *X v Immigration and Protection Tribunal (substantive decision)*, above n 59, at [43] per Venning J.

being allowed on this issue and the matter being sent back to the Tribunal for fresh consideration.

[90] When it comes to the merits of the Tribunal's conclusion that performing Islamic rituals and prayers would not constitute serious harm to the applicants, the second respondent submits the Tribunal has not erred, as periodic mandatory Islamic worship cannot amount to serious harm, and therefore persecution. In this regard, the Tribunal described the impact of this as being "fleeting and insignificant".[62]

Applicants' arguments before the Tribunal

[91] I have carefully read the written submissions that the applicants' counsel provided to the Tribunal. Separate submissions were prepared for each applicant. However, in substance, each is much the same. Accordingly I have dealt with them globally. Under the heading "is there a real chance of the appellant being persecuted", the submissions gave one concern as being the appellants' lack of belief in Islam, which is Iran's official religion. In Iran, they are still regarded as Muslims. The submissions also refer to the Iranian state's denial of the appellants' right to renounce the Muslim religion, this being the religion of their birth.

[92] Under a separate heading, "objection to military service in Iran", one of the concerns advanced is that the objection to military service is based on the appellants' religious beliefs. Then, under a separate heading, "military service in Iran", the appellants develop the argument that under the constitution of Iran, the military is Islamic and that Muslim worship forms part of military service. The submissions state that non-believers in the Muslim faith are not exempt from military service.

[93] Later, the appellants submit that their lack of religious beliefs and their opposition to the Iranian regime are their core beliefs, with their ethnicity being an additional factor. They then submit that the enforcement of military service in the Iranian Army on them constitutes an interference with their right to freedom of belief under Art 18(1) of the ICCPR. Later still, the applicants cite a decision of the United Kingdom Supreme Court in *RT (Zimbabwe) v Secretary of State for the Home*

---

[62] *CV*, above n 33, at [88]; and *CW*, above n 33, at [81].

Department[63] in which that Court found that where a claimant holds no political or religious beliefs and yet in his or her home country is expected to declare a particular belief for fear of being persecuted, then a claim for refugee status is made out.

[94] From my reading of the applicants' submissions to the Tribunal, I have the clear impression that they based their appeal for refugee status in part on their objections to compulsory military service in an Islamic army, which will require them to participate in Islamic worship. There were other reasons as well, such as their dislike of the Iranian regime, given their Azari ethnicity, and the discrimination they perceived they and their family had suffered. This general dislike of the regime made them not want to serve in the military for a number of reasons.

[95] I am also satisfied that the grounds of review in the applicants' statements of claim raise questions of the Tribunal's alleged failure to consider if the applicants' being required to participate in Islamic worship while serving in the Iranian Army can amount to them being persecuted. There are also grounds of review that raise questions of the Tribunal's alleged failure to consider the consequences for the applicants if the Iranian Army administration discovers they are non-believers, or if they refuse to perform military service. The applicants also raise as an additional ground of review the Tribunal's failure to consider their predicament, irrespective of military service obligations, in living in Iran, given their religious and political beliefs.

[96] Whilst the grounds of review can be approached discretely, I also consider that they are capable of being read more roundly, and in that way they clearly raise questions of: (a) whether conscripted military service in an army that observes a particular religion can result in non-believers being persecuted; (b) whether in such circumstances non-believers who refuse to serve in order to avoid observance of a religion not of their choosing will be persecuted; and (c) whether the Tribunal failed to consider these questions.

---

63 *RT (Zimbabwe) v Secretary of State for the Home Department* [2012] UKSC 38, [2013] 1 AC 152.

[97] It follows that I reject the interpretation that the second respondent has sought to place on the applicants' cases as presented to the Tribunal and to this Court. Further, I observe that the fact the Tribunal dealt with the question of religious persecution if the applicants were to serve in the Iranian Army suggests that the Tribunal understood their claims to have this feature.

Relevant legal principles

[98] Art 1A(2) of the Refugee Convention ("the Convention") provides that a refugee is a person who:[64]

> … 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 such fear, is unwilling to return to it.

[99] Since its decision in *Refugee Appeal No 74665/03*, the Tribunal has taken a "human rights approach" to determining refugee status issues.[65] On a human rights approach, the meaning of the words "being persecuted" in Art 1A(2) of the Refugee Convention is read in the light of international human rights law centred on international treaty law. This approach has been endorsed by this Court and the Court of Appeal.[66]

[100] The relationship between the human rights approach and the concept "being persecuted" is well explained in *Refugee Appeal No 75378*:[67]

> [44] One of the central arguments that underpin *Refugee Appeal No* 74665/03 is that international human rights law centred on international treaty law, as opposed to customary international law, provides the most appropriate framework for considering and determining the issue of being persecuted in the refugee status determination process. As to this approach, the authority observed at [115]:

---

64 Convention relating to the Status of Refugees 189 UNTS 137 (signed 20 June 1960, entered into force 22 April 1954).

65 *Refugee Appeal No 74665/03*, above n 46.

66 See *Teitiota v Chief Executive of Ministry of Business, Innovation and Employment* [2014] NZCA 173, [2014] NZAR 688 at [18]–[22].

67 *Refugee Appeal No 75378* RSAA Auckland, 19 October 2005.

> The human rights standard requires a decision-maker to determine first, the nature and extent of the right in question and second, the permissible limitations which may be imposed by the State. Instead of making intuitive assessments as to what the decision-maker believes the refugee claimant is entitled to do, ought to do (or refrain from doing), instead of drawing on dangerously subjective notions of "rights", "restraint", "discretion" and "reasonableness", there is a structure for analysis which, even though it may not provide the answer on every occasion, at least provides a disciplined framework for the analysis. A framework which is principled, flexible, politically sanctioned and genuinely international. Under the human rights approach, where the risk is only that activity at the margin of a protected interest is prohibited, it is not logically encompassed by the notion of "being persecuted". A prohibition is to be understood to be within the ambit of a risk of "being persecuted" if it infringes basic standards of international human rights law. Where however, the substance of the risk does not amount to a violation of a right under applicable standards of international law, it is difficult to understand why it should be recognised as sufficient to give rise to a risk of "being persecuted".

[45] Under this approach, the treaties comprising the international bill of rights, namely the Universal Declaration of Human Rights 1948 (UDHR) the International Covenant of Civil and Political Rights 1966 (ICCPR) and International Covenant on Economic, Social and Cultural Rights 1966 (ICESCR) provide the core, but not exclusive framework of rights and freedoms upon which the question of "being persecuted" is to be addressed …

[46] The critical question is, therefore, whether an objection by a refugee claimant to the performance of military service, can be considered to be within the ambit of a right contained in any of the treaty instruments underpinning the Authority's approach to the issue of being persecuted.

[101] Art 18 ICCPR provides:

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom either individually or community with others and in public or private to manifest his religion or belief in religion, observance, practice and teaching.

2. No one shall be subject to coercion which would impair his freedom to have or adopt a religion or belief of his choice.

3. Freedom to manifest one's religions or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or the fundamental rights and freedoms of others.

[102] I consider the discussion in *Refugee Appeal No 74665/03 of Canada (Attorney General) v Ward* and *R v Immigration Appeal Tribunal, ex parte Shah also* to be relevant to the present case.[68] In the Canadian Supreme Court decision in *Ward*, La Foret J stated that underlying the Convention is the international community's commitment to the assurance of basic human rights without discrimination.[69] In *R v Immigration Appeal Tribunal, ex parte Shah*, Lord Steyn identified a premise of the Convention as being that all human beings shall enjoy fundamental rights and freedoms;[70] and Lord Hoffman saw counteracting discrimination as being a fundamental purpose of the Convention. His Lordship stated:[71]

> In my opinion, the concept of *discrimination in matters affecting fundamental rights and freedoms is central to understanding the Convention.* It is concerned not with all cases of persecution, even if they involve denials of human rights, but with persecution which is based on discrimination. And in the context of a human rights instrument discrimination means making distinctions which principles of fundamental human rights regard as inconsistent with the right of every human being to equal treatment and respect.

[103] The above statements of principle display acceptance of a linkage between persecution and discrimination. The second respondent has argued that "persecution is a strong word" and that there is a "clear distinction between a breach of human rights (discrimination) and a sustained or systemic denial of core human rights (persecution)". The second respondent seemingly attempts to distinguish one from the other on the basis that discrimination is a less serious intrusion on human rights than is persecution. However, this argument overlooks the meaning ascribed to "discrimination" by Lord Hoffman in *ex parte Shah*, who uses the term to refer to circumstances where targeted individuals are stripped of the enjoyment of fundamental human rights. It is the targeted and therefore discriminatory nature of such ill-treatment that leads to it being persecution.

[104] Of relevance also is the acceptance that persecution can be both direct and indirect. Indirect persecution occurs where there is a rule or rules which may appear

---

68 *Refugee Appeal No 74665/03*, above n 46, at [56] and [57].

69 *Canada (Attorney General) v Ward* [1993] 2 SCR 689 at 733.

70 *R v Immigration Appeal Tribunal, ex parte Shah* [199] 2 AC 629 (HL) at 639.

71 At 651 (emphasis added).

"facially neutral"[72] but which result in discrimination or persecution because of an exclusive or disproportionate adverse impact on certain categories of persons. In *Okere v Minister for Immigration and Multicultural Affairs*, Branson J of the Australian Federal Court gave a telling example of indirect persecution:[73]

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

[105] *Refugee Appeal No 74665/03* also helpfully identifies the approach to determining whether the facts establish there is a well-founded risk of being persecuted. This is said to require:

(a) Identification of the serious harm faced in the country of origin; and

(b) The state's ability and willingness to respond effectively to that risk.

The Authority described it thus:[74]

> "Being persecuted" is the construct of two separate but essential elements, namely risk of serious harm and a failure of state protection.

[106] In *Refugee Appeal No 71427/99*, the Authority held that "state protection" demands an enquiry as to whether the protection available from the state will reduce the risk of serious harm to below the level of a real chance of serious harm.[75]

---

72 A law that is neutral on its face. The term is used by James Hathaway and other human rights jurists.

73 *Okere v Minister for Immigration and Multicultural Affairs* 87 FCR 112 at 118. In the New Zealand context, s 19 of the New Zealand Bill of Rights Act 1990, freedom from discrimination has been read to include indirect discrimination: see *Northern Regional Health Authority v Human Rights Commission* [1998] 2 NZLR 218 (HC) at 236.

74 *Refugee Appeal No 74665/03*, above n 46, at [53].

75 *Refugee Appeal No 71427/99* RSAA Auckland, 16 August 2000 at [66].

[107] New Zealand follows other jurisdictions in taking what James Hathaway describes as a "predicament approach".[76] Hathaway says that the:[77]

> New Zealand Tribunal has thus appropriately concluded that "[t]he employment of the passive voice (being persecuted) establishes that the causal connection required is between a Convention ground and the *predicament* of the refugee claimant.

Thus, the intent of the persecutor is irrelevant.[78]

[108] There is general acceptance that mixed motives will not defeat a valid refugee claim.[79] Hathaway attributes this to the recognition that human conduct is a "rarely, if ever, uni-dimensional".[80] So, the presence of non-Convention reasons cannot detract from Convention qualifying reasons when they are also present.

[109] Much of the jurisprudence on whether objection to military conscription can amount to being persecuted under Art 1A(2) of the Refugee Convention entails an analysis of whether conscription laws in a particular state are universal, are applied in a discriminatory manner, or in a way which would give rise to human rights abuse. For example, in *Refugee Appeal No 75378*, it was said that:[81]

> Conscription laws are laws of general application and the infliction of punishment for their breach is not motivated by the benefit of the claimant. There is, therefore, no nexus between the punishment and a Convention ground.

[110] Refugee law recognises that "deprivation of liberty … is inherent in a generalized duty to render military service to one's country".[82] So it is not enough to qualify as serious harm under the Convention. Something more is required, such as "discriminatory conscription or conditions of service".

---

76 James C Hathaway and Michelle Foster *The Law of Refugee Status* (2nd ed. Cambridge University Press, Cambridge, 2014) at 378 citing *Refugee Appeal No 72635/01* RSAA Auckland, 6 September 2002 at [168].

77 At 378.

78 At 379.

79 At 382 and the decisions cited there, which include *Refugee Appeal No 72635/01*, above n 76; *Applicant in V488 of 2000 v Minister for Immigration and Multicultural Affairs* [2001] FCA 1815; and *Minister for immigration and Multicultural Affairs v Sarrazola (No 2)* (2001) 107 FCR 184.

80 At 384.

81 *Refugee Appeal No 75378*, above n 35, at [42].

82 Hathaway and Foster, above n 76 at 269.

[111] Freedom of religion encompasses both the right to hold or not to hold any form of theistic, non-theistic or atheistic belief, and to live in accordance with a chosen belief, including participation in, or abstention from, formal worship in other religious acts, expression of views and the ordering of personal behaviour.[83]

[112] The language of Art 18(1) of the ICCP is regarded as including the freedom of non-belief. Thus, it is well recognised that a person can be at risk of being persecuted for religious reasons when the risk arises from his or her non-belief in a religion. The idea is well expressed in US Department of Homelands Security statement that "the notion of freedom of religion encompasses the freedom to hold and express a belief system of one's choice and not to be subjected to coercion that impairs the freedom to have or adopt a religion or belief of one's choice.[84]

[113] Hathaway points out that it is not necessary for someone to have taken any kind of active role in the promotion of his or her beliefs, nor need he or she be particularly observant of those beliefs, as is apparent from the observation in *Wynn v Minister of Immigration and Multicultural Affairs*, where it was noted that the Convention:[85]

> Aims at the protection of … the followers as well as the leaders in religious, political or social causes. In a word, the ordinary person as well as the extraordinary one.

[114] Hathaway opines that the central issue is whether there is a:[86]

> Linkage between the threat of being persecuted and the claimant's self-defined or externally ascribed religious beliefs, in which case refugee protection is warranted.

---

83 Hathaway and Foster, above n 76, at 401, n 326 citing decisions that had followed this earlier analysis by Hathaway in James C Hathaway *Law of Refugee Status* (LexisNexis, Toronto, 1991 and see discussion in *RT (Zimbabwe) v Secretary of State for the Home Department*, above n 63, at [33]–[39].

84 US Department of Homeland Security *Asylum Officer Basic Training, Female Asylum Applicants and Gender Related Claims* (12 March 2009) as cited in Hathaway and Foster, above n 76, at 402. See also *RT (Zimbabwe) v Secretary of State for the Home Department*, above n 63, at [36]–[39].

85 *Win v Minister of Immigration and Multicultural Affairs* [2001] FCA 132, (2001) 105 FCR 212 at [20]. Similar views are expressed in *RT (Zimbabwe)*, above n 63, at [41]–[45].

86 Hathaway and Foster, above n 76, at 401. This analysis was cited with approval by the Federal Court of Australia in *Pei Lan He v Minister for Immigration Multicultural Affairs* [2001] FCA 446 at [30].

[115] Being coerced to conform to a religion or to religious practices that are not part of one's belief is a recognised form of persecution. The issue has arisen in the Iranian context where females who do not believe in the Islamic religion are nonetheless compelled to wear the chador. *SBBG v Minister for Immigration and Multicultural & Indigenous Affairs* involved claims based on religious persecution of a family who were members of the Mandaean religion in Iran, one of which raised a complaint about the imposition of an Islamic dress code on Mandaean women. The Full Federal Court of Australia rejected the view that the universal application of this law prevented it from constituting persecution, and found that when applied to persons not of the Muslim faith, it could in principle amount to persecution:[87]

> In relation to some of the specific allegations of persecution, particularly those relating to the legal obligation on women to wear the chador, the Tribunal concluded that this was a general obligation of Iranian law and thus could not constitute persecution. However, when an apparently general obligation in fact imposes a requirement reflecting discrimination for a Convention reason, it is not a "general requirement". … For example, a law requiring everyone who gives evidence in court to take an oath on the Christian bible appears to be general in form but is discriminatory on all those who are not Christians. Whether that discrimination constitutes "persecution" or not may depend upon the surrounding circumstances, such as what the practical consequence of the law might be.

[116] The idea that a non-believer or a follower of a different religion can avoid persecution by outwardly conforming to the requirements of a particular religion has been rejected in a number of decisions here and elsewhere. In *MPR v Refugee Status Appeals Authority*, this Court found that:[88]

> [35] Whilst I would also accept that, in principle, a believer who successfully worships in secret, so that he is unknown to a regime that persecutes members of his faith, may lack a well-founded fear of persecution, the critical question is whether the resort to secrecy is part of the creed to which he belongs, or because to worship otherwise would attract persecution. If it is the latter, the adoption of secret behaviour simply confirms the existence of a fear of persecution. Therefore, until this question

---

87 *SBBG v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCAFC 121, (2003) 199 ALR 281 at [30].

88 *MPR v Refugee Status Appeals Authority* 2012 NZHC 567 at [35] and the case law discussed in this case from Australia: *Appellant S359/2002 v Minister for Immigration and Multicultural Affairs* [2003] HCA 71, (2003) 216 CLR 473 and *Win v Minister for Immigration and Multicultural Affairs*, above n 87; and the United States: *(Falun Gong) IAO v Gonzales* 400 F 3d 530 (7th Cir 2005), and *Muhur v Ashcroft* 335 F 3d 958 (7th Cir 2004). See also *X v Immigration and protection Tribunal (leave decision)*, above n 21, at [64] and the discussion of *RT (Zimbabwe) v Secretary for the Home Department*, above n 63, and *HJ (Iran) v Secretary of State for the Home Department* [2010] UKSC 31, [2011] 1 AC 596.

> is asked, no one can be sure as to whether or not the absence of overt demonstration of his faith is due to fear of persecution. The question forms part of the legal requirements of the proper application of Art 1A(2); it is in answering this question that the Authority engages on a factual assessment of the merits of an applicant's case.

[117] The idea that persecution can be avoided through the claimant expressing the behaviour giving rise to persecution covertly has been roundly rejected in relation to other Convention grounds as well.[89] This is logical as there is no difference in principle when it comes to recognition of a claimant's right to manifest any of the Convention reasons overtly in circumstances where the claimant is free of a well-founded fear of persecution.[90]

[118] Whether a claimant should be expected to hide his or her sexuality, or whether a claimant should be expected to tolerate the imposition of a requirement to conform to another religious faith or practice are questions that call for the same answer. Such universality is recognised by Hathaway who describes the "discretion approach" in this way:[91]

> … the discretion approach suffers from a basic shortcoming in principle since, as articulated by the UK Supreme Court "refugee status cannot be denied by requiring of the claimant that he or she avoid being persecuted by forfeiting a fundamental human right.

[119] Hathaway also cites the Australian High Court in *Appellant S 395/2002 v Minister for Immigration and Multicultural Affairs* where McHugh, Kirby JJ stated:[92]

> History has long shown that persons holding religious beliefs or political opinions, being members of particular social groups or having particular racial or national origins are especially vulnerable to persecution from their national authorities. The object of the signatories to the Convention was to protect the holding of such beliefs, opinions, membership and origins by giving the persons concerned refuge in the signatory countries when their country of nationality would not protect them. It would undermine the

---

[89] See Hathaway and Foster, above n 76, at 392, n 181. The issue has arisen in cases dealing with persecution as a result of a claimant's sexual orientation *Refugee Appeal No 74665/03*, above n 62, described as impressive in *HJ (Iran)*, above n 88, at 629; and *Appellant S 395/2002* [2003] HCA 71, (2003) 216 CLR 473.

[90] *RT (Zimbabwe)*, above n 63, at [25]: "It is well established that there are no hierarchies of protection amongst the Convention reasons for persecution, and the well-founded fear of persecution test does not change according to which Convention reason is engaged".

[91] Hathaway and Foster, above n 76, at 392 citing *RT (Zimbabwe)*, above n 63, at [20].

[92] Appellant *S 395/2002 v Minister for Immigration and Multicultural Affairs*, above n 89 at [41].

> object of the Convention if the signatory countries required them to modify their beliefs or opinions or to hide their race, nationality or membership of particular social groups before those countries would give them protection under the Convention.

And where Gummow and Hayne JJ said:[93]

> To say that an applicant for protection is "expected" to live discretely is both wrong and irrelevant to the task to be undertaken by the Tribunal if it is intended as a statement of what the applicant *must* do.

[120] Art 18(3) of the ICCPR recognises some limitations on the right to freedom of religion and other beliefs. Where these are established, the right to freedom of religion and belief under Art 18(1) gives way. The limitations apply when they are "necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others".[94] Compulsory military service *per se* has been recognised to come within the limitations.[95] However, compulsory military service that entails religious coercion through requiring conscripts to observe a particular religious faith despite their lack of belief in that faith is quite different. I have found no authority that has recognised this circumstance as something that could come within Art 18(3).

[121] In two recent decisions, the United Kingdom Supreme Court has discussed whether the proposed action by a claimant was at the "core of the right" in question, or "at its margins", and accordingly what effect this might have on a claimant's ability to seek protection under the Convention.[96]

[122] The first decision is *HJ (Iran) Secretary of State for the Home Department*,[97] which was a case involving claimants who were practising homosexuals in countries where homosexuality was proscribed. The lower courts had dismissed their claims for refugee status on the ground they could avoid persecution by conducting themselves discretely in their home countries. This approach was rejected by the Supreme Court.

---

93 At [82] (emphasis in original).
94 *Sepet v Secretary of State for the Home Department* [2003] UKHL 15, [2003] 1 WLR 856 at [46] per Lord Hoffman.
95 At [46].
96 *RT (Zimbabwe)*, above n 63 at [21].
97 *HJ (Iran)*, above n 89.

[123] In *HJ (Iran)*, Lord Dyson JSC referred to the emphasis given in *Refugee Appeal No 74665/03* to the fact that refugee status cannot be denied to a person who on return would forfeit a fundamental human right in order to avoid persecution.[98] This led Lord Dyson to the view that to deny refugee status to gay men who could avoid persecution by behaving discretely, and who say that on their return to their home country this is what they will do, would frustrate the humanitarian objective of the Convention, and deny them the enjoyment of their fundamental rights and freedoms without discrimination. Reference was also made to *Canada (Attorney General) v Ward*[99] where the Canadian Supreme Court saw the right to dignity underpinning the Convention's protections, and approved Hathaway's statement that:[100]

> The dominant view … is that refugee law ought to concern itself with actions which deny human dignity in any key way, and that the sustained or systemic denial of core human rights is the appropriate standard.

[124] Lord Dyson saw the approach in *Refugee Appeal No 74665/03* as facilitating a determination of whether the proposed action by the claimant was at the core of the right in question, or at its margins.[101] But then His Lordship queried whether there could be a distinction between harmful action at the core of a right and harmful action at its margin in cases of persecution on grounds of immutable characteristics such as race and sexual orientation, the latter being the Convention ground in issue in that case, though he allowed that some distinction may be drawn in cases concerning persecution for religious or political reasons:[102]

> It is a valuable distinction and there may be more scope for its application in relation to cases concerning persecution for reasons of religion or political opinion.

[125] In *HJ (Iran)* there was no need to determine if any distinction should be made between core rights and peripheral rights as the rights in question in that case were recognised to be fundamental rights. However, the question of whether any such distinction should be made arose later in *RT (Zimbabwe)*.

---

98 *HJ (Iran)*, above n 89, at [113].
99 *Canada (Attorney General) v Ward*, above n 69.
100 Hathaway (1991), above n 83, at 108.
101 *HJ (Iran)*, above n 89, at [114].
102 At [115].

[126] *RT (Zimbabwe)* is similar to the present case insofar as it involved claimants who did not hold beliefs that were expected of them in Zimbabwe, though in this case, the beliefs were political, not religious. In the lower courts, the conclusion was that as long as the claimants were discreet about their lack of political beliefs, they would not be persecuted. This was rejected by the United Kingdom Supreme Court.

[127] The Home Secretary had tried to draw a distinction between someone who was a conscientious and committed political neutral and someone who was indifferent to political issues. The Home Secretary accepted that for the first category of person, a need to dissemble and pretend to hold political beliefs that found favour with the regime would be an infringement of a fundamental right, whereas for the latter, any dissemblance would be at the margins of the right of freedom of belief.

[128] Lord Dyson identified three reasons for rejecting the Home Secretary's argument. First, he found that the right not to hold political beliefs was a fundamental right and so there was "nothing marginal about it".[103] Secondly, he considered the distinction unworkable as it would entail identifying in every case where on the spectrum a claimant's non-belief became a core or fundamental right.[104] Thirdly, and most importantly for present purposes, His Lordship considered that the Home Secretary's argument was based on a misunderstanding of what he had said in *HJ (Iran)*.[105]

[129] Lord Dyson said that to understand properly what was said in *HJ (Iran)* first required some consideration of what the Tribunal had said in *Refugee Appeal No 74665/03*. He then referred to passage of *Refugee Appeal No 74665/03* where it was said that if a fundamental right is being interfered with, the next question is to determine "the metes and bounds of that right".[106] So if the proposed action fell squarely within the ambit of that right, then the failure of the state of origin to protect a claimant from exercising the right, coupled with the infliction of serious harm

---

103 *RT (Zimbabwe)*, above n 63, at [42].
104 At [46].
105 At [47].
106 At [47] referring to the discussion in *Refugee Appeal No 74665/03*, above n 46, at [82].

should establish the claimant is at risk of persecution. Lord Dyson summed the matter up, stating:[107]

> For the purpose of refugee determination, the focus must be on the "minimum core entitlement conferred by the relevant right". Thus, where the risk of harmful action is only that "activity at the margin of a protected interested is prohibited, it is not logically encompassed by the notion of "being persecuted".

[130] Lord Dyson then adopted examples of activity that the Tribunal in *Refugee Appeal 746605/03* considered to be at the margins of a right.[108] These included: a prohibition on a gay person adopting a child; the denial of the right to marry to post-operative transsexuals; the denial of homosexuals of the right to marry; and the prosecution of homosexuals for sado-masochistic acts. Further, in *HJ (Iran)*, Lord Rodger had given the example of a claimant seeking asylum because he feared persecution from marching in a gay parade, and noted that if such a person was otherwise able to live freely and openly as a gay person, his claim for refugee status might fail. This led Lord Dyson to say that in *HP (Iran)*:[109]

> At paras 114 and 115 of my judgment …, I was saying no more than that a determination of whether *the applicant's proposed or intended action lay at the core of the right or at its margins* was useful in deciding whether or not the prohibition amounted to persecution.

[131] Thus, in Lord Dyson's view, the core/peripheral assessment takes account of whether the claimant's proposed expression of his Convention rights in his or her home country is something that lies at the core of the right concerned, or at its periphery. This enquiry pays no regard to whether the intrusion on those rights is something that goes to the core of this right, or has no more than a marginal impact on its exercise.

[132] Lord Kerr of Tonaghmore in *RT Zimbabwe* entirely agreed with the approach of Lord Dyson. He stated:[110]

---

107 At [48].
108 At [49].
109 *RT (Zimbabwe)*, above n 63, at [50] (emphasis added).
110 At [71].

> As a general proposition, the denial of refugee protection on the basis that the person who is liable to be the victim of persecution can avoid it by engaging in mendacity is one that this Court should find deeply unattractive if not indeed totally offensive.

Lord Kerr stated:[111]

> As a matter of fundamental principle, refusal of refugee status should not be countenanced where the basis on which that otherwise undeniable status is not accorded is a requirement that the person who claims it should engage in dissimulation. This is especially so in the case of a pernicious and openly oppressive regime such as exists in Zimbabwe. But it is also entirely objectionable on purely practical grounds. The intellectual exercise (if it can be so described) of assessing whether (i) a person would – and could reasonably be expected to lie; and (ii) whether that dissembling could be expected to succeed, is not only artificial, it is entirely unreal. To attempt to predict whether an individual on any given day could convince a group of undisciplined and unpredictable militia of the fervour of his or her support for Zanu-pf is an impossible exercise.

[133] Like Lord Dyson, Lord Kerr accepted that there was under the Convention a protected right not to have a political opinion. Lord Kerr similarly rejected the idea that such a right could be attenuated according to the disposition of the person who espoused a strictly apolitical stance. In rejecting the idea that the level of protection could be calibrated to the inclination of the individual who claimed the protection, Lord Kerr stated:[112]

> The essential character of the right is inherent to the nature of the right, not to the value that an individual places on it.

[134] In *HJ Iran*, another factor that caused Lord Dyson to reject the idea that concealment or dissimulation can mitigate the seriousness of the harm of persecution was the idea expressed by McHugh and Kirby JJ in *Appellant S 395/2002 v Minister for Immigration and Multicultural Affairs*[113] that concealment of one's true beliefs or identity to avoid being persecuted will not and cannot reduce fear of persecution. Lord Dyson said:[114]

> … if a person will conceal his true identity and protected status out of a well-founded fear that he will otherwise be persecuted, he will nevertheless continue to have a well-founded fear of persecution even if, by concealing

---

111 At [72].
112 At [74].
113 *Appellant S 395/2002 v Minister of Multicultural Affairs*, above n 92, at [43].
114 At [116].

> his true identity, he may succeed in avoiding serious harm. As McHugh and Kirby JJ said in *S 395/2002* at para 43:
>
>> In many – perhaps the majority of – cases, however, the applicant has acted in the way that he or she did only because of the *threat* of harm. In such cases, the well-founded fear of persecution held by the applicant is a fear that, unless that person acts to avoid the harmful conduct, he or she will suffer harm. It is the threat of serious harm with its menacing implications that constituted the persecutory conduct.

[135] Lord Dyson went on to say:[115]

> In other words, the threat of serious harm and the fear of it will remain despite the avoiding behaviour.

[136] He then referred to an often cited passage from *Win v Minister for Immigration and Multicultural Attain*, where Madgewick J said:[116]

> Upon the approach suggested by counsel for the respondent, Anne Frank, terrified as a Jew and hiding for her life in Nazi-occupied Holland would not be a refugee: if the Tribunal were satisfied that the possibility of her being discovered by the authorities was remote, she would be sent back to live in the attic. It is inconceivable that the framers of the Convention ever did have, or should be imputed to have had, such a result in contemplation.

[137] This led Lord Dyson to state:[117]

> Even if it could be imagined that Anne Frank, as an asylum seeker, would not objectively have been at risk of being discovered in the attic, she would nevertheless have had a well-founded fear of the threat of serious harm, a fear not eliminated by her decision to conceal her identity as a Jew and live in the attic.

[138] The Supreme Court in *HJ (Iran)* also rejected the idea that a claimant will have no entitlement to protection where the limitation placed on his ability to express himself in the exercise of his protected rights is seen to be reasonably tolerable. The notion of some limitations being reasonably tolerable prompted Lord Dyson to query:[118]

---

115 At [117].

116 *Win v Minister for Immigration and Multicultural Affairs*, above n 85, at [18].

117 At [118].

118 *HJ Iran*, above n 89, at 121.

> Is it a subjective test? Or does the word "reasonably" import the idea of the reasonable victim? If so, how for example would a decision-maker determine whether it is reasonably tolerable to a person to conceal his or her sexual orientation or race? … On the Secretary of State's test, it would seem that a person who feels compelled to conceal his or her protected status, but does not feel strongly about it and does not find the concealment intolerable is denied the protection of the Convention; whereas the person who does feel strongly about it and finds the concealment intolerable has the benefit of its protection. This differential treatment of the tolerant and the intolerant is unfair. It is an unprincipled and improper basis for deciding whether a person or should not be accorded refugee status.

[139] *HJ (Iran)* helpfully sets out tests that fact-finding tribunals should adopt when deciding whether or not a claimant should be granted refugee status. The tests draw together the relevant principles and, in my view, if applied, will avoid a tribunal falling into error. As set out by Lord Rodger of Earls Ferry in *HJ (Iran)*,[119] the tests refer to whether a gay claimant qualifies for protection, however, they can be applied to protected right under the Convention:

> 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 "discretely".
>
> If on the other hand the Tribunal concludes that the applicant would in fact live discretely 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 discretely simply because that was how he himself would wish to live, or because of social pressures, eg, 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.

---

119 At [82].

> If on the other hand, the tribunal concludes that a material reason for the applicant living discretely 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 discretely 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.

[140] Drawing from Lord Rodger's statement of the law as well as comments from other Judges who sat in *HJ (Iran)*, I consider that a helpful checklist for the New Zealand context would be as follows:

(a) The Tribunal must first decide whether it is satisfied on the evidence that a claimant comes within one of the protections in the Convention. This is a purely factual assessment that will hinge on the reliability and credibility of the claimant's evidence.

(b) The next stage is to consider what will the situation of the claimant be on her return to her home country? Included within this enquiry are questions as to how an individual claimant will conduct herself, if returned, and how others will react to what she does. This includes paying regard to those whom she will come into contact with in private, as well as in public. The way she conducts herself may vary from one situation to another with varying degrees of risk. A claimant, however, cannot and must not be expected to conceal aspects of herself which she is unwilling to conceal, even from those whom she knows may disapprove of it. If she fears being persecuted as a result, and that fear is well-founded, she is entitled to asylum, however unreasonable her refusal to resort to concealment may be: "The question of what is reasonably tolerable has no part in this enquiry".[120]

---

[120] *HJ (Iran)*, above n 91, at [35] per Lord Hope of Grayhead.

(c) If it is found that a claimant will in fact conceal aspects of himself if returned, it is then necessary to consider why he will do so. If this will simply be in response to social pressures, or for cultural or religious reasons of his own choosing and not because of fear of persecution, his claim for asylum must be rejected. But if the reason he will resort to concealment is that he genuinely fears that otherwise he will be persecuted, it will be necessary to consider whether that fear is well-founded. This is the final and conclusive question: "does he have a well-founded fear of being persecuted?"[121]

Discussion

[141] In the present case, when the Tribunal came to decide the applicants' appeal, it did so by discretely considering whether they had made out sustainable grounds of persecution based on either compulsion to perform military service in Iran, or religion. Regarding military conscription as a form of persecution, the Tribunal took the approach that as compulsory military service was applied universally in Iran, the applicants could not establish a Convention reason for being persecuted. The Tribunal found that there was no suggestion that in Iran, conscription is conducted in a discriminatory manner; and there was no evidence to suggest that prosecution for military evasion or desertion was discriminatory. The Tribunal's reasoning in relation to whether military conscription *per se* can establish a ground under the Convention is orthodox and in keeping with established principle.

[142] When it came to the impact of Islamic religious observance as required by the Iranian Army, the Tribunal considered that for the applicants, religious observance in the Artesh[122] would simply be tedious and require them to participate in prayers which they did not believe in. None of which, the Tribunal found, constituted a breach of the applicants' rights to hold their own beliefs because they were not being forced to change those beliefs.[123] In reaching this conclusion, the Tribunal erred. It paid no regard to whether the pretence involved with those observances went to the core of the claimants' rights of freedom to manifest their beliefs on religion. Thus, it

---

121 *HJ (Iran)*, above n 91, at [35].
122 This is the section of the Iranian Army into which the applicants are most likely to be drafted.
123 *CV*, above n 34, at [88]; and *CW*, above n 34, at [81].

departed from the approach in *Refugee Appeal 74665/03*.[124] Moreover, in seeing the observances as unpleasant, but something that the claimants could readily submit to, the Tribunal seems to have adopted the type of "reasonably tolerable" tests that were rejected in *RT (Zimbabwe)*.[125] The Tribunal's decision that if the applicants were prepared to tolerate these observances and to hide their non-belief in Islam – in other words to be discreet about their non-belief in Islam – they would come to no harm, is the very sort of reasoning that this Court rejected in *MPR v Refugee Status Appeals Authority* and in *X v Immigration and Protection Tribunal*, and which has been rejected in overseas jurisdictions as well.[126] The Tribunal has also erred through misapplying the core/peripheral assessment. It looked at the impact of the intrusion on the applicants' right to freedom of religion and decided that this intrusion was minimal. However, that is not how the core/peripheral test is to be applied. As developed in *Refugee Appeal No* 74665 and approved in *RT (Zimbabwe)*, the focus of the assessment is on whether the *claimant's proposed action*[127] goes to the core of the Convention right, or is at the periphery of this right. Had the Tribunal applied the core/peripheral test properly, it would have realised that expecting a claimant to outwardly pretend to hold a religious belief that he rejects goes to the core of his right to manifest his religious beliefs. It follows that the Tribunal's reasoning and application of the relevant law is not consistent with established authority in New Zealand and overseas.

[143] However, the questions raised by the applicants' case go beyond the usual scope of religious persecution, as here there is the element of state coercion through observance of the Islamic religion being forced upon conscripts in the Iranian Army.[128] In Iran, compulsory military service is for a period of two years. Military service necessarily entails some loss of liberty, and military discipline necessarily entails some forms of coercion. But loss of the freedom to manifest one's religious beliefs is not usually something that is attendant on military service.

---

124 An approach that was approved by the United Kingdom Supreme Court in *HJ(Iran)* and *RT (Zimbabwe)*.

125 And the earlier authorities to like effect that were reviewed in this judgment

126 See earlier discussion at [119]–[139].

127 See discussion herein at [129]–[130].

128 In this regard the Tribunal accepted that the Iranian Army makes no allowance for the non-religious or those who belief in religions other than Islam.

[144] The imposition of one religion on all who are compelled to serve in a military force is an imposition on freedom of religion that goes beyond the stated limitations in Art 18(3) of the ICCPR.[129] It is hard to see how any of those limitations could be applied to that circumstance.

[145] Moreover, in the Iranian Army the loss of religious freedom will necessarily be discriminatory as it will only be suffered by those who do not believe in Islam. For those who do believe in Islam, being part of an Islamic Army will allow them to express their religious beliefs. But for a non-believer, to have to outwardly observe Islam while in the Iranian Army is something that goes to the core of his right to manifest his non-belief in this religion.[130] The Tribunal found that Islamic observances in the Iranian Army would not force the applicants to change their beliefs.[131] However, this is an incorrect view of what constitutes coercion under Art 18(2) of the ICCPR. Those non-believers, who submit to Islamic observances unwillingly, are being coerced into religious observance against their own beliefs. If they act in this way for fear of otherwise suffering serious harm from the military authority, from other recruits or both as the case may be then, because the coercion comes from an arm of the Iranian government, all the elements of being persecuted will be made out.[132] If they do not so submit, the next question is, will they suffer serious harm as a result? If they will, the result will be indirect persecution for a religious reason. When the applicants' cases are looked at in the round, this seems to me to be the crux of their claims for refugee status.

[146] The Tribunal was wrong in law to have approached the applicants' cases by looking discretely at the question of military conscription and then at the question of religion as a reason for being persecuted. In doing so, it asked itself the wrong questions and so completely overlooked the nature of the persecution the applicants claimed they would suffer if they had to return to Iran.[133]

---

129 See [101] herein.

130 The same would apply in the case of a conscript who believed in a religion other than Islam.

131 *CV*, above n 33, at [88]; and *CW*, above n 33, at [81]

132 A person will have a well founded risk of being persecuted if: (a) he fears or he will suffer serious harm should the protected belief be discovered; and (b) the home country offers him no protection from such harm.

133 See *Ye v Minister of Immigration* [2009] 2 NZLR 596 (CA) at [403] where the Court said that asking the wrong question is a classic public law ground of review. See also *Ye v Minister of Immigration* [2009] NZSC 76, [2010] 1 NZLR 104 at [45].

[147] The key point in this case is that the Iranian Army is a religious army. That is a fact that was accepted by the Tribunal. Further, it is an Islamic army, which makes no provision for non-believers, or for those who adhere to religions other than Islam; that is also a fact that the Tribunal must have implicitly accepted because it acknowledged that those who serve in the Iranian Army are expected to declare themselves Muslims and to observe this religion. So, in this respect, the Iranian state offers no protection for conscripts who hold beliefs other than Islam.[134] It follows that one of the elements of there being a well-founded risk of the applicants being persecuted was satisfied, though the Tribunal failed to recognise this.

[148] The Tribunal failed to ask itself whether universal conscription of a type that requires non-believers to profess to be Muslims, while serving in the Iranian Army, is a form of indirect persecution, insofar as it precludes non-believers from manifesting their religious beliefs. Part of this consideration would include having regard to the length of military service, and for the duration of this time how it would be for a non-believer to have to hide his true beliefs.[135] There is also a question of what might happen to such a person if at some stage during his time in the military, the military authorities or Islamic servicemen discovered that he was a non-believer. For non-Muslim conscripts who adopt the pretence of being Muslim, the risk of discovery must always be present. Here, the Tribunal accepted the applicants were non-believers. It also recognised that the applicants had once been Muslims, which would make them apostates in Iran. Therefore, the Tribunal should have asked itself whether there was a real chance of harm to those who falsely declare themselves to be Muslim on entering the Iranian Army, and who are later discovered to be apostates.

[149] The Tribunal also did not ask itself whether conscripts who openly profess beliefs other than Islam are at risk of serious harm if they are open about those beliefs. The Tribunal did not determine this question because on the approach it took, the question was not relevant. On its view, the applicants could avoid suffering any serious harm by pretending to be believers of the Muslim faith, and keeping quiet about their true beliefs. However, once the fallacy of the "being discreet"

---

[134] This is part of the test for whether a claimant is being persecuted.
[135] See discussion above at [134] to [139].

approach is realised, the relevance and importance of considering what is the risk of serious harm for those who openly profess their non-belief in Islam becomes clear.

[150] There is the separate question of whether a refusal to serve in an Islamic army on the ground of being a non-believer of that faith would result in the applicants being persecuted. The applicants say that the Tribunal accepted that draft evaders in Iran will be arrested, and it accepted that the applicants will refuse to perform military services if they are returned to Iran. Therefore, they argue, the only conclusion open to the Tribunal was that on their return to Iran they would be arrested, which amounts to a real chance of serious harm. Thus, they contend that they are at risk of being persecuted if, on their return to Iran, they refuse to perform military service.

[151] The Tribunal took no account of the consequences for the applicants if, on their return to Iran, they refused to perform military service. This was because the Tribunal had already found that the applicants did not have a valid claim based upon refusal to perform military service. However, the Tribunal's reasoning begs the question. The same can be said for the second respondent's argument that any religious persecution through being compelled to observe the Islamic faith will necessarily be avoided if the applicants refuse to perform military service in the Iranian Army. Both the Tribunal and the second respondent overlook the reasons for such refusal. If the refusal is in part based on the applicants not wanting to be coerced by the Iranian military into religious observance of the Muslim faith, any penalty that they may pay for this refusal can amount to them being indirectly persecuted for being non-believers. This is something that the Tribunal was obliged to determine. The Tribunal failed to address this relevant legal question.

[152] For, if the applicants refuse to perform military service because, amongst other things, they do not want to participate in Islamic religious observance, they are in fact refusing to be coerced into observance of a religion they do not accept. They are exercising a fundamental freedom, namely the freedom to manifest an absence of religious belief.[136] If the exercise of such freedom leaves them open to arrest and

---

[136] This is part of the freedom guaranteed by Art 18 of the ICCPR.

punishment, there would then be a real chance of them suffering serious harm should they refuse to perform military service.

[153] Whilst the applicants' desire to avoid service in the Iranian Army goes beyond their refusal to observe the Islamic religion, the presence of other non-Convention reasons for them not wanting to return to Iran and perform military service cannot reduce the strength of the qualifying reasons.[137] So long as they genuinely hold fears of being persecuted based on a Convention ground, the presence of anything else cannot undermine their claim for refugee status.

[154] *Refugee Appeal No 75378* makes the point that performance of military service may constitute an interference with other rights guaranteed to an individual under the international bill of rights and, in particular, Art 18 of the ICCPR, which imposes binding obligations under international law on states in relation to freedoms of religion and belief.[138] This would usually be in the context where a conscript's religious beliefs were against him or her serving in a secular military. However, in my view, interference with Art 18 will also result when military service has the effect of coercing a conscript into adopting religious beliefs that he or she does not hold, or where a refusal to yield to such coercion carries adverse consequences for the conscript. Such interference falls squarely within Art 18(2) of the ICCPR. Further, as such harm will only be suffered by non-Muslims, there is no question of it applying to all conscripts; therefore, it is discriminatory in the way that term was used by Lord Hoffman in *ex parte Shah*. Discriminatory conduct that causes loss of fundamental rights coupled with a real chance of serious harm to the targets of such discrimination and a failure on the part of the State to protect them are all that is required to establish a claim for asylum under the Convention.

[155] I am satisfied, therefore, that the applicants may have a strong case for refugee status whether they perform military service in Iran or refuse to do so. In either case, there may be a well-founded risk of them suffering serious harm. I am also satisfied that the legal errors that have been identified are responsible for the

---

137 At [83].

138 Refugee Appeal No 75378, above n 35, at [47] referring to the point made by Nowak in Manfred Nowak *UN Covenant on Civil and Political Rights: CCPR Commentary* (NP Engel, Strasbourg, 1993) at 323. See also Hathaway (1991), above n 83, at 109.

Tribunal failing to recognise the true nature of the applicants' claims for refugee status.

[156] The legal principles in issue here raise issues of public and general importance that go beyond the applicants' cases. Whether conscription of a non-believer into a religious army is a form of religious coercion that results in the non-believer being persecuted either through suffering having to observe a religion that he or she abjures; or through refusing to perform military service to avoid such religious coercion is a far reaching question of general and public importance. I am satisfied, therefore, that the issues raised by this judicial review proceeding meet the test for the grant of leave under s 249 of the Act. The Tribunal, in coming to its decisions, did not direct itself correctly on the law and asked itself the wrong questions. Accordingly, the Tribunal's decisions are set aside and the Tribunal is directed to reconsider the applicants' appeals in the light of the law as I have found it to be.

[157] The checklist of questions set out above[139] may provide some helpful guidance to the Tribunal when it comes to re-consider the applicants' appeal.

[158] The conclusions that I have reached on the Tribunal's decision on the Convention grounds make it unnecessary to consider its decision in relation to the Convention against Torture and the ICCPR.

Result

[159] The applicants are granted leave to judicially review the decision of the Tribunal refusing them refugee status.

[160] The applicants' judicial review of the Tribunal's decision is allowed.

[161] The appeals that the applicants brought before the Tribunal are remitted back to the Tribunal for re-consideration

---

[139] At [134].

[162] The Tribunal should consider, in accordance with the law as I have found it to be, whether there is a well founded risk of the applicants as non-believers of Islam being persecuted, either directly or indirectly for religious reasons, and in particular being subject to coercion to conform to the Islamic faith by the Iranian Army, if on their return to Iran they:

(a) perform compulsory military service in the Iranian Army; or

(b) they refuse to, in order to resist or to avoid being required to observe the Islamic religion.

[163] The parties have leave to file memoranda on costs.

Duffy J