FEDERAL COURT OF AUSTRALIA

AZAAB v Minister for Immigration and Citizenship [2009] FCA 248

MIGRATION – protection visa – whether unarticulated claim made of well-founded fear of persecution by reason of being a conscientious objector to compulsory military service – whether claim addressed by Tribunal – whether jurisdictional error

Held – claim of well-founded fear of persecution by reason of being a conscientious objector to compulsory military service squarely raised on material – claim not addressed or incorrectly addressed by Tribunal – jurisdictional error established

Migration Act 1958 (Cth)
Convention Relating to the Status of Refugees
Protocol Relating to the Status of Refugees

Minister for Immigration and Multicultural Affairs v Ibrahim (2000) 204 CLR 1 referred to
Mijoljevic v Minister for Immigration and Multicultural Affairs [1999] FCA 834 discussed
Erduran v Minister for Immigration and Multicultural Affairs (2002) 122 FCR 150 discussed
NAQF v Minister for Immigration and Multicultural and Indigenous Affairs (2003) 130 FCR 456 referred to
Collector of Customs v Pozzolanic Enterprises Pty Ltd (1993) 43 FCR 280 referred to
Appellant S395/2002 v Minister for Immigration and Multicultural Affairs (2003) 216 CLR 473 referred to
NABE v Minister for Immigration and Multicultural and Indigenous Affairs (No 2) (2004) 144 FCR 1 referred to

AZAAB v MINISTER FOR IMMIGRATION AND CITIZENSHIP and REFUGEE REVIEW TRIBUNAL

SAD 175 of 2008

MANSFIELD J
27 MARCH 2009
ADELAIDE

IN THE FEDERAL COURT OF AUSTRALIA
SOUTH AUSTRALIA DISTRICT REGISTRY **SAD 175 of 2008**

ON APPEAL FROM THE FEDERAL MAGISTRATES COURT OF AUSTRALIA

BETWEEN: **AZAAB**
Appellant

AND: **MINISTER FOR IMMIGRATION AND CITIZENSHIP**
First Respondent

REFUGEE REVIEW TRIBUNAL
Second Respondent

JUDGE: **MANSFIELD J**
DATE OF ORDER: **27 MARCH 2009**
WHERE MADE: **ADELAIDE**

THE COURT ORDERS THAT:

1. The appeal be allowed.
2. The orders of Federal Magistrates Court of 8 October 2008 be set aside.
3. The decision of Refugee Review Tribunal of 22 November 2007 be quashed and the application to the Refugee Review Tribunal of 29 July 2007 be remitted for further consideration according to law.
4. The first respondent pay to the appellant her costs of the proceedings before the Federal Magistrates Court and of this appeal.

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules. The text of entered orders can be located using eSearch on the Court's website.

IN THE FEDERAL COURT OF AUSTRALIA
SOUTH AUSTRALIA DISTRICT REGISTRY **SAD 175 of 2008**

ON APPEAL FROM THE FEDERAL MAGISTRATES COURT OF AUSTRALIA

BETWEEN: **AZAAB**
Appellant

AND: **MINISTER FOR IMMIGRATION AND CITIZENSHIP**
First Respondent

REFUGEE REVIEW TRIBUNAL
Second Respondent

JUDGE: **MANSFIELD J**
DATE: **27 MARCH 2009**
PLACE: **ADELAIDE**

REASONS FOR JUDGMENT

INTRODUCTION

1 The appellant is a 26 year old Israeli citizen. She came to Australia on a visitor visa, arriving on 26 November 2005. Shortly before that visa expired, on 23 March 2007 she applied for a Protection (Class XA) visa under the *Migration Act 1958* (Cth) (the Act). Initially she had applied for the incorrect class of protection visa, but nothing turns on that. To qualify for that visa, in essence, the appellant had to have a well-founded fear of persecution by reason of her race, religion, nationality, membership of a social group or political opinion as explained in Art 1A(2) of the Convention Relating to the Status of Refugees as amended by the Protocol Relating to the Status of Refugees (the Convention), using those terms as defined in the Act.

2 Her application was refused by a delegate of the first respondent (the Minister) on 26 June 2007. She subsequently sought review of that decision by the Refugee Review Tribunal (the Tribunal). As it was required to do, the Tribunal conducted a hearing in relation to her application on 20 September 2007. It will be necessary to refer to the content

of that hearing in a little detail. On 22 November 2007, the Tribunal affirmed the decision of the delegate of the Minister, refusing her a protection visa.

3 The decision of the Tribunal was challenged in the Federal Magistrates Court for jurisdictional error. On 8 October 2008, that Court dismissed her application. The present appeal is an appeal from the decision of the Federal Magistrate.

THE TRIBUNAL'S REASONS

4 The Tribunal described the "essential claim" of the appellant as being "that she is persecuted by the organisations, or members of those organisations, that are hostile to Israel (such as Palestinians and terrorists)", and that she has therefore a fear of persecution if she returns to Israel from which the Israeli authorities are not able to protect her. It accepted that the appellant fears the possibility of being the victim of a future attack by Palestinian or other parties hostile to Israel. It accepted that that fear is a real one, having regard to the recent past history of events in Israel and the continuing evidence of terrorist attacks and armed conflict. It also accepted that there are security issues in Israel as a result of hostilities between Israel and several of its neighbouring countries.

5 The Tribunal concluded that the kind of fear which the appellant so described is a "daily reality" for all Israelis. It noted that, following the decision of the High Court in *Minister for Immigration and Multicultural Affairs v Ibrahim* (2000) 204 CLR 1, a person does not fear persecution for a Convention reason if the fear is one of generalised violence, internal turmoil or civil war where that person or her immediate family is not personally attacked for a particular Convention reason. Hence, although it accepted her fear about living in an environment of tension and uncertainty, it was not satisfied that her fear was a fear of persecution for a Convention reason. The generalised violence, which she feared, would not impact differentially upon her due to her civil or political status, that is the basis upon which she made claims to have been a refugee.

6 It then added, in the passage to which attention was drawn on the appeal, the following:

> Secondarily, the applicant drew attention to legal obligations required of her to serve in the Israeli army in the future, when she will be exposed to more danger. The Tribunal notes that independent country information corroborates the explanation of

> compulsory military service given by the applicant. The Tribunal notes that the enforcement of laws providing for compulsory military service (and for punishment of desertion or avoidance of such service) does not provide a basis for a claim of persecution within the meaning of the Convention: *Mijoljevic v MIMA* [1999] FCA 834. The Tribunal finds that in Israel the obligations to undertake military service generally amount to a non-discriminatory law of general application.

THE FEDERAL MAGISTRATE'S REASONS

7 The appeal before the Federal Magistrate concentrated on that particular passage. The contention was that the Tribunal had failed to identify that the appellant had made a claim to have been a conscientious objector, that is to have conscientiously objected to undertaking compulsory military service or further military service in Israel, and that as a result she may be persecuted by the Israeli authorities.

8 The Federal Magistrate pointed out that the Tribunal had not accurately reflected the observations of Branson J in *Mijoljevic v Minister for Immigration and Multicultural Affairs* [1999] FCA 834 in that passage. Her Honour in that decision at [23] said that it is **ordinarily** the case that a basis for a claim of persecution within the meaning of the Convention will not flow from the enforcement of laws providing for compulsory military service, or for the punishment of those who avoid such service. The Federal Magistrate then referred to the decision of Gray J in *Erduran v Minister for Immigration and Multicultural Affairs* [2002] FCA 814, in particular at [28] where Gray J said:

> The question would have to be asked whether conscientious objectors, or some particular class of them, could constitute a particular social group. If it be the case that a person will be punished for refusing to undergo compulsory military service by reason of conscientious objection stemming from political opinion or religious views, or that is itself political opinion, or that marks the person out as a member of a particular social group of conscientious objectors, it will not be difficult to find that the person is liable to be persecuted for a Convention reason. It is well-established that, even if a law is a law of general application, its impact on a person who possesses a Convention-related attribute can result in a real chance of persecution for a Convention reason.

9 The Federal Magistrate, having identified an error of law on the part of the Tribunal in misstating the law in the way described, was nevertheless not satisfied that that error of law amounted to jurisdictional error. His Honour concluded that it did not because, upon the whole of the evidence before the Tribunal, the appellant's evidence did not "even get to that nascent stage" of considering whether there was a Convention related reason for any fear of

the appellant flowing from a decision not to undertake her compulsory military service, because there was no indication of her having formed an intention not to serve in the army.

10 It also followed that the second contention on behalf of the appellant before the Federal Magistrate also failed. That contention was that there was material before the Tribunal which indicated that the appellant did not want to return to Israel because she did not want to serve in the army on account of her conscientious objection, either because of her political opinion or because of a more generalised opposition to war which might itself also be said to be political opinion. His Honour described the materials relied upon by counsel for the appellant before him, which were said by her counsel to demonstrate such a claim having been made by the appellant, in the following way at [30]:

> Considerable ingenuity and effort is required in my view, to construct from these raw materials any unarticulated claim for refugee status on the basis of a fear of persecution arising from a conscientious objection to military service.

11 The third matter argued before the Federal Magistrate was that the Tribunal had failed to conduct a hearing in accordance with s 425 of the Act because it had not given the appellant a substantial opportunity to give evidence and to present arguments in relation to her claim to have been a conscientious objector and to have a well-founded fear of persecution by reason of that claim. The Federal Magistrate concluded, having reviewed the hearing before the Tribunal, that the appellant had the opportunity to raise with the Tribunal any decision by her to refuse to perform military service on the part-time basis required of her if she were to return to Israel, but that she but did not do so. His Honour noticed, correctly, that the main focus of the appellant before the Tribunal was her fear to return to Israel principally from fear for her physical safety given the terrorist threats to the country. He did not consider that the exploration of those issues by the Tribunal was conducted in a way which dissuaded or discouraged her from pursuing an aspect of her claim: cf *NAQF v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 130 FCR 456.

THE APPEAL

12 Each of those three matters was reargued on appeal, and in respect of each of them counsel for the appellant argued that the Federal Magistrate had erred in his approach to those three matters. In essence, however, the argument centred upon and depended upon the appellant persuading the Court that the Federal Magistrate had erred in not identifying that

the appellant had raised before the Tribunal an unarticulated claim to have a well-founded fear of persecution by reason of how she might be treated by the Israeli authorities were she to return to Israel and in face of her conscientious objection which (it was argued) she had signalled to the Tribunal.

13 I have identified the focus of submissions on the appeal in that way because, notwithstanding the general observations of the Tribunal set out in [6] above which may demonstrate legal error, they do not do so relevantly except in the context of a claim by the appellant to be a conscientious objector. I would otherwise read the Tribunal's observations in that passage, with an eye not keenly attuned to the perception of error (see *Collector of Customs v Pozzolanic Enterprises Pty Ltd* (1993) 43 FCR 280), as indicating no more than that the enforcement of laws for compulsory military service do not of themselves provide a basis for a claim of persecution merely because those obliged to undertake compulsory military service might thereby be at greater risk than civilians. If the appellant were not in fact a conscientious objector, there was nothing to indicate that she was required to undertake compulsory military service for a Convention reason or that she would then be treated differently whilst doing so for a Convention reason. Indeed, counsel for the appellant appeared to accept as much. At one point, he said that the error discussed by the Federal Magistrate flowed from failing to ask what would happen to the appellant if she is a conscientious objector.

14 Absent the making of a claim, either articulated or implied, that the appellant feared persecution for a Convention reason if she were to conscientiously object to further undertaking compulsory military service in Israel, the "behaviour modification" considerations addressed for example in *Appellant S395/2002 v Minister for Immigration and Multicultural Affairs* (2003) 216 CLR 473 do not relevantly arise.

15 The second contention is that the appellant's material exposed an unarticulated claim to fear persecution, in effect for a political opinion, by being a conscientious objector to undertaking compulsory military service if she were to return to Israel. She had, on the material, previously undertaken a period of compulsory military service between 2000 and 2002. It was also clearly accepted by the Tribunal that she would have to undertake a further 30 days' military service each year until the age of 35. She said in her application for the

protection visa that, if called up, "it will be more risky for me if I'll (sic) have to take that call in this situation". In the same document, she said:

> I think all the people that [are] responsible to (sic, for) this situation in Israel if it's the Hizballa (sic), or the Israely (sic) government that just can't get to an agreement to stop the terrorism for long long years.

In her written statement to the Tribunal, the appellant wrote:

> I'm not saying that I agree with the Israeli government and the actions that they take as a responds (sic) to the bombing, I find the suffer[ing] of the other side really horrible, but I'm just against this hole (sic) situation, I feel sad for both sides with the lost that they're suffering, I believe no one should die in this long war that just doesn't stop since I remember myself, since I was a little girl I remember bombing and killing in behalf of (sic) this war …

and a little later she added:

> … if I'll (sic) go back to Israel, as I wrote in my request all Israelis (sic) girls that serve the army in a job similar to mine have to serve again every year for 30 days, and if I'll (sic) go back while the security situation is so unknown and might get worse in short time the army will defiantly (sic, definitely) call me to serve my time and this might make my chances to die bigger.

Her oral evidence to the Tribunal included the following:

> Q. Tell me: why do you think you're a refugee? Tell me slowly.
> A. Okay. Israel – as we all know, it's a really hard place to live. Like, apparently all of our neighbours just want to get all the Israelis out of Israel and have the country for themselves. So some people living in Israel just choose to live with this situation, just look at it as an ordinary thing, like you wake up in the morning, maybe one of the buses right next to you will blow up and people will be dying and life goes on. I don't think – I don't see it that way, just
>
> … and I just couldn't go back to the mess in Israel. That's the only thing. I just think that what's going on is wrong – what's going on in our side and also in their side, what our army doing to them – it's also wrong. I just can't live with it being – and this is why I think I just – I need you to let me stay here.

And in relation to further army service, she said:

> A. And if I won't go, so they just come and take me and put me in gaol or something like that.
> Q. Yes, I understand how it works. This applies to all Israeli citizens?
> A. Yes.
> …
> A. Well, I can live my life as I did before I came here, and just in fear that the

> next place that I'm going to be is going to blow up by a terrorist or something. And also the army – it's also arrest you to go back there and something can happen. You're just frightened to go back there.

After that passage, the Tribunal asked her who was persecuting her. It pointed to the Convention reasons: race, religion, nationality "and so on", and it suggested that she did not fit neatly into the category of persons persecuted by their own government. She responded by saying the government could not protect her from Palestinian or other terrorist acts.

16 The Tribunal was obliged to deal with any claim raised by the evidence or contentions which, if resolved in one way, could resolve the application: *NABE v Minister for Immigration and Multicultural and Indigenous Affairs (No 2)* (2004) 144 FCR 1 at [58] and [63] provided the claim has been squarely raised.

17 As noted, the Federal Magistrate properly identified that obligation. However, his Honour did not consider that there was any unarticulated claim for refugee status on the basis of a fear of persecution arising from a conscientious objection to military service.

18 In my judgment, the Federal Magistrate erred in that conclusion. Clearly, the appellant's main concern was that she and all Israeli citizens may be exposed to Palestinian or other terrorist violence, and that the Israeli authorities are unable to protect its citizens from such acts. Whether as a civilian or while doing compulsory military service, that fear (as the Tribunal found) was not one for a Convention reason. There is no challenge to that conclusion before the Federal Magistrate, and hence on this appeal.

19 However, in my view, there was also squarely raised on the material a claim that the appellant feared persecution by reason of being a conscientious objector to further compulsory military service. That claim was not addressed by the Tribunal. It should have been. If it was, and if it was addressed in the manner set out in [6] above, that claim would have been incorrectly addressed for the reasons discussed by the Federal Magistrate. The Tribunal would have needed to consider, in the appellant's particular circumstances, the reason for her objection to compulsory military service to determine whether the consequence of such objection might amount to persecution for a Convention reason. Those questions were not considered by the Tribunal.

20 The claim was not specifically articulated, but in the passages I have referred to it is apparent that:

(1) the appellant expressed criticism not simply of the Palestinian or other terrorist activities but also of the response of the Israeli government;

(2) she did not see the situation as "an ordinary thing" where she would simply live with that situation; and

(3) she adverted on two occasions to the prospect of being imprisoned by the Israeli government for refusing to do further compulsory military service, and (on one of those occasions) of a fear of that consequence.

21 As to the third ground of appeal, I have carefully considered the contentions and the course of the hearing before the Tribunal. I note that the appellant adduced evidence before the Federal Magistrate about the Tribunal's interview. The Federal Magistrate considered, nevertheless, that the Tribunal had not diverted her from expressing her claims in the manner she wished to do so, even though the affidavit suggests that she had been so diverted. I respectfully agree with the Federal Magistrate's decision in that regard, and his reasons for that conclusion. I do not need to repeat them.

22 For these reasons, I make the following orders:

(1) The appeal be allowed.

(2) The orders of the Federal Magistrates Court of 8 October 2008 be set aside.

(3) The decision of Refugee Review Tribunal of 22 November 2007 be quashed and the application to the Refugee Review Tribunal of 29 July 2007 be remitted for further consideration according to law.

(4) The first respondent pay to the appellant her costs of the proceedings before the Federal Magistrates Court and of this appeal.

I certify that the preceding twenty-two (22) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Mansfield.

Associate:

Dated: 27 March 2009

Counsel for the Appellant:	S Ower
Solicitor for the Appellant:	McDonald Steed McGrath Lawyers
Counsel for the Respondents:	P d'Assumpcao
Solicitor for the Respondents:	Australian Government Solicitor
Date of Hearing:	26 February 2009
Date of Judgment:	27 March 2009