0904705 [2009] RRTA 972 (29 September 2009)

DECISION RECORD

RRT CASE NUMBER:	0904705
DIAC REFERENCE(S):	CLF2006/145639 CLF2007/19520
COUNTRY OF REFERENCE:	Israel
TRIBUNAL MEMBER:	Paul Fisher
DATE:	29 September 2009
PLACE OF DECISION:	Melbourne
DECISION:	The Tribunal remits the matter for reconsideration with the direction that the applicant satisfies s.36(2)(a) of the Migration Act, being a person to whom Australia has protection obligations under the Refugees Convention.

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

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

2. The applicant, who claims to be a citizen of Israel, arrived in Australia [in] September 2005, and applied to the Department of Immigration and Citizenship for a Protection (Class XA) visa [in] February 2007.

3. The delegate decided to refuse to grant the visa [in] April 2007, on the basis that the applicant is not a person to whom Australia has protection obligations under the Refugees Convention, and notified the applicant of the decision and his review rights.

4. The applicant sought review of the delegate's decision and the Tribunal, differently constituted, affirmed the delegate's decision [in] July 2007. The applicant sought review of the Tribunal's decision by the Federal Magistrates Court and [in] January 2008 the Court, by consent, set aside the decision and remitted the matter to the Tribunal to be determined according to law.

5. [In] July 2008 the Tribunal, differently constituted, affirmed the delegate's decision. The applicant again sought review of the Tribunal's decision by the Federal Magistrates Court. The matter was transferred to the Federal Court pursuant to s.476A(1) of the Act and s.39 of the *Federal Magistrates Court Act 1999* (Cth), and [in] May 2009 the Federal Court quashed the decision and remitted the matter to the Tribunal for further consideration according to law: *AZAAA v Minister for Immigration and Citizenship* [2009] FCA 554.

6. The matter is now before the Tribunal pursuant to the order of the Federal Court.

RELEVANT LAW

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

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

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

Definition of 'refugee'

10. Australia is a party to the Refugees Convention and generally speaking, has protection obligations to people who are refugees as defined in Article 1 of the Convention. Article 1A(2) relevantly defines a refugee as any person who:

> owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear, is unwilling to return to it.

11. The High Court has considered this definition in a number of cases, notably *Chan Yee Kin v MIEA* (1989) 169 CLR 379, *Applicant A v MIEA* (1997) 190 CLR 225, *MIEA v Guo* (1997) 191 CLR 559, *Chen Shi Hai v MIMA* (2000) 201 CLR 293, *MIMA v Haji Ibrahim* (2000) 204 CLR 1, *MIMA v Khawar* (2002) 210 CLR 1, *MIMA v Respondents S152/2003* (2004) 222 CLR 1 and *Applicant S v MIMA* (2004) 217 CLR 387.

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

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

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

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

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

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

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

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

CLAIMS AND EVIDENCE

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

Background

21. The applicant's background and claims were summarised in the decision of the Tribunal at first instance as follows:

> According to the protection visa application the applicant is a Jewish male born on [date] in [Town A] in Israel. The applicant lived all his life in [Town B]. He received 13 years of education and is fluent in English and Hebrew. The applicant described his occupation, before coming to Australia, as student. His past employment details include DJ from May 1997 to May 1998, delivery man from May 1998 to November 1999, soldier completing national service from November 1999 to November 2002, and supervisor with [Company] from November 2002 to December 2003, May 2004 to September 2004 and July 2005 to September 2005. The applicant previously travelled to Thailand in 2003 and Laos, Nepal, India and Thailand in 2004. He left Israel on [date] September 2004 legally on a tourist visa for travel to Australia. At the time of making his application, the applicant's mother, father and two sisters were living in Israel.
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> The applicant claimed he left Israel initially just to travel and explore Australia. Six months ago the situation in Israel became worse, with bombs falling in every single town, especially in the northern area where his house is located. As a result, even his parents changed their location and moved to a different place in Israel, hopefully far from the bombing. The applicant stated although now the situation in Israel was not as bad as it was six months ago, there was still bombings going on. A week ago a terrorist blew himself up in a street of the southeast city in Israel, El-qt, which was supposed to be the safest city. The applicant queried who could promise him that if he went back to Israel, a terrorist would not blow himself up and he would be there. He claimed this was what frightened him and made him scared of returning to Israel. He stated he had been in Australia already for 16 months and everything around him was really peaceful and quiet, and people were

friendly. He feared that if he went back to Israel the situation would only get worse, because it was never quiet there. He was scared that, like the bomb that fell on the building next to his house, it could also happen to his home the next time. He found it really traumatic to live in fear all the time, and that there was a possibility that the next bus he got on would have a terrorist on it who would decide to blow up the bus. He could not see a future living in fear all the time. He had seen the way that people live in Australia and believed that was the way life should be. He feared if he went back the army would probably call him to serve the country as all Israeli men had to perform military service for three years at the age of 18, and after that, 30 days in a year.

The applicant feared all the terror that was going on in Israel and the people that were responsible for the situation. Terror was a reality that all Israelis lived with every day. The Israeli authorities were doing their best, but could not protect people from terror in a Jewish country surrounded by Arabs. The Israeli government already tried to sign a peace agreement with these countries, but these countries wanted a big part of Israel, including the capital Jerusalem, which made it impossible to achieve peace.

The delegate's decision to refuse to grant the visa was made on [date] April 2007. He applied for a review of the delegate's decision on [date] May 2007. On [date] June 2007, the Department received a letter from the applicant which was passed to the Tribunal.

In his letter of [date] June 2007, the applicant submitted points that supported his request for refugee status in Australia. The applicant stated the war that occurred in July 2006 was really hard for him and for his family because of the dangerous location of their house, which was at the heart of the wall. He was lucky to be here in Australia, but his thoughts were in Israel. The applicant submitted that there was talk in the Israeli media that there would be another war very soon. He submitted Israel had even bigger problems because of the fact that most of the people in the government running the country were under investigation, including the President and Prime Minister. Not long ago there was a report of a council that investigated who was to blame for the war in July 2006, and this concluded that the Prime Minister of Israel was guilty because of failure and corrupted leadership. The applicant stated this may not be a good reason to be a refugee, but when people who are the head of the country failed, there was no-one else to trust to protect the country from their enemies and there was no future for the country. The applicant suggested the situation in Israel now was that there were 10 bombings on average every single day in the area of Sderot in the centre of Israel. He stated that the situation had been going on for a very long time and the government could not do anything to solve the problems except to just bomb back. The applicant stated on reflection he remembers that this had been the situation for a long time and he could not see a change in the future. He was ashamed in the way that his country treated its "opposition" and did not agree with killing anyone. He was lucky that he was not in Israel because if he was there the government would make him fight in the army for something he did not believe in and did not agree with, because all Israeli men had a duty to serve in the Israeli army for a month every year until the age of 45 and if they resisted they would be imprisoned. The applicant could not understand how the delegate had found that he had not been persecuted because of his religion or race, as all the problems in Israel were because Israelis were Jewish and their Arab neighbours were determined to eliminate the very existence of the Israeli country. Even when he wanted to travel the world, he could not go to many places because of his race and religion. There were lots of examples of Israeli Jews being persecuted in different places in the world. His reluctance to return to Israel "it was at the start only because of fear now it's also because I'm ashamed in what's happening over there and I am

determent (sic) never to live in that place again". This was the first mention by the applicant of objection to military service.

22. The Tribunal at first instance also set out in its decision the following summary of the applicant's evidence at the first tribunal hearing:

> The applicant stated that he was born on [date] and he lived in [Town B] except for less than a year when he went to College, just before he came to Australia. He received 12 years education, in addition to the one year at College. He did not have any particular qualifications. Before he came to Australia he was studying. He worked a few months before he came to Australia as a supervisor in a supermarket. The applicant stated he departed Israel legally on [date] September 2005. He came to Australia to travel and see the country. The purpose of his trip was to visit 6 months and travel around and then go back but things changed over in Israel and here. The applicant stated his parents and 2 sisters were all living in Israel. He was in contact with his family regularly. His family were residing in [Town B].
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> The applicant confirmed the purpose of his trip was to travel and have a holiday. The Tribunal asked the applicant why he feared returning to Israel. He stated when he arrived in Australia he travelled around and met the Australian people. In Israel people lived in a bubble. They were born to suffer. If there was a bomb on a bus or somebody killed nothing would happen. Life would continue as normal because this was the way people lived there. Here in Australia he understood this was not the way to live. He loved the importance of family in Australia and the fact there was no threat to life in this country. In contrast in Israel, people did not know what would happen the next day. There were soldiers and security guards on the buses and other places such as the shops, checking people. Despite this the people in Israel were not in panic but were leading a normal life. Everywhere in Israel there were soldiers with guns. The applicant stated he did not want to live this way. He did not want to serve in the army for a month each year. He felt ashamed by what was happening in his country and against the Palestinian people. Most people were innocent and wanted to live their lives but because of the terror over there they lived difficult lives as the Israeli army could shut off the electricity and other amenities and control their lives. The applicant stated it was now 2007 and Israel was a modern place. Tel Aviv was comparable to London. Although Arabs would come and bomb themselves at nightclubs and other places resulting in a lot of people being killed, people continued to lead normal, happy lives. When a person was living there, in Israel, that sort of life was usual but over here it appeared weird to live in those circumstances. The applicant stated life in Australia was normal and the way it should be. It was the way he wanted to live, without fear. He wanted to bring up his kids in a good place. In the war last year a bomb fell in front of his sister's house and her 3 children now live in panic whenever they hear a siren letting people know something bad was happening. The applicant stated there was talk about another war or something serious with Syria as the Syrians wanted Golan Heights. The applicant stated he wanted to live in Australia. He did not want to go back to Israel Although he missed his family, he did not miss his country.
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> The applicant stated he completed military service from 1999 to 2002. The Tribunal asked the applicant which part of the Israeli Defence Force he served in. He stated he served in the North as a driver for a Commander and described his time in the service as fun. After a year of carrying a gun he asked the Commander to take it from him as he did not need it and it was useless as he did not know how to use it. The applicant stated he did not perform any further service after he completed his military service in 2002. The Tribunal asked the applicant if he had been called up for reserve duty since he performed his military service. He stated he went to the far east at the time of the Al Aqsa war and after returning to Israel

he started College during which time he was called once but he was not required to serve because he was studying. He was still in contact with his Commander at that time and he fixed everything up for him. His Commander was able to help him because it was not long after he had completed his service but if he went back now there was no way he would be able to avoid service. The applicant confirmed since he completed military service in 2002 he had only been called up the once and had never performed reservist duties. He would never do it. If he was in Israel and called up to serve and he refused he would be arrested and put in jail. The Tribunal asked the applicant, if he was called up to serve the 30 days he technically was required to do, what would be the reason for not performing this duty. The applicant stated everything changed for him since coming to Australia. When he was in Israel it was normal to serve in the army and fight the Palestinians, Lebanese and others but now that he had known something else he now believed it was wrong to go with a gun and kill others. The Tribunal asked the applicant why he now believed it was wrong. The applicant stated it was complicated as the Palestinians wanted Jerusalem, the Syrians wanted Golan Heights and Hezbollah from Lebanon were against Israel and this would not change. Similarly, there was no way Israel would give in to what the Arabs wanted so there was no chance of peace in the future. The government of Israel were found guilty for what happened during the war last year. Although a new government was due to be elected nothing would be different as this situation had persisted for many years and it would continue to be the same in the future as neither side would give up as they believed their position to be the truth. The applicant stated in Israel a person did not know what would happen in a day. When there was a bomb in a place where he knew people lived he would try to call to see if they were OK but there would be no reception because everyone was trying to call to find out about people they know and he would experience feelings of loss until given the chance to speak to the person. In the two years he had been in Australia he had not experienced these feelings or any fear. He could disconnect himself from what was happening in Israel here in Australia and do something with his life.

The Tribunal asked the applicant about information he had provided the Department about his parents moving from [Town B]. The applicant stated during the war, his parents, sister and her children stayed with friends in Tel Aviv. They stayed in Tel Aviv for more than a month, until the war was over, and then they returned home to [Town B].

The Tribunal asked the applicant if he feared returning to Israel because of the 34 day war in July-August 2006, why did he wait until February 2007 to apply for protection. The applicant stated he could stay in Australia until that time. Also it was not easy or simple to ask for refugee status because it was not something good or complimentary. He therefore looked for the best options for him and took the time he had available to think about what was the best thing to do.

The Tribunal explained to the applicant that as the delegate had detailed in their decision and as the Tribunal had also described at the beginning of the hearing, in order to be recognised as a refugee there had to be a real chance he would face persecution if he returned to Israel for one of the five reasons outlined earlier, that was, race, religion, nationality, membership of a particular social group or political opinion. The reasons he had claimed to fear returning to Israel was because of the general conditions in the country as a result of the hostilities between Israel and its neighbours. However these hostilities did not appear to fall within the Convention definition as the Convention did not encompass people fleeing generalised violence or internal turmoil. Similarly, his opposition to performing reservist duties did not appear to fall within the Convention as this was a law which applied to all Israelis and unless the law was applied discriminatorily for one of the five Convention reasons, the definition of a refugee was not attracted. The applicant

stated he understood but it was complicated as the people in Israel were in danger everyday. In Israel there was a chance of being killed by terrorists going to the shops or on a bus.

The applicant stated when he received the decision from the delegate he was ashamed because of the things that were detailed in the decision that Israelis had done to the Palestinians. He did not want to go back to Israel because he did not want to be part of a community against the Palestinians. He did not want to go back and live a weird life, in a bubble. He deserved the opportunity to live a normal life and look to the future, which he could do in Australia.

23. At the second Tribunal hearing, the applicant provided the following additional claims and evidence as summarised in the decision of the Tribunal at second instance:

In the statutory declaration dated [date] June 2008 the applicant states his personal and working history as noted previously including that he came to Australia in September 2005 for reasons of tourism: "*I was very interested in Australia. I had read a lot about the Australian lifestyle and as things were becoming increasingly frightening and unpleasant in Israel I thought that Australia would be a good place to travel to*". He states that "*many people are critical of the way Israel has conducted itself politically particularly as regards to Palestinians and also as regards its close neighbours such as Lebanon*". In mid 2006 the Israel-Lebanon war broke out and "*I do disapprove of Israel's conduct in relation to the war with Lebanon*" He refers to terrorist attacks perpetrated against Israel and that they are partly attributable to Israel's own policy decisions. "*I am afraid of returning to Israel. The situation in Israel is not at all safe for ordinary people. Terrorist attacks and bombing happen every day. There is a real prospect of a significant escalation of hostilities between Israel and its closest neighbours*".

The statutory declaration also states:

> "I understand and have been told by the Department and the Refugee Review Tribunal that I cannot be a refugee just on the basis that I am afraid of returning to Israel. However, I want to make it very clear that I feel unable to return to Israel because if I return to Israel I will be required to undertake 30 days of national service each year. I do not believe in violence and I do not believe in the activities and policies of the Israeli Government or the Israeli Army. I would feel unable to do national service for the Israeli Army because of my political opinions. A failure to undertake national service as required could produce a penalty in the form of imprisonment. [paragraph 17]
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> "In addition, I believe that I would suffer from persecution unless I am willing to fall into line with the common views held by Israelis about our neighbours including the Palestinians and the Lebanese and about the need to forcibly repress our neighbours and the Palestinians. [paragraph 18].
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> "I would describe myself as a moderate but to many Israelis my views would be a betrayal of Israel I would be at risk of being targeted by extreme political groups or killed. The Israeli government and agencies like the police are not able to protect me. [paragraph 19]
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> "In addition, I believe there would be a social stigma attached to me having unpopular, arguably unIsraeli political views. I would be repelled by society. When applying for employment I may have to demonstrate that I have completed my 30 days per year of national service. My political views would certainly be known to others and would virtually preclude me from securing employment or advancement in Israel." [paragraph 20]

Hearing [date] June 2008

The applicant appeared before the present Tribunal on [date] June 2008 to give evidence and present arguments. He stated that he did not require an interpreter.

At the hearing, the applicant corroborated his personal and travel details. He said he had been employed in the army as a driver with the rank of Private. In the normal course of events, after his initial three years service culminating in November 2002, he would be expected to serve 30 days per year as a reservist. However, he confirmed that he had not served the time in any year from 2003 to date, a total of 6 years. Asked what was the basis of his objection to military service, the applicant said he did "*not agree with it. It is wrong. I believe in peace*". He said he changed his view while in Australia, because when "*you are inside Israel you are surrounded by opinion, but when you are outside you see things properly*". He said he did not believe there would be peace in Israel, "there is no way I will go back". He may be gaoled for refusing to serve in the army. He said he thought he would be persecuted because of his opposition to military service and therefore he had a political opinion. He said "they" would think that he is "weird" for holding this opinion. He would lose his friends, he would not be able to get a job, there is a group of criminals who would harm him. He said that people in Israel held the view that "*every Arab/Palestinian must die*" The applicant was unable to identify the alleged 'group of criminals' except to say that they are the group who support the government and have the power to do as they want. He was unable to provide details on this group. He said he would be a target from one side because of his Jewishness and from the other because of his opinion.

The agent noted that the statutory declaration dated [date] May 2008 was substantially the same as the statutory declaration dated [date] June 2008 but was incomplete and asked the Tribunal to disregard it. The Tribunal agreed to disregard the former and take into account the latter only.

The applicant's agent requested an additional week in which to submit further documents. By letter of [date] June 2008 the applicant's agent provided the following submission:

> The applicant falls within the definition of refugee because of his political opinion. The applicant was not interested in Israeli politics until after he had travelled. He formed his views especially during the hostilities between Israel and Lebanon in 2006 while he was in Australia His political opinions are now in opposition to the policies of the Israeli government and the Israeli Army and different from those held by most Israeli citizens. He does not agree with the forcible repression of Israel's neighbours and the Palestinians. The applicant claims that in Israel political discussion is very much part of everyday life. He states that his views would be seen by many Israelis as a betrayal of Israel, he is at risk of being targeted by extreme political groups who may kill him, and the Israeli government and police cannot protect him. His views would result in him being rejected so that it would be difficult for him to find employment.
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> The representative quoted from an Amnesty International report dated 2 September 1999 to the effect that "conscientious objectors, including pacifists and those opposed to implementing Israeli policies in the Occupied Territories, who refuse to perform military service are normally imprisoned for weeks and sometimes months after receiving unfair trials by military officers".

The representative referred to a number of previous RRT cases where other Israelis successfully claimed protection on the basis of conscientious objection, but also noted that these cases were not binding on the Tribunal.

24. The judgment of the Federal Court, in quashing the second Tribunal decision, relevantly includes the following observations of Mansfield J:

> 44. The Tribunal by its heading specifically identified the need to decide whether the applicant's "conscientious objection" to performing military service could be regarded as a form of political opinion.

45. It recited the evidence which, in the passage quoted, it discussed. That evidence was largely to the effect that the applicant feared the perils associated with military service, as well as those generally associated with living in Israel, from its enemies. The only evidence it noted (or "discussed", to use its word) which might have given rise to a claim to object to military service on conscience grounds was that, at the hearing on [date] June 2008, the applicant said he did not agree with military service, and that "... it's wrong. I believe in peace." That was the evidence the Tribunal regarded as manifesting no more than a "mere intellectual persuasion". In the concluding part of its reasons on the topic, the Tribunal noted that the applicant when previously in Israel had not objected to military service. It does not follow that he would not do so upon his return to Israel, but the Tribunal's conclusion that it was not satisfied that the applicant would make known his views about objection to military service is not necessarily a non sequitur. It is an assessment of the strength of the applicant's views, as it identified them based on the evidence it discussed.

46. The Tribunal as initially constituted had accepted that the applicant's attitude to further military service may have changed since he had come to Australia, as he had learned more about the actions of the Israeli government as well as those of its enemies, and that there is a real chance he may refuse to serve because of his opposition to fighting and as such he may be liable to punishment.

47. It is not necessary to go back to the evidence upon which those findings were made, or to determine if the same material was before the Tribunal as reconstituted. The Tribunal as reconstituted was not obliged to reach the same conclusions. It had to reach its own views. It identified that it had to address the issue, and it did so in the passages referred to.

48. However, in my judgment, the Tribunal as reconstituted has failed to appreciate the detail of the evidence of the applicant about his objection to undertake military service. The relevant terms of his statutory declaration of [date] June 2008 are set out in [9] above. That is not referred to by the Tribunal.

49. Moreover, in what was a relatively short hearing of 34 minutes on [date] June 2008, the Tribunal asked the applicant when he decided he was a "conscientious objector". He did not appear to understand the question. He was then asked whether he had objections to military service; he said he had. He said it was:

> Because look what happen, like all the years. Many children, many innocent people dying from the Israeli army ..
>
> I don't agree with [military service] ... it's wrong – everything there. No way that I cooperate with something like this. I don't believe it. I believe in peace and not wait for war every day, every place, to kill every person that you recognise like Arabic, Palestinian or Lebanon – never mind. No way. It's not my way. It's not the way that I see my life.

The Tribunal then remarked that everybody believes in peace, so it asked for more detail. The answer was:

> Yes, but not – but in Israel it's different. In Israel it's different because all your life surrounded by this war, this – is Jewish again, Arabic, and everything surrounded by this. I don't believe it. I don't have any problem with Palestinian and Lebanon. I don't have any problem with this. I like them.
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> Here, for example, in Australia I have many friends from there, and I live with them in peace and happiness, and that's it. And back there – if people hear me think like this way, okay, so they think that I am – "What is this? Who are you? You're not belong to us." I'm then against them, because in Israel everyone – they – if you hear in the news about 100 Palestinians that died because they were – I don't know what – the army was killing them – so everyone happy, you know, "(indistinct) beautiful – another 100 gone." What do you want me to say? Yes? No. Straightaway, I said, "Well, what are you talking about?" This is not the way…
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> I don't believe in this peace. I don't believe that they want to do peace, not on this side. And I don't want to be – to keep saying, "It's going to be all right, it's going to be all right." I want to be – to do right. I want to be in a place that it's right (indistinct) right.

> No way that I'd go back to this country, no way. It's a weird place. For me it's a weird place right now. And, okay – for example, if I'm going to be there – they think that I am here. That's the main problem. They think that I am betrayed. They think that I'm one of them.

The "one of them", he told the Tribunal, was one of the Arabic people, and he expressed understanding for the Palestinians and said he thought that what Israel was doing to the Palestinians was like what the Germans had done to the Jews previously: they control their lives, and "that's disgusting" The expression of his views would, the applicant said, mean he would be regarded as a betrayer. He said that the Israelis are loyal to their country, but they "live in a bubble – that everything is right and, as long as it's against Arabic, it's fine, it's okay, it's legal".

50. The Tribunal then asked the applicant what he would suffer from his unorthodox views. He said, firstly, that if he refused his compulsory military service he would be gaoled. And he said he was not going to do further military service. He again said also that, if he openly expressed his views, he would be regarded as a traitor and would not be able to get work.

51. The Tribunal did not indicate that it did not accept the applicant's evidence. There is no comment at all in its reasons regarding his credibility. Indeed, later in its reasons, the Tribunal appears to have accepted that his political views, in some important respects, may be in opposition to those of the Israeli government. It did so when considering whether his political views might expose him to forms of persecutory conduct (other than the consequences of refusing to undertake military service) as a member of a particular social group, either from the Israeli authorities or from vengeful groups in Israel from whom the authorities had no system to protect him. There is no issue on this application about that part of the Tribunal's decision.

52. In my view, the Tribunal's approach reveals that it did not apprehend the true nature of the applicant's objection to undertaking further military service if he were to return to Israel. To categorise it simply as a generalised belief in peace was wrong. It was clearly more than that. The Tribunal, for some reason, has apparently simply overlooked the evidence to which reference has been made. Hence, it has not considered whether to accept or reject that evidence, and so not considered that claim of the applicant.

53. The Tribunal was obliged to consider any claim made by the applicant which could, if the asserted facts were established to the satisfaction of the Tribunal, resolve the application for a protection visa in his favour: *Dranichnikov v Minister for Immigration and Multicultural Affairs* [2003] HCA 26; (2003) 77 ALJR 1088 at [23] and [32] per Gummow and Callinan JJ, Hayne J agreeing, and at [65] and [74] per Kirby J. That case involved a failure to respond to a substantial, clearly articulated argument relying upon established facts, and so a failure to exercise its jurisdiction in relation to that claim. In *NABE v Minister for Immigration and Multicultural and Indigenous Affairs (No 2)* [2004] FCAFC 263; (2004) 144 FCR 1 at [63], the Court (Black CJ, French and Selway JJ) said:

> It follows that if the Tribunal makes an error of fact in misunderstanding or misconstruing a claim advanced by the applicant and bases its conclusion in whole or in part upon the claim so misunderstood or misconstrued its error is tantamount to a failure to consider the claim and on that basis can constitute jurisdictional error.

See also *Chen v Minister for Immigration and Multicultural Affairs* [2000] FCA 1901; (2000) 106 FCR 157 at [114].

54. The applicant raised the claim that he had a well-founded fear of persecution by reason of his political beliefs, namely that he would decline to further undertake compulsory military service and be penalised for doing so, for the Convention reason of his political beliefs. It was, in my view, not understood and so not addressed by the Tribunal. For the reasons given, I consider that amounts to jurisdictional error on its part.

55. Although the jurisdictional error I have found is expressed a little differently from the contention of the applicant, in essence I have accepted the applicant's contention. For reasons which are not apparent, the Tribunal has diverted itself from considering whether

the evidence of the applicant should be accepted on that aspect of his claim and then from considering whether on that evidence, it is satisfied of that aspect of his claim. That is despite the heading to that section of its reasons. It was not inappropriate to start with the question of whether the applicant is a conscientious objector, if that was taken to mean whether he would (or there was a real chance) that he would refuse to undertake further compulsory military service. What appears to have occurred, however, is that the Tribunal has not recognised that there was an apparently cogent body of evidence on that issue and so it has not addressed that issue.

56. I note that the Tribunal, in addition, said that any refusal to undertake military service would be assessed by the Israeli authorities in respect of its genuineness, and that their assessment would involve the application of a non-discriminatory law of general application. That alternative step in its reasons does persuade me that its jurisdictional error is not an operative one. If the Tribunal were to be applying a "what if I am wrong" test, the independent information on the topic which it recited includes that: no provision is made for alternatives to military service for conscientious objectors; conscientious objectors are sentenced on one of a number of charges for up to five years' imprisonment but generally not more than one year's imprisonment; there are no provisions such as alternate forms of service for conscientious objectors under Israeli law; and [inconsistent with other information] genuine conscientious objectors may be exempted from service if they are an "absolute pacifist" rather than an objector on "political grounds"; and that [again] there are no legal provisions for conscientious objectors. There is no discussion of those various pieces of information. The concluding paragraph of the Tribunal's reasons set out at [15] above therefore appears to be more an aside than serious consideration of the issue, for otherwise it could not have failed to discuss that conflicting information.

25. [In] July 2009 the Tribunal invited the applicant to attend a further hearing scheduled [in] August 2009 to give evidence and present arguments. Acceptance of the invitation was communicated to the Tribunal [in] July 2009.

26. [In] August 2009 the Tribunal received a submission in support of the review application incorporating the following:

> We are instructed to provide a further statutory declaration in relation to [the applicant's] claims We would ask the Refugee Review Tribunal to take into account all of the information previously submitted including the application for a Protection visa submitted by [the applicant] on [date] February 2007, the materials before the first Refugee Review Tribunal (RRT1), the materials before the second Refugee Review Tribunal (RRT2), and the decisions of the Federal Magistrates Court.
>
> For the convenience of the third Refugee Review Tribunal (RRT3), we are **attaching** a copy of our submission to the RRT2 dated [in] June 2008 together with a copy of [the applicant's] signed statutory declaration which was forwarded to the RRT2.
>
> [The applicant] has now provided an updated statutory declaration. A copy of the signed statutory declaration will be forwarded to the Tribunal prior to the hearing.
>
> [The applicant] will suffer persecution in Israel because of his political opinion (conscientious objection). It is a requirement in Israel that all men and women undertake compulsory military service of 30 days per year. If he were returned to Israel he would refuse to undertake this reservist duty because of his conscientious objection and as a result would suffer persecution in the form of imprisonment.
>
> Israel requires all Israeli citizens and permanent residents to perform regular and then reservist military service. Men are required to serve three years and women two years of "regular service" and thereafter both men and women are required to do a period of reservist service each year. There is no provision in Israeli law to excuse citizens or permanent residents from service on the basis of their conscientious objection. [The

applicant] has completed his regular military service but would be required to undertake reservist duty each year.

Section 46 of the Defence Service Law states that a failure to fulfil military service duty is punishable by up to two years imprisonment, attempting to evade military service is punishable by up to five years imprisonment. Refusal to perform reserve duties is punishable by up to 56 days imprisonment, the sentence being renewable if the objector refuses repeatedly. Israeli law does not provide for an alternative form of civil service. Nor does the country have an independent decision making body to hear and determine requests for exemption from military service on the basis of conscientious objection.

Article 18 of the ICCPR provides that every person has a right to freedom of thought, conscience and religion. The United Nations Committee on Human Rights has reiterated an individual's right to refuse to perform military service in several resolutions. In 1998 the Committee adopted Resolution 1998 177 that stresses a state should not imprison conscientious objectors and recommended states form a foundation for a form of alternative service and an independent decision making body to determine whether a person has a genuine conscientious objection.

In Israel, conscientious objectors are seen as traitors and political dissidents. A 2002 article by Dani Ben Simhon reported that military police arrested and detained a high school student who expressed his objection to military service in a letter to the Prime Minister. New Profile is an organisation in Israel that places and supports citizens who do not wish to do military service. In April 2009 six members of this organisation were detained and interrogated by Israeli police. Helping someone to avoid military service is punishable by fine or up to two years imprisonment. This suggests that while compulsory military service requirements are of general application, the law is not applied indiscriminately. W e submit that the law is in fact used to discriminate against those citizens of Israel who have an alternative political opinion to that of the Israeli government and those citizens who have a genuine conscientious objection to military service. Citizens who object to military service on religious grounds are exempt from service, while citizens who object to military service on political or moral grounds are imprisoned[1]

We submit that if the applicant returns to Israel and refuses to perform military service, he will be liable to punishment without being afforded the right to a fair trial. Should the applicant be imprisoned, we submit there is a real chance that he will be treated more harshly in detention due to his political opinion and the fact that he will be seen as an opponent to Israeli policy in the Occupied Territories.

Documents

In support of this submission we **enclose** the following documents:

1. Dani Ben Simhon article - Conscientious Refusal - Those who say "No!", January - February 2002
2. War Resister's International - Israel: WRI Affiliate New Profile raided by police, 4 May 2009
3. Erduran v Minister for Immigration & Multicultural Affairs [2002] FCA 814 (27 June 2002)
4. N03147474 [2004] RRTA 292 (14 April 2004)

We ask the Tribunal to note that in a case which is virtually identical on the facts, the Refugee Review Tribunal (Dominic Lennon) recently found that the applicant was a refugee. We are **attaching** a copy of the Refugee Review Tribunal decision in RRT case number 0903074.

We also refer the Tribunal to the decision of the Refugee Review Tribunal in N03 147474

[1] Amnesty International Report 2008 - Israel and the Occupied Territories

[2004] RRTA 292.

27. [In] August 2009 the Tribunal received a further letter in support of the review application referring to an article entitled *Hezbollah stockpiles 40,000 rockets near Israel border*, available at http://www.timesonline.co.uk/tol/news/world/middle_east/article6739175.ece. The article, also dated 5 August 2009, includes the following:

> Three years after Israel fought a bloody war in Lebanon against Hezbollah, there are fears that hostilities could erupt again — this time with the militant group better armed than ever.
>
> According to Israeli, United Nations and Hezbollah officials, the Shia Muslim militia is stronger than it was in 2006 when it took on the Israeli army in a war that killed 1,191 Lebanese and 43 Israeli civilians.
>
> Hezbollah has up to 40,000 rockets and is training its forces to use ground-to-ground missiles capable of hitting Tel Aviv, and anti-aircraft missiles that could challenge Israel's dominance of the skies over Lebanon.
>
> Brigadier-General Alon Friedman, the deputy head of the Israeli Northern Command, told The Times from his headquarters overlooking the Israeli-Lebanese border that the peace of the past three years could "explode at any minute"…
>
> His concerns were due partly to threats from Hezbollah's leadership. Last month Sheikh Hassan Nasrallah, the leader of Hezbollah, warned that if the southern suburbs of Beirut were bombed as they were in the last war, he would strike back against Tel Aviv, the largest Israeli city.
>
> "We have changed the equation that had existed previously," he said. "Now the southern suburbs versus Tel Aviv, and not Beirut versus Tel Aviv."
>
> Hezbollah's rearming is in the name of resistance against Israel. The real reason, however, probably has more to do with its ally Iran. If Israel carries out its threat to attack Iran's nuclear facilities, the main retaliation is likely to come from Hezbollah in Lebanon.
>
> All sides agreed that the threat was not a bluff. Last month the scale of the Hezbollah build-up was revealed after an explosion at an ammunition bunker in the village of Khirbet Slim, 12 miles from the Israeli border.
>
> Surveillance footage obtained by *The Times* showed Hezbollah fighters trying to salvage rockets and munitions from the site. Obstructions were placed in the way of Unifil peacekeepers going to investigate.
>
> Alain Le Roy, the head of UN peacekeeping operations, told the Security Council last month that the explosion amounted to a serious violation of UN Resolution 1701, which imposed a ceasefire and arms ban after the war.
>
> "A number of indications suggest that the depot belonged to Hezbollah and, in contrast to previous discoveries by Unifil and the Lebanese Armed Forces of weapons and ammunition, that it was not abandoned but, rather, actively maintained," he said.
>
> Unifil's mandate is due to be renewed by the Security Council this month and Israel is pressing for the peacekeepers to be more robust in stopping Hezbollah and other armed groups from infiltrating the UN-patrolled region south of the Litani river. Hezbollah, which is armed, trained and financed by Iran, has been engaged in a recruitment, training and rearmament drive since the end of the 2006 war. Although basic training on firing weapons is taught at camps in the mountains flanking the Bekaa Valley, specialised courses are carried out in Iran. Hundreds of

fighters have travelled to Iran since 2006 to learn about bomb-making, anti-tank missiles, sniping and firing rockets.

"War will definitely come," said Hussam, a 33-year-old fighter who joined Hezbollah in 1987 as a scout. "Israel will never leave us alone."

Military sources close to Hezbollah said that the group wanted to increase the number and effectiveness of its air defence systems. Hezbollah is believed to have acquired large numbers of SA18 shoulder-fired missiles that could mount a challenge to Israeli helicopters and low-flying jets. Western intelligence sources told The Times that Hezbollah fighters were receiving training in Syria on the SA8 system. The radar-guided SA8 missiles are launched from tracked vehicles and have a maximum altitude of 36,000ft (11,000m), which would pose a serious threat. Israeli jets and drones use Lebanese airspace almost daily. Israel said that the flights were necessary for reconnaissance purposes, although the UN considered them violations of Resolution 1701.

Israel said that Hezbollah's acquisition of advanced anti-aircraft missiles could prompt a military response to destroy the systems. Israeli warnings relayed to Syria appear to have forestalled the entry of the SA8 system into Lebanon, the sources said.

Israel claims that Hezbollah has tripled the number of surface-to-surface rockets since 2006, to about 40,000.

"Hezbollah has not only replaced the munitions but upgraded their missiles," Danny Ayalon, the Deputy Israeli Foreign Minister, said. "They are bragging now that they can hit Tel Aviv."

According to Western intelligence sources, Hezbollah hopes to receive an improved version of the Iranian-manufactured Fateh-110 rocket, which can carry a 1,100lb (500kg) warhead more than 125 miles (200km).

Hezbollah officials refused to provide details on its military build-up but they did not deny that they were prepared for another war.

"Hezbollah today is in a better condition than it was in July 2006," said Sheikh Naim Qassem, Hezbollah's deputy leader, in an interview with *The Times*. "And if the Israelis think they will cause more damage against us, they know that we also can inflict more damage on them."

28. The letter also encloses a draft statutory declaration by the applicant incorporating the following:

3. I applied to the Department of Immigration and Citizenship for a Protection visa, I prepared that application myself. The application was refused and I appealed to the Refuges Review Tribunal (RRT1). The RRT1 affirmed the decision to refuse my visa. I appealed to the Federal Magistrate's Court and on [date] September 2007 the Federal Magistrate's Court made a decision in my favour.

4. My case was sent back to the Refugee Review Tribunal (RRT2). I had a further hearing in the RRT2 and in 2008 the Tribunal Member again found that I was not a refugee. I again appealed to Federal Magistrate's Court and now it is my understanding that the case has been sent back to the Refugee Review Tribunal for further hearing.

5. I previously provided the immigration Department and the RRT1 and RRT2 with information about my claims and my fear that I will be persecuted if I return to Israel. I would ask the current Tribunal (Refugee Review Tribunal 3) to take into account all of the information I have provided before.

6. I am preparing this statutory declaration to provide more detail about my claims and also to provide Refugee Review Tribunal 3 with updated information about my claims.

7. I was born in [Town A] in Israel on [date]. [Town A] is a small town in the north of Israel. When I was approximately three years of age my family members moved to [Town B] which is an the coast, near the border between Israel and Lebanon.

8. I was raised by both parents and I have two siblings, a sister, [name], and a brother, [name].

9. I completed my secondary schooling in Israel in July 1999.

10. While I was at school I had a number of different part time jobs.

11. At school, all Israeli children are taught about the wars that the Israeli's have been though, and about the holocaust during the second world war. We were taught about how our Arab neighbours were our enemies and that Israel was in a very vulnerable position. We were taught that Israel had to he strong and to fight for its very existence, and that that included treating the Arab population and all of our neighbours including Lebanon and Syria and all Palestinians as our enemies. We were always taught never to trust Arabs. As a child and a young man I just accepted the training and teaching I received at school.

12. Between November 1999 and November 2002 I completed a three year period of compulsory military service in Israel.

13. Every boy and girl aged 18 years of age receives a letter from the military requiring them to report at a particular place and time to undertake military service obligations.

14. The law of Israel requires that even after an individual has completed their compulsory military service, both men and women are required to undertake an additional 30 days per year military service.

15. The obligation to perform military service is enforced by the authorities. It for example I had refused to undertake my military service when I was called up in November 1999 I would have been taken to gaol by the military police and would have remained in gaol for a period of time.

16. Before I completed my college qualification I travelled through Asia. I went to Thailand, Laos, Nepal and India I enjoyed my travels in 2003 and 2004 and returned to Israel to complete my college education. After completing my education I worked for a couple of months and then decided that I would like to continue travelling.

17. When I first arrived in Australia my intention was to be a tourist. I wanted to enjoy a lot of experiences in Australia.

18. I first arrived in September 2005.

19. Since I arrived in Australia I have not had permission to work. I had some saving previous work and my parents have also sent me money.

20. I applied for my Protection visa initially on [date] February 2007, over one year after I arrived in Australia. During the period of time in Australia I loved living in a peaceful and safe country. The comparison between the constant fear in Israel was very striking to me. At the time of my application for a protection visa I did have a very strong fear of returning to Israel I was afraid of living in Israel because it is a violent place and because terrorists attacks can happen at any time. However, there was more to my claim than that. I may not have expressed it very well in my initial application but after arriving in Australia I had had the opportunity to see how other people thought and to see Israel and its behaviour internationally from other points of view. Of course I was already aware that the terrorist attacks that take place in Israel are often conducted by Arab and Palestinian groups. Once I was in Australia I came to realise that Israel had contributed to the danger in which it found itself because it had taken such an inflexible and harsh position in relation to the Palestinians and other Arab neighbours such as the Lebanese. I came to feel that these people were quite desperate as a result of Israeli policy and that our own government had contributed to the danger ordinary Israelis like myself faced in our own country.

21. In Israel I did not question anything. I was brainwashed like everybody else in Israel because

of the teachings and because of our constant exposure to anti-Arab and anti-Palestinian thoughts. I had never met anyone in Israel that had made an effort to consider the perspective of or neighbours of Israel like the Palestinians.

22. Having lived in Australia and having grown up and thought about these issues deeply, I am now opposed to the political position of Israel towards its neighbours and in particular towards the Lebanese and the Palestinians. I think that Israel's conduct in the war against Lebanon in June 2006 was inexcusable. I feel that Israel should recognise the rights of the Palestinians to the land occupied by the Israelis and should not try to control the Palestinians by withdrawing essential services like electricity and water which are under the control of the Israelis. I think that Israel is guilty *of* cruel and inhumane conduct, and conduct that is potentially dangerous for Israel in that will breed a whole new group of people that hate Israel.

23. I am opposed to all forms of violence and I do not believe in a violent solution to the problems in Israel and the Middle Fast.

24. If I return to Israel I will be required to undertake 30 days national service each year would not undertake this national service. I would not undertake this national service because of my political opinion, namely my objection *to doing military service* with the Israeli military because of the anti-Arab and anti-Palestinian position of the Israeli government.

25. If I object to undertaking military service in Israel I will face charges and imprisonment as it is a criminal offence not to undertake military service in Israel A decision to refuse to do military service would also shut me out of lots of different types of work and I would also become socially isolated for holding unpopular opinions.

Third Tribunal Hearing

29. The applicant appeared before the Tribunal in person [in] August 2009 to give evidence and present arguments. The Tribunal hearing was conducted with the assistance of an interpreter in the Hebrew and English languages. The applicant was represented in relation to the review by his registered migration agent. The representative attended the Tribunal hearing via video-link.

30. The Tribunal explained its role and the Convention definition of a refugee to the applicant, and indicated that the matters in issue were:

> whether, as a conscientious objector, he could avoid the obligation to perform reserve military duty in Israel, either fully or in part, including by performing a non-military role;
>
> if not, whether the consequences would amount to persecution or merely prosecution in the sense of being the implementation of a law of general application; and
>
> if so, whether he would be treated differentially to anyone else who refuses to serve for a Convention reason, for example by being imputed with a political opinion.

31. The applicant confirmed his identity and explained his current living arrangements, namely that he resides with his de facto partner, another Israeli conscientious objector who was recently found to be a refugee by the tribunal, differently constituted, in decision 0903074 (26 June 2009, per Dominic Lennon). He met her here in Australia approximately two years ago. She is aware of his claims, that he is a conscientious objector; indeed, that is one of the important things they have in common.

32. The applicant was asked whether, after performing his initial military service, he had actually performed any reserve duty. He explained that he was either travelling abroad

or studying at university where he was exempt, although if war had broken out at that time it would have been different.

33. The applicant was asked whether he opposes all military service. He said he does, but it wasn't always the case. Over in Israel when he was younger it seemed all right, and he had never been exposed to different viewpoints. His family and friends all felt the same. The Tribunal observed that there are dissenting Israeli voices who favour a more conciliatory attitude to Palestine. The applicant observed that it hadn't seemed like that to him at the time.

34. Now, however, he doesn't believe in what is happening there, and won't serve in the Israeli army again. People he knows well are aware of his opinion. He is now against all war, but particularly the current conflict with the Palestinians, as he has seen the situation up close.

35. The Tribunal noted that there does exist a provision in the laws of Israel for exemption from military service, albeit in limited form. The applicant replied that if people knew what his views were in Israel he would have problems. His family and friends wouldn't like it if they knew his position; they were happy about the recent Israeli invasion of Gaza.

36. The Tribunal observed that the laws of Israel make at least some provision for exemption from military service on the grounds of conscientious objection. The applicant agreed that he is not the first person who doesn't wish to perform military service, but expressed the view that most of them go to gaol, and that there is only a small chance that the authorities will think that a person's opposition to military service is genuine, and that only a tiny percentage share his views. Most go to gaol, and if they don't they are ostracised by the community, and can't get a job.

37. The applicant was asked whether he would be opposed to military service if the war was clearly a just one. He acknowledged that that was a difficult question, but insisted that at present it has no application in Israel. If he had returned there during the recent war he thinks he would have been called up and forced to serve.

38. The applicant's representative then acknowledged that the applicant may not be a complete pacifist, but that this is not necessary for his case to be made out. He has a moral objection to performing military service in the Israeli context, but wouldn't be able to argue against having to perform reserve duty, having already performed his initial service, and would be unlikely to get a waiver in the future, even if some others manage to.

Country Information

39. A considerable amount of relevant country information has been set out in the primary decision and the first and second decisions of the Tribunal, and referred in submissions made on behalf of the applicant. In particular, the Tribunal notes the following summary from the second Tribunal decision:

> In a 2003 a paper by Andreas Speck for *War Resistors International* the following observations of the system in general was made:
>
> > Conscription exists since the establishment of the State of Israel in 1948. The present legal basis of conscription is the 1986 National Defence Service Law. All Israeli citizens and permanent residents are liable to military service. However, the Ministry of Defence has used its discretion

under Art 36 of this law to automatically exempt all non-Jewish women and all Palestinian men except for the Druze from military service ever since Israel was established. Palestinian Israelis may still volunteer to perform military service, but very few (especially among the Bedouin population of Israel) do so. Military service lasts for three years in the case of men, and for 20-21 months in the case of women. It lasts longer for officers and certain specialists, such as doctors and nurses. New immigrants are given a two-year 'absorption period', but can be called up for military service during this period. They are conscripted for similar or shorter periods, according to their age, gender, and status as 'potential immigrants' or 'immigrants'. Reserve service is required up till the age of 51 in the case of men (54 for officers) and up till 24 in the case of women. Reservist duty involves one month training annually. Traditionally the reserve service has been considered a very important aspect of Israel's defence policy, indeed an important aspect of building a national identity. Since the 1980s attitudes seem to have changed somewhat. Men of over 35 are often not called up for reserve training, as they are considered medically unfit. Usually men are finally discharged at the age of 41 or 45. Women are as a rule not called up for reserve training at all. (Speck, Andreas 2003, 'Conscientious objection to military service in Israel: an unrecognised human right', War Resisters' International website, 3 February, p.3 http://wri-irg.org/pdf/co-isr-03.pdf).

The 2003 paper by Andreas Speck for *War Resistors International* states of the penalties for avoiding military service:

According to the National Defence Service Law, art 35 (a) (2), failure to fulfil a duty imposed by the National Defence Service Law is punishable by up to two years' imprisonment.

Attempting to evade military service is punishable by up to five years' imprisonment.

Refusal to perform reserve duties is punishable by up to 56 days' imprisonment, the sentence being renewable if the objector refuses repeatedly.

Helping someone to avoid military service is punishable by a fine or up to two years' imprisonment.

Those who disobey call-up orders are regarded as refusing to perform military service and can thus be sentenced to up to five years' imprisonment. In practice sentences do not exceed more than a year's imprisonment. In practice, conscientious objectors are sentenced on one of the following charges: refusing to obey an order, absence without leave, desertion, or refusal to be mobilised.

If an application for exemption from military service is rejected, the individual is ordered to perform military or reserve service. Continued refusal may lead to being disciplined or court-martialled. As stated above, there is no clearly discernible pattern to decision making in cases of people refusing to serve. Military courts have sentenced objectors to up to one-and-a-half years' imprisonment. Sentences are frequently much shorter, but may be imposed repeatedly. They may be from seven to 35 days' imprisonment, and they may be renewed as much as five times. After they leave prison people may either be 'forgotten' or exempted. Usually COs get exempted after serving a total of more than 90 days in prison. However, this practice is changing, and recently conscientious objectors were sentenced again and again after having spent more than 150 days in prison.

It has been reported in the past that Druze objectors are apt to receive exceptionally severe sentences for draft evasion and desertion.

Since October 2000, more than 181 conscientious objectors spent time in prison – the majority (151) refusing reserve duty in the Occupied Territories (selective conscientious objection).

While the sentences for refusing to perform reserve duty in the Occupied Territories mainly remained constant – normally 28 days, with some cases of 14 or 21 days, and some cases of 35 days – the sentences for draft evasion increased. It can be seen that the average was below 90 days for draft resisters who were called up in 2001, those who were called up in 2002 received sentences of more than 100 days on average, with average sentences climbing to more than 140 days for those called up from August 2002 onwards (the figures for December 2002 and January 2003 are misleading, as these draft resisters haven't received their last prison sentence yet).

The increase of sentences is the result of repeated imprisonment. Before 2002, draft resisters were usually sentenced 4 or at maximum 5 times, until they had spent at least 90 days in prison. Eventually they are sent to the "Unsuitability Committee" that usually exempts them on grounds of

'unsuitability for military service'. The decision to refer a draft resister to this committee is with the 'Classification Officer'.

In some cases a classification officer referred a draft resister to the Unsuitability Committee even before 90 days in prison were reached. For those draft resisters who were called up in 2002 the situation changed. Victor Sabranski, who was called up in May 2002, spent 126 days in prison. Those who were called up from August 2002 on spent even more days in prison, being sentenced five, six, seven, or even more times, with no end in sight. In the case of Jonathan Ben-Artzi, who is presently serving a seventh prison term, the decision was transferred to the Head of the Manpower Department of the IDF, an indication that the increase in sentencing is a change of policy.

(Speck, Andreas 2003, 'Conscientious objection to military service in Israel: an unrecognised human right', War Resisters' International website, 3 February, p.8 http://wri-irg.org/pdf/co-isr-03.pdf).

Provisions made for pacifists

The sources consulted indicate that there are no provisions such as alternate forms of service for conscientious objectors under Israeli law. However, persons who are deemed to be genuine conscientious objectors may be granted exemption from service: one issue involved here is whether the person is an "absolute" pacifist or whether they object to performing military service on "political" grounds, such as in the Occupied Territories There is also some evidence that the large number of draftees who are granted medical exemptions may include people who are simply unwilling to serve.

A 2005 document entitled '*Conscientious Objection'* from the website of the Israel Ministry of Foreign Affairs provides the government's legal position:

3. The IDF will respect the views of a conscience objector, provided that it is satisfied that these views are genuine. To this end, a special military committee, headed by the IDF's Chief Recruitment Officer, or his deputy, hears the application of those who wish to be exempted from the army on the basis of conscience objection. Among the members of this committee are an officer with psychological training, a member of the IDF attorney's office and a civilian expert on conscience objection.

4. The willingness to grant an exemption from the army due to conscience objection stems from the fact that the State sees the freedom of conscience as a fundamental human right and this attitude is integral to a tolerant society, regarding objection as a human phenomenon.

5. The High Court of Justice has addressed the issue of conscience objection in H.C.J. 7622/02, David Zonsien v. Judge-Advocate General. The Court here held that the difficulty lies in balancing between conflicting considerations: the duty to pay appropriate respect to the individual conscience of the objector, stemming from the right of individual dignity, and the consideration that it is neither proper nor just to exempt individuals from a general duty imposed on all other members of society.

6. A very fine line divides between the two main fundamental values of society: the freedom and protection of the individual and the value of equality and order in society. The duty of army service is a civil duty of every citizen that is explicitly stated in the Law. It is extremely difficult to decipher where an objection is a conscience objection, and therefore acceptable, and when to deny the exemption.

7. In a recent decision of the High Court of Justice, (H.C.J. 2383/04 Liora Milo v. Minister of Defence et al.) the Court emphasized that once it is clear that the objection stems from genuine motives, there is a need to distinguish whether the case is a conscience objection case or non-fulfilment of a civil duty. The latter has a "protest nature" to it and is perpetuated by ideological and political opinions with the intention of influencing change in State policy, usually performed in public by numerous people trying to get a message across to the authorities. The individual's needs and consciousness are not the reasons standing behind this phenomenon.

8. The Court here affirmed that exemption from army service, in the case where conscience objection is proven, is granted to men and women alike in the context of the abovementioned Section 36, according to the balances set in H.C.J David Zonsien, mentioned above.

> 9. The conscience objection is compelled by personal and specific motives. The purpose behind the objection is not to change state policy, it stands on its own as a completely individual decision with personal reasons. The individual has no interest in influencing others to join him.
>
> 10. Furthermore, the Court here distinguishes between a general objection and a selective objection. The general objection that is acceptable has no relation to the circumstances of time and place or to the army's policy, but rather stems from the lack of correlation between the individual and the nature of the army service. The selective objection is the result of ideological and political beliefs and is directly linked to the time and place where duties need to be performed by the army (objection to fulfil duties at a specific place, time or manner). Inherent in the army system is the fact that individuals do not choose what commands to fulfil or not. The selective objection alerts discrimination and dismantles the unity existent in the defence forces inherent in its nature.
>
> 11. The IDF is non-political. Soldiers are not permitted to engage in partisan politics while in uniform. Nevertheless, as citizens of a democracy, soldiers are permitted to be members of political parties and to advocate change in government policies. IDF Soldiers, just as all Israeli citizens, are encouraged to vote in national elections. By voting and exercising their individual right to party membership, soldiers are able to participate in the democratic process with the intention of achieving change.
>
> 12. Nevertheless, it is absolutely imperative to differentiate between the duty of fulfilling a command and political debate. Incorporating political values and opinions in the IDF drafting policy, will damage the basic values of the security service. Acceptance of selective objections will discriminate between individuals and in effect harm the democratic system based on equality.
>
> 13. Note that the disciplinary measures that Israel takes against objectors who are illegally refusing to fulfil their duties are lenient in nature. This, despite the imminent security threat, which places a higher value on the preparedness of each individual soldier in its comparatively small army ('Conscience Objection' 2005, Israel Ministry of Foreign Affairs website, 13 July http://www.mfa.gov.il/MFA/Government/Law/Legal+Issues+and+Rulings/Conscience%20Objection%2013-Jul-2005)

40. In addition, the Tribunal has also had regard to the following.

41. The Immigration and Refugee Board of Canada on 7 June 2007 published a report on Israel entitled *Whether there has been an amendment to the military service law; if yes, whether the law is more open/flexible with respect to conscientious objectors; what the law states with respect to conscientious objectors*, reference ISR102548.E – Israel, available at http://www.irb-cisr.gc.ca/en/research/rir/index_e.htm?action=record.viewrec&gotorec=451292 . The report includes the following comments by "[a] postdoctoral instructor at the Buchmann Faculty of Law at Tel Aviv University… with respect to military service law and conscientious objectors" in Israel:

> The policy regarding conscientious objectors has remained more or less the same in the last decades, despite being challenged before the Israel Supreme Court by different petitioners. The way it works is as follows: The army distinguishes between "total" objection to service, stemming from pacifism, and what it calls "selective" objection, stemming from political objection to specific policies and duties of the army. In the former cases, people will be granted exemption from service, and in the latter case, they won't (and should selective objectors refuse to enlist, they can be tried and jailed for Refusal to Obey Orders, an offense according to article 122 of the Military Justice Act, 1955). When someone states, before being drafted, that he or she is a conscientious objector, they are invited to a hearing before a special committee, popularly known as "the conscience committee", whose role is to establish whether the person can be exempted as a "total" objector, or drafted as a "selective" objector. (15 May 2007)

42. The report also indicates that:

> In March 2007, Amnesty International (AI) conveyed its concern regarding the imprisonment of Israeli conscripts and reservists objecting to military service based on

> conscientious grounds (AI 30 Mar. 2007; see also ibid. 2006). Media sources reported in July and August 2006 that an Israeli military captain was jailed for refusing to fight in the conflict in Lebanon (AFP 30 July 2006; ABC 2 Aug. 2006). The Refuser Solidarity Network corroborates the imprisonment of conscientious objectors and states that "Israel maintains an extremely narrow definition of 'conscience,' equating conscientious objection only with some forms of pacifism" (Jan. 2006). The Refuser Solidarity Network also states that Israel does not have a definition of conscientious objection articulated in any official document (Jan. 2006) (Immigration and Refugee Board of Canada 2007, *ISR102548.E - Israel: Whether there has been an amendment to the military service law; if yes, whether the law is more open/flexible with respect to conscientious objectors; what the law states with respect to conscientious objectors* , 7 June http://www.irb-cisr.gc.ca/en/research/rir/index_e.htm?action=record.viewrec& gotorec=451292 – Accessed 20 August 2007

43. Recent reports on conscientious objection in Israel include an article dated 31 August 2008 in the *Palestine Chronicle* indicating that 18-year-old Sahar Vardi had been sent to an Israeli military prison after " refusing to be conscripted into the Israeli military." Vardi "is part of a broader movement of Shministim, high-school seniors who refuse to be conscripted due to the military's oppression of the Palestinians. Two other conscientious objectors, Udi Nir and Avichai Vaknin, were imprisoned earlier this month and a few others are likely to follow suit." Vardi was "in prison because the military conscientious committee did not accept her appeal", because in the committee's opinion, her appeal **"was based on political convictions rather than a sincere conscientious belief"** (Gordon, Neve 'Sahar Vardi: An Israeli Refusing to Oppress', *The Palestine Chronicle* , 31 August 2008). [emphasis added]

44. Similarly, an article in *The Christian Science Monitor* dated 27 August 2008 refers to 18-year-old Sahar Vardi being jailed until 1 September 2008 after refusing to undertake mandatory military service in Israel. According to the article:

> ...Vardi will remain in jail until Sept. 1, when she'll be asked again to serve her term in the IDF. If she refuses, the state is expected to give her another weeklong sentence. If she continues to defy the state, Verdi could remain behind bars anywhere from 42 days to two years

FINDINGS AND REASONS

Country of Nationality

45. The Tribunal accepts, based upon the various pieces of documentary evidence on the departmental and Tribunal files consistent with the applicant's evidence to that effect, that the applicant is a citizens of Israel For the purposes of the Convention, the Tribunal has therefore assessed the applicants' claims against Israel as his country of nationality.

Assessment of the Claims and Evidence

Credibility Generally

46. The mere fact that a person claims fear of persecution for a particular reason does not establish either the genuineness of the asserted fear, that it is "well-founded", or that it is for the reason claimed. It remains for the applicant to satisfy the Tribunal that all of the statutory elements are made out: *MIEA v Guo & Anor* (1997) 191 CLR 559 at 596. Although the concept of onus of proof is not appropriate to administrative inquiries and

decision-making (*Yao-Jing Li v MIMA* (1997) 74 FCR 275 at 288), the relevant facts of the individual case will have to be supplied by the applicant himself or herself, in as much detail as is necessary to enable the examiner to establish the relevant facts. A decision-maker is not required to make the applicant's case for him or her: *Prasad v MIEA* (1985) 6 FCR 155 at 169-70; *Luu & Anor v Renevier* (1989) 91 ALR 39 at 45. Nor is the Tribunal required to accept uncritically any and all the allegations made by an applicant: *Randhawa v MILGEA* (1994) 52 FCR 437 at 451.

47. In the present case, and having regard to the evidence given by the applicant over the course of three separate hearings, the Tribunal considers the applicant to have given a consistent and credible explanation of the reasons he does not wish to perform any further military service.

48. The Tribunal accepts that the applicant initially performed his military service with the Israel Defence Forces, and finds that at that time he had no conscientious objection to doing so, but that the experiences he gained during the course of his military service have informed the subsequent development of his views on military service generally and the conflict between Israel and its Arab neighbours in particular

49. The Tribunal accepts that since leaving Israel, and particularly since arriving in Australia, the applicant has developed a different outlook on the Israeli-Arab conflict, that he has formed a genuine moral objection to the manner in which the Israel Defence Forces engage in that conflict, and that he conscientiously objects to performing further military service with those forces. The Tribunal also accepts that the applicant is now opposed to war generally, although not necessarily in all circumstances.

50. Finally, the Tribunal accepts that if the applicant did return to Israel, and was required to perform reserve military service, he would refuse to do so for reasons of conscience.

Well-Founded Fear of Persecution

Real Chance of Serious Harm Capable of Amounting to Persecution

51. The country information before the Tribunal indicates that there are a number of categories of person who are automatically exempt from the obligation to perform military service in Israel including, for example, newly arrived migrants and Arab Israelis. The Israeli government also makes some legal provision for conscientious objection to the performance of military service In doing so, however, it draws a distinction between absolute pacifists and those opposed to serving on ‘political’ grounds, and the conscientious objection provisions expressly discriminate against the latter, as can be seen from the document *Conscientious Objection* published by the Israeli Ministry of Foreign Affairs, and also from the reasons for the imprisonment of Sahar Vardi as reported in *The Palestine Chronicle*, both extracted above

52. The country information before the Tribunal also indicates that reserve military service is mandatory for men such as the applicant at least until they reach the ages of 41 or 45: see, *Conscientious objection to military service in Israel: an unrecognised human right*, extracted above.

53. There is no evidence before the Tribunal to suggest that the applicant has any basis for avoiding or being exempted from military service if he returns to Israel in the

reasonably foreseeable future other than conscientious objection, and the Tribunal finds accordingly.

54. In a case such as the present one, where the applicant has already performed his initial military service and is not necessarily opposed to all war, the Tribunal considers it most unlikely that an objection to the performance of reserve duty would be accepted as a flection of the objector's absolute pacifism capable of bringing the matter within the scope of the conscientious objection provisions. On the contrary, the Tribunal has formed the view that if the applicant were to raise such an objection, it would be both characterised and dismissed as political, bearing in mind both the content of the Israeli Ministry of Foreign Affairs document and the views which applicant has himself expressed about his opposition to the Arab-Israeli conflict.

55. Consequently, the Tribunal finds that if the applicant returns to Israel in the reasonably foreseeable future, he will be called up to perform reserve military service, and would not be relieved of that obligation on grounds of conscientious objection.

56. As the Tribunal has already found that the applicant would refuse to perform reserve military service, the Tribunal finds that the applicant would be imprisoned for such refusal when called up to do so, given that the country information indicates that this has happened to many other people who have done likewise.

57. Section 91R(1) of the Act provides that in order to amount to persecution, treatment must involve serious harm, which is defined in s.91R(2) to include a threat to a person's liberty.

58. The Tribunal therefore finds that there is a real chance that the applicant will experience serious harm capable of amounting to persecution if he returns to Israel in the reasonably foreseeable future.

Persecution or Prosecution

59. In *Erduran v Minister for Immigration and Multicultural Affairs*, (2002) 122 FCR 150, Merkel J at [28], referring to *Wang v MIMA* (2000) 105 FCR 548 at [65], stated that "even if a law is a law of general application, its impact on a person who possesses a Convention-related attribute can result in a real chance of persecution for a Convention reason." The judgment in *Erduran* was subsequently set aside on appeal. However, in allowing the Minister's appeal, the Full Federal Court did not directly deal with his Honour's discussion of Convention nexus: *MIMIA v VFAI of 2002* [2002] FCAFC 374 (Black CJ, North & Merkel JJ, 25 November 2002). The 'test' in *Erduran* has been followed in many recent cases involving conscription laws.

60. For example, in *VCAD v MIMIA* [2004] FCA 1005, Gray J's analysis in *Erduran* was accepted by both parties as correct, and accepted by the Court in the absence of argument to the contrary. The Court held that the Tribunal had proceeded on the mistaken basis that a law of general operation, which did not expressly discriminate or inflict disproportionate punishment, could not support a well-founded fear of persecution for a Convention reason. Justice Kenny held that this was "plainly erroneous", adding that there may well be a well-founded fear of persecution because a law, neutral on its face, has an indirect discriminatory effect or indirectly inflicts disproportionate injury, for a Convention-related reason (at [31] – [35]). This decision was upheld on appeal in *VCAD v MIMIA* [2005] FCAFC 1.

61. *A fortiori*, where a law such as that applying in the present case does expressly discriminate against persons whose objection to military service is in fact, or is perceived to reflect, their political opinion, it follows that the enforcement of the law can be persecutory, because where laws of general application are selectively enforced, in that the motivation for prosecution or punishment for an ordinary offence can be found in a Convention ground, then Convention protection may be attracted. Thus in *"Z" v MIMA* (1998) 90 FCR 51, Katz J pointed to selective prosecutions for a Convention reason, or the imposition of greater punishments for a Convention reason, as features which would render enforcement by a country of one of its generally applicable criminal laws persecution for a Convention reason.

62. The Tribunal finds therefore that the punishment which the present applicant risks if he returns to Israel transcends the mere enforcement of a law of general application and amounts to persecution for the purposes of s.91R(1)(b) of the Act.

Availability of State Protection from the Harm Feared

63. As the risk of persecution comes in this case from the state itself, the Tribunal finds that state protection is not available to the applicant.

Conclusion on Persecution.

64. The Tribunal is satisfied that there is a real chance that the applicant will experience serious harm capable of amounting to persecution for the purposes of s.91R(2) in the reasonably foreseeable future if he returns to Israel.

65. The Tribunal also finds that the persecution feared involves systematic and discriminatory conduct for the purposes of s.91R(1)(c) of the Act.

Convention Nexus

66. In *SZAOG v MIMIA* [2004] FCAFC 316, Emmett J (Beaumont J agreeing) at [46] expressed the opinion, consistently with Gray J's opinion in *Erduran*, that:

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

67. In the present case, the Tribunal finds, on the basis of the country information setting out the Israel Defence Forces' characterisation of conscientious objection, that for the purposes of s.91R(1)(a) of the Act, the essential and significant reason for the persecution faced by the applicant is the Convention reason of his political opinion.

Internal Relocation

68. Given that it is the state apparatus from which the applicant has a well founded fear of persecution, the Tribunal also concludes that safe relocation within Israel is not available to him.

Safe Third Country

69. There is no evidence before the Tribunal that the applicant has the right to enter and reside in any third country for the purposes of s.36(3) of the Act, and the Tribunal finds accordingly that he does not.

CONCLUSIONS

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

DECISION

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

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

Sealing Officer: PRMHSE