FEDERAL MAGISTRATES COURT OF AUSTRALIA

SZNQJ v MINISTER FOR IMMIGRATION & ANOR *[2009] FMCA 1246*

MIGRATION – Persecution – review of Refugee Review Tribunal decision – visa – protection visa – refusal – applicant's refusal to be conscripted – whether based on conscientious objection to law of general application – necessary findings of fact when objection to conscription alleged – Tribunal's consideration of totality of the claims put forward – consideration of claims on a cumulative basis – Tribunal stated it had considered claims cumulatively.

Migration Act 1958, ss.91R, 425, 474

Plaintiff S157/2002 v Commonwealth (2003) 211 CLR 476
Appellant S395/2002 v Minister for Immigration & Multicultural Affairs (2003) 216 CLR 473
SZIOZ v Minister for Immigration & Citizenship [2007] FCA 1870
SZBEL v Minister for Immigration & Multicultural & Indigenous Affairs (2006) 228 CLR 152
Minister for Immigration & Citizenship v SZKTI (2009) 83 ALJR 1017
SZGUW v Minister for Immigration & Citizenship [2008] FCA 91
Tickner v Chapman (1995) 57 FCR 451
Minister for Immigration & Ethnic Affairs v Guo (1997) 191 CLR 559
Erduran v Minister for Immigration & Multicultural Affairs (2002) 122 FCR 150
SZMFJ v Minister for Immigration & Citizenship (No.2) [2009] FCA 95
NAVK v Minister for Immigration & Multicultural & Indigenous Affairs [2004] FCA 1695

Applicant:	SZNQJ
First Respondent:	MINISTER FOR IMMIGRATION & CITIZENSHIP
Second Respondent:	REFUGEE REVIEW TRIBUNAL
File Number:	SYG 1277 of 2009
Judgment of:	Cameron FM
Hearing date:	25 November 2009

Date of Last Submission:	25 November 2009
Delivered at:	Sydney
Delivered on:	16 December 2009

REPRESENTATION

Counsel for the Applicant:	Mr P. Reynolds
Solicitors for the Applicant:	Asad Lawyers
Counsel for the First Respondent:	Mr J. A. C. Potts
Solicitors for the Respondents:	Clayton Utz

ORDERS

(1) A writ of certiorari issue directed to the second respondent quashing its decision made on 21 April 2009.

(2) A writ of mandamus issue directed to the second respondent requiring it to determine according to law the application for review made on 8 January 2009.

(3) A writ of prohibition issue prohibiting the first respondent and his delegates, servants and agents from acting upon or giving effect to the second respondent's decision made on 21 April 2009.

FEDERAL MAGISTRATES COURT OF AUSTRALIA AT SYDNEY

SYG 1277 of 2009

SZNQJ
Applicant

And

MINISTER FOR IMMIGRATION & CITIZENSHIP
First Respondent

REFUGEE REVIEW TRIBUNAL
Second Respondent

REASONS FOR JUDGMENT

Introduction

1. The applicant is a citizen of Iran. He alleges that while he was in Iran attempts were made to force him to become a member of the Iranian Revolutionary Guards ("Guards") and the Velayat-e Fakih Islamic Party ("Party"). He claims that his refusal to join either of them led to him being denied enrolment in any public university, to him being denied employment and to him being arrested.

2. The applicant claims to fear persecution in Iran because of his political views and his ethnicity.

3. After his arrival in Australia on 12 November 2005, the applicant lodged an application for a protection visa. This was refused by the delegate of the first respondent ("Minister") on 17 December 2008. The applicant then applied to the Refugee Review Tribunal ("Tribunal") for a review of that departmental decision. The applicant

was unsuccessful before the Tribunal and has applied to this Court for judicial review of the Tribunal's decision.

4. In these judicial review proceedings the Court's task is to determine whether the Tribunal's decision is affected by jurisdictional error as that is the only basis upon which it can be set aside: s.474 *Migration Act 1958* ("Act"); *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476.

5. For the reasons which follow, the Tribunal's decision will be set aside and the matter remitted to it for determination according to law.

Background facts

6. The facts alleged in support of the applicant's claim for a protection visa are set out on pages 4 – 10 of the Tribunal's decision (Court Book ("CB") pages 163 – 169). Relevant factual allegations are summarised below.

Primary application

7. In his visa application, the applicant made the following claims:

   a) he was born in Iran and is of Turkish (Azeri) and Iranian ethnicity;

   b) he completed university in 1999 and then undertook two years of compulsory military service;

   c) throughout high school, the Guards sought to give him lessons about Islam and also tried to force him to be a member of the Guards and the Party. Students who refused to join, including him, were threatened with expulsion and given the lowest marks in assessments;

   d) he was denied free enrolment into university because he was not a member of the Guards and the Party and was a member of a particular ethnic group. To enrol in university he had to pay a fee equivalent to $10,000;

e) he was refused employment by the Iranian authorities because he was not a member or a supporter of the Guards and the Party;

f) at his last job interview, he was asked when he last prayed and when he answered, he was refused the position. He spoke with the manager who said that he could not do anything as the applicant had to be a member of the Guards and the Party;

g) he was offered large amounts of money by the Guards and the Party to fight alongside "Hezbollah Militia, Mehdy or Badr Army also the Mujjaheddin in Afghanistan and Pakistan";

h) he cannot return to Iran because he would be forced by the Iranian authorities and the government to become a member of the Guards and the Party and then be sent to Iraq, Pakistan, and Afghanistan for the purposes of "Islamic Jihad". If he were to refuse, his "fate would be imprisonment and death"; and

i) he cannot return to Iran because he would definitely face the death penalty for his refusal to become a member of the Guards and the Party.

Review application

8. At a Tribunal hearing on 12 March 2009, the applicant made the following additional claims:

a) he arrived in Australia in November 2005 on a working holiday visa valid for a year, which he had renewed on two further occasions. His parents and siblings remain in Iran;

b) he had completed a Bachelor of Science in Applied Chemistry in Iran;

c) the Basij ("a political military style supporter of the government") approached him at high school and university;

d) during his third year of high school (aged 16 or 17) he was asked to join military training by the Basij but he refused and was subsequently refused enrolment in fourth year;

e) he was denied enrolment into public university because he refused to join the Basij, and during his enrolment in a private university he was threatened with expulsion;

f) he was arrested during his third year at university after refusing a request by the Islamic Association of the university that he undertake "activities". He was refused enrolment in the following term. He stated that he was arrested two years prior to finishing university, towards the end of May. Later in the hearing, he stated that he could not recall exactly when he was arrested but it was the first week of the third month in the Iranian calendar;

g) during this arrest, he was taken to the office and he was asked why he was not participating in political, religious, and/or military activities or programmes;

h) he did not mention this incident in his visa application because he thought he could explain it subsequently in the course of the hearing;

i) he was unemployed for five years after completing compulsory military service but was employed for three to four months prior to coming to Australia;

j) at a particular job interview for a teaching position at a government school, he was asked when he had last prayed. He replied that the answer was personal and unrelated to a chemistry position;

k) he had not suffered any harm on the basis of his Turkish ethnicity; and

l) he would be gaoled and harmed if the Iranian authorities were to discover that he had sought protection in Australia.

9. Following the hearing, the Tribunal received the following documents, amongst others, from the applicant:

a) a letter dated 24 March 2009 from a Mr M. Kargar referring to the applicant's good character and membership of the Australian Azerbaijani community; and

b) a statement from the applicant dated 27 March 2009 providing the following additional information:

i) in 2003 he participated in the public commemoration of the birthday of an Azerbaijani "hero". He was detained for four days, ill-treated and forced to say "anything in order to get away". He was later transferred to Ardabil intelligence services where he was interviewed. A week later, he signed an agreement not to participate in Azerbaijani activities;

ii) he joined a "group of Azerbaijani activists", attending various meetings where they talked about Azerbaijani issues;

iii) his mother told him that the Iranian authorities had concerns about him and his freedom and that they knew about his protection application. She told him that the intelligence services had asked about him and were watching their home; and

iv) he suffered discrimination on a daily basis because of his Azerbaijani background and the authorities would "not do anything".

The Tribunal's decision and reasons

10. After discussing the claims made by the applicant and the evidence before it, the Tribunal found that it was not satisfied that the applicant is a person to whom Australia has protection obligations under the *United Nations Convention relating to the Status of Refugees 1951*, amended by the *Protocol relating to the Status of Refugees 1967* ("Convention"). The Tribunal's decision was based on the following findings and reasons:

a) in relation to the claim that the applicant had encountered difficulty entering university as a consequence of not joining the Basij and/or other Islamic groups, the Tribunal was not satisfied that this constituted serious harm or persecution. This was on the basis that although it was plausible that preference was given to

supporters of various Islamic groups and that the applicant had had difficulty gaining entry to a public university:

i) the fact was that he had completed university; and

ii) there could have been other reasons for his inability to enter university that were "not essentially and significantly related to his actual or perceived lack of support for the Iranian regime";

b) consequently, and in consideration of the evidence as whole, the Tribunal was not satisfied that the applicant's claimed difficulties at university, including the alleged threats of expulsion and awards of low marks, were essentially and significantly related to his actual or perceived lack of support for the Iranian regime or any other Convention-related ground;

c) in relation to the applicant's claim to be unable to gain employment in his field, the Tribunal was not satisfied that this was essentially and significantly due to his actual or perceived lack of support for the Islamic regime. Although it accepted as plausible the claim that the applicant encountered difficulties finding employment and that it was plausible that his lack of support for Islamic groups had something to do with these difficulties:

i) there could be many reasons why he was unsuccessful, for example, his response at the interview concerning when he last prayed "may not have been in his interest"; and

ii) the applicant had actually managed to work and survive in Iran;

d) the Tribunal rejected the applicant's post-hearing claims based on his membership of the Azerbaijani ethnic group partly because it did not see any valid reason for his failure to mention those claims prior to or at the hearing;

e) the Tribunal was not satisfied that the applicant's involvement in the Australian Azerbaijani community would mean that there is a real chance that he would suffer serious harm as a result or that he

would engage in similar activities in Iran. In reaching these conclusions, the Tribunal considered reports concerning persecution of high profile Azerbaijani activists in Iran and was not satisfied that the applicant had an equivalent profile and would attract persecution as a result. Nor was it satisfied that he would engage in Azerbaijani activities in Iran that carried a real chance of attracting the adverse attention of Iranian authorities;

f) the applicant's inability to provide details of the incident concerning his alleged arrest by the university's Islamic Association raised doubts about its veracity and the Tribunal did not accept that he had ever been taken by the university's Islamic Association;

g) the Tribunal was not satisfied that there is a real chance that the applicant would suffer serious harm on the basis that the Iranian authorities had learned of his protection visa application because:

   i) such applications are private and confidential and it was difficult to see how the Iranian authorities would come to know of his; and

   ii) there was no evidence in country information that failed claimants, persons who had illegally exited Iran or deportees face any significant problem upon returning to Iran;

h) the Tribunal noted that in Iran compulsory military service is a law of general application and, notwithstanding the applicant's ethnicity and lack of support for Islamic groups, it was satisfied that a future requirement to perform compulsory military service would not be discriminatory, selective, disproportionate or have a differential impact on the applicant such as to amount to persecution.

Proceedings in this Court

11. Those grounds of the amended application which were pressed at the hearing in these proceedings were pleaded as follows:

   (1) The Tribunal committed jurisdictional error by failing to ask itself the right question.

(2) The Tribunal committed jurisdictional error by asking itself the wrong question or otherwise making a finding in the absence of evidence.

(3) The Tribunal committed jurisdictional error by breaching section 425.

(4) The Tribunal committed jurisdictional error in that it applied the wrong test when determining whether the persecution feared by the Applicant had a 'Convention nexus' or it otherwise misunderstood the correct test to be applied in this regard.

(5) The Tribunal committed jurisdictional error in respect of its consideration as to the existence of 'persecution' in that it rejected each integer of the matters said by the Applicant to constitute persecution without considering whether the totality of these matters amounted to persecution.

(6) The Tribunal committed jurisdictional error by failing to deal with the claims before it.

(7) …

(8) The Tribunal committed jurisdictional error by failing to ask itself the right question, applying the wrong test or by otherwise making a finding in the absence of evidence. …

Failure to ask the right question

12. The allegation that the Tribunal failed to ask itself the right question was particularised as follows:

(a) The Applicant claimed to face a well founded fear of persecution by reason of his Azerbaijani activities;

(b) The Tribunal found that the Applicant would not engage in Azerbaijani activities in Iran and, therefore, no well founded fear of persecution arose on this basis.

*(c) However, the Tribunal was obliged to ask itself **why** the Applicant would not engage in Azerbaijani activities in Iran, which it did not do.*

13. The Tribunal accepted that the applicant had been involved in Azerbaijani activities in Australia but went on to find that he would not

engage in similar activities in Iran were he to return. The applicant submitted that there were two potential reasons for this conclusion and that different consequences attached to each of them. The two potential reasons identified by the applicant were:

a) he had no wish or interest to have such an involvement; and

b) he feared the possibility of persecution if he did get involved so he modified what would otherwise have been his natural behaviour in order to avoid the risk of harm.

The applicant submitted that, because different consequences attached to each of these reasons, the Tribunal was obliged to identify which of them would have motivated him to not be involved in Azerbaijani activities in Iran. He submitted that it failed to do this

14. The applicant referred to *Appellant S395/2002 v Minister for Immigration & Multicultural Affairs* (2003) 216 CLR 473 where the issue was whether, if returned to his country of nationality, an applicant would modify his behaviour to avoid persecutory harm. In *Appellant S395/2002's case* it was held:

> *To determine the issue of real chance without determining whether the modified conduct was influenced by the threat of harm is to fail to consider that issue properly.* (per McHugh and Kirby JJ at 490-491 [43])

The applicant submitted that in this case the Tribunal was diverted from addressing the fundamental question of whether he had a well-founded fear of persecution because it failed to consider whether he would avoid harm by choosing to live in a way which would not attract adverse attention: *Appellant S395/2002* per Callinan and Heydon JJ at 503 [88].

15. When considering the Tribunal's conclusions regarding the applicant's potential involvement in Azerbaijani activities in Iran by reason of his actual or imputed involvement in the Australian Azerbaijani community, it should first be recalled that the Tribunal rejected the applicant's claims to have been involved in any Azerbaijani activities in Iran or to have been arrested or detained on that account. Consequently, the only remaining issue regarding the applicant's claim

to fear persecution in Iran by reason of his Azerbaijani associations was the one arising out of his alleged Australian activities. Relevantly, what the Tribunal said was:

> *The Tribunal gives the applicant the benefit of the doubt and accepts as plausible that the applicant has been involved in Azerbaijan activities in Australia. However, the Tribunal is not satisfied that the applicant's involvement (actual or imputed) in the Australian Azerbaijani Community would mean that there is a real chance that he would suffer serious harm on this basis or that he would engage in such activities in Iran. … In consideration of the evidence as a whole, the Tribunal is not satisfied that the applicant has a profile (actual or imputed) that would mean that there is a real chance that he would suffer serious harm on the basis of his involvement in the Australian Azerbaijani Community or that he would engage in Azerbaijani activities in Iran that carries* [sic] *a real chance of attracting the adverse attention of the Iranian authorities.* (para.92)

16. From this it can be concluded that the Tribunal reached its finding that the applicant would not engage in Azerbaijani activities in Iran because his involvement in Australia did not demonstrate the sort of commitment which would justify such a conclusion. That is to say, it concluded that the applicant had no interest in engaging in Azerbaijani activities in Iran. This finding must be seen in the context of the Tribunal's antecedent conclusion that the applicant's allegations that he had been involved in Azerbaijani activities in Iran were not true. The Tribunal should be understood to have said that if the applicant had not been involved in these activities while he was in Iran, it was not convinced that he would, upon return, participate in them simply because he had been involved in Azerbaijani activities in Australia.

17. It can therefore be seen that the Tribunal did consider why the applicant would not involve himself in Azerbaijani activities in Iran although it did not approach the question using the structured approach advocated by the applicant, namely, by identifying possible reasons for the conduct and then choosing between them. As it was entitled to do, it considered the evidence and reached a conclusion that was open on that evidence. The Tribunal addressed the issue of the applicant's motivation for not engaging in Azerbaijani activities in Iran and did so in a way which involved no error of the sort seen in *Appellant S395/2002's case*.

Asking the wrong question, no evidence

Wrong question

18. The allegation that the Tribunal asked itself the wrong question or made a finding in the absence of evidence was particularised as follows:

> *(a) The Tribunal rejected the Applicant's claims in relation to his pro-Azerbaijani activities in Australia on the basis that the Applicant's profile was not sufficiently high.*
>
> *(b) In so finding, the Tribunal rejected the Applicant's claims on the basis of a dichotomy unsupported by the evidence before it between low profile and high profile activists, which amounted to jurisdictional error.*

19. The applicant alleged that when considering whether he had a well-founded fear of Convention-related persecution arising out of his pro-Azerbaijani activities in Australia, the Tribunal assumed that a dichotomy existed between Azerbaijanis of high and low profiles and concluded that if the applicant fell into the low profile group he would not be persecuted. He submitted that the Tribunal determined his claim by assigning him to a particular category and determining the probability of his persecution by reference to his membership of that category. Again, the applicant referred to *Appellant S395/2002's case* and, in particular, to the reasons of McHugh and Kirby JJ at 494-495 [55]-[60].

20. I agree with the Minister's written submissions on this point and adopt them:

> *The applicant seeks to call in aid S395/2002 in relation to* [the] *first limb of this ground and the so-called "dichotomy point". S395/2002 concerned a claim to fear persecution because of membership of a particular social group, namely, homosexuals. The error in that case was a failure to consider the correct particular social group. The case does not stand for any broad proposition about drawing "dichotomies", or the impermissibility of doing so as part of* [the] *process of fact finding.*
>
> *The Tribunal referred to the "generic reports provided by the applicant post-hearing", and concluded based on those reports that "those reports generally relate to actual and/or perceived*

high-profile activists, some of whom have had a history with the Iranian authorities". That was not the Tribunal setting up some sort of dichotomy but was, simply, the Tribunal analysing the country information and reaching a conclusion about what it disclosed, namely that the persecution arguably evidenced by those reports was largely directed to those who were actually, or were perceived to be, high profile activists. There was nothing exceptional or impermissible in this conclusion.

No evidence

21. The applicant also submitted that the Tribunal assumed that Azerbaijanis with a low profile would not face a well-founded fear of persecution because articles provided by the applicant relating to this aspect of his claim generally referred to activists who had or were perceived to have a high profile. He submitted that there was no basis for the Tribunal to conclude that the activists referred to in the reports which he had submitted had, or were perceived to have, a high profile. He said that although the reports referred to some activists by name this, in itself, said nothing about their profile. He said that the Tribunal's finding was contrary to the summaries in the articles concerning what the activists had done to warrant arrest and detention, noting that many of the activists appeared to have been arrested or otherwise punished for engaging in ordinary demonstrations.

22. He further submitted that there were frequent references in the articles to mass arrests and to persecution of Azeris at a general level. He submitted that it was not open to the Tribunal to find that the articles generally related to activists who had or were perceived to have high profiles and that, rather, they simply referred to the targeting of ordinary people who had merely attended a protest.

23. The reports considered by the Tribunal are reproduced at CB 124-156, being folios 126-158 in the Tribunal's file. A review of that material discloses that there was a factual basis for the Tribunal's conclusion. The reports contained in the documents which the applicant gave the Tribunal did refer to arrests and apparent mistreatment of ordinary protestors. However, the articles also dealt in some detail with the treatment allegedly meted out to individuals who were more than ordinary protesters. These were persons who appear to have been engaged in political activism, not simply people who had attended

protests as crowd members. Essentially, the applicant's allegation is that the Tribunal should have reached a conclusion different from the one it reached and pressed this emphatically by saying that its conclusion was not open on the evidence. However, it is apparent that the evidence did provide sufficient basis for the Tribunal's finding in question such that it did not manifest legal error. As a result, this ground of the application is not made out.

Breach of s.425

24. The applicant particularised his allegation that the Tribunal breached s.425 of the Act as follows:

> *(a) An issue that was dispositive to the review was the timing of the Applicant's claims pertaining to his Azerbaijanian ethnicity.*
>
> *(b) This issue only arose after the hearing and, therefore, the Applicant did not have an opportunity at the hearing to give evidence and present arguments in relation to this issue.*
>
> *(c) In the circumstances, the Tribunal was obliged to invite the Applicant to a further hearing to give evidence and present arguments in relation to this issue, which it did not do.*

25. The applicant submitted that the Tribunal is obliged to identify to an applicant the issues which would be dispositive of the review, at least to the extent that an issue was not an issue before the delegate. He also submitted that any such issue must be identified at or prior to a hearing and that if such an issue arises after the hearing, a further hearing is to be held. The applicant referred to *SZIOZ v Minister for Immigration & Citizenship* [2007] FCA 1870 where Besanko J said at [59]:

> *The letter from the Tribunal sent after the hearing, it seems with its obligation in s 424A in mind, raises that issue but a letter after the hearing cannot satisfy the provisions of s 425(1) of the Act.*

26. The applicant submitted that in the present case an issue that was dispositive of the review was the timing of the applicant's claims pertaining to his Azerbaijani ethnicity. He pointed to the fact that the Tribunal specifically expressed a concern that the applicant had raised his claims relating to that ethnicity after the hearing and had relied on

this to reject those claims. It was alleged that because the Tribunal failed to raise this issue with the applicant and give him an opportunity to give evidence and present arguments in relation to it, it had erred.

27. Section 425(1) provides:

> ***425 Tribunal must invite applicant to appear***
>
> *(1) The Tribunal must invite the applicant to appear before the Tribunal to give evidence and present arguments relating to the issues arising in relation to the decision under review.*

In *SZBEL v Minister for Immigration & Multicultural & Indigenous Affairs* (2006) 228 CLR 152 it was held that, by virtue of s.425, a review applicant before the Tribunal is entitled to be aware of the issues which may be dispositive of his or her review. Section 425(1) describes these as "the issues arising in relation to the decision under review".

28. In para.89 of its decision the Tribunal referred to the applicant's post-hearing submission in which he referred to his involvement in Azerbaijani activities while in Iran and to the mistreatment he received as a result. In para.90 of its decision the Tribunal said:

> *The claims of being involved in Azerbaijani activities and the four day detention are significant and serious claims that had not been made by the applicant previously, particularly and in the course of the hearing when he was asked and given an opportunity to discuss his claims in full. He made no mention of those claims. In post-hearing material, the applicant stated that he has not talked about this matter before because he was not sure if he could stay in Australia. He was afraid that the Iranian authorities would know this since his mother told him about two weeks ago that the Iranian authorities have concerns about him and his freedom and that they know about his protection application. He now has nothing to lose and he can talk about everything. The Tribunal has carefully considered his explanations but the Tribunal finds them unpersuasive; it is difficult to see valid reasons for the failure to have mentioned those substantial claims, particularly being detained. The Tribunal notes that in relation to the claimed incident of being taken by the Islamic Association of the University, the applicant stated that he could not recall exactly when he was arrested but it was the first week of Khordad (third*

month in the Iranian calendar). His inability to give more details about this alleged incident raises doubts about its veracity.

29. Although the applicant's post-hearing submission went into some detail concerning his ethnicity-based claim, this was not the first time that the issues relating to his ethnicity had been raised. They were, in fact, discussed by the applicant with the Tribunal at the hearing. At para.55 of the Tribunal's decision record, the following appears:

> *The Tribunal asked the applicant if he has suffered any harm on the basis of his Turkish ethnicity. He said his ethnicity made a big difference. He said about two years ago, he saw an article whilst he was in Australia in an Iranian newspaper in which the editor referred to Turks as* 'cockroaches'*, which was insulting. The Tribunal asked the applicant again if he had suffered any harm on the basis of his Turkish ethnicity and the applicant stated that he did not suffer any harm on that basis.*

30. In para.88 of its decision the Tribunal records:

> *The applicant is of the Azerbaijani ethnic group. In the course of the hearing, the Tribunal asked the applicant if he has suffered any harm on the basis of his ethnicity. He said his ethnicity made a big difference. He said about two years ago, he saw an article whilst he was in Australia in an Iranian newspaper in which the editor referred to Turks as* 'cockroaches'*, which was insulting. The Tribunal asked the applicant again if he had suffered any harm on the basis of his Turkish ethnicity and the applicant stated that he did not suffer any harm on that basis.*

Although at the hearing the applicant did not advance claims to have suffered previous harm by reason of his ethnicity, he effectively made such claims in his post-hearing submissions.

31. It is apparent that the issue of the applicant's ethnicity, and whether it provided a foundation for his claim, was canvassed by the Tribunal at its hearing. The applicant addressed that issue by giving the evidence which was recorded in paras.55 and 88 of the Tribunal's decision record. After the hearing, the applicant provided further, and different, evidence addressed to this issue. This was referred to by the Tribunal at paras.62, 63 and 89 of its decision record. The fact that after the hearing the applicant sought to return to an issue which, it must be assumed, he considered he had inadequately addressed at the hearing

does not mean that a new issue was raised in the post-hearing correspondence. The applicant's evidence in his post-hearing submission was additional evidence on an extant issue; it did not constitute the raising of a new or additional issue such as to trigger the obligation to give another hearing: *Minister for Immigration & Citizenship v SZKTI* (2009) 83 ALJR 1017 at 1027 [51].

32. This situation is not altered by the manner in which the allegation is pleaded. The applicant asserts that the issue was the timing of his claims concerning his Azerbaijani ethnicity and the fact that the Tribunal expressed the view that it was difficult to see a valid reason for his failure to make these allegations earlier. What the applicant is, in truth, saying is that the issue was the credibility of the evidence which he presented concerning his claim to fear persecution because of his ethnicity. However, the evidence was not rejected on credibility grounds. It was simply not persuasive. The persuasiveness of evidence is always in issue unless some contrary indication is given by the Tribunal. As disclosed at para.91 of its decision, the Tribunal considered all the evidence on the issue in question but was not persuaded, when considering it as a whole, that the applicant had a well-founded fear of Convention-related persecution by reason of his ethnicity. That was the issue, not whether the applicant adduced evidence on the point at the hearing or afterwards.

Applying the wrong test

33. The applicant alleged that the Tribunal applied the wrong test when determining whether he had a Convention-related fear of persecution. It was submitted that the Tribunal erred when it considered, first, the difficulties which the applicant alleged he had encountered when seeking to enter university and, secondly, his claims to have had difficulty finding employment.

University entry

34. In relation to the university entry issue, the applicant referred to what the Tribunal had said at para.84 of its decision:

> *At [84], the Tribunal approaches the question of the reason as to alleged difficulties encountered by the Applicant in entering university as follows:*
>
> > "… the Tribunal is of the view that there may well have been other reasons for the applicant's inability to enter a public university (although he said his grades were comparatively good) and that this is not essentially and significantly related to his actual or perceived support for the Iranian regime."

The applicant submitted that if the Tribunal speculated that there were other, specified, reasons for the difficulties which he encountered in entering university this pointed to it having not taken a proper approach to determining whether there was a real chance that he held a well-founded fear of persecution for a Convention reason. He submitted that the contemplation of another reason for those difficulties was consistent with there being a real chance that those difficulties were for a Convention reason. He submitted that the Tribunal had to ask whether there was a real chance but, instead, concluded that there could not be a real chance because there might have been another cause for the difficulties he encountered.

35. The Tribunal's conclusions in relation to this aspect of the matter were in two parts. The first part involved the Tribunal accepting as plausible that supporters of various Islamic groups were favoured in terms of university entry and that there may have been other reasons, not essentially and significantly related to the applicant's actual or perceived lack of support for the Iranian regime, which brought about his inability to enter a public university. It discussed these two considerations without reaching a conclusion concerning which of them was the cause of his inability to enter a public university. In the second part of its reasoning it went on to conclude that, regardless of what might have been the cause of the applicant's inability to enter a public university, it was satisfied that he did not and would not suffer relevant persecution because this difficulty did not amount to serious harm as contemplated by the Act.

36. It should therefore be understood that this aspect of the applicant's case was not determined by reference to the "real chance" aspect of the

Convention test but according to whether the harm suffered by the applicant was "serious harm" as required by s.91R(1) of the Act.

Employment difficulties

37. The second aspect of the allegation related to the Tribunal's findings at para.87 of its decision record where it stated:

> *The Tribunal accepts as plausible that the applicant encountered difficulties in finding employment in his field, and whilst it is plausible that his lack of support for Islamic groups may have had something to do with those difficulties, there could be many reasons why he was unsuccessful in getting employment. For example, the Tribunal notes that during an interview, he said he was asked what time he had prayed on that morning. He said he responded to the question by telling the interviewer that it was personal and unrelated to the position of chemistry; his lack of response to the question may not have been in his interest.*

38. The applicant submitted that this reasoning reflected a misunderstanding of the applicable test to be applied. In his written submissions he said:

> *… It is bizarre to accept that, whilst a lack of support for Islamic groups 'may' have had something to do with the Applicant being unable to obtain employment, there was no Convention nexus because it was possible that there were other reasons and then proffer an example of a situation that could only be described as religious discrimination to support this. Clearly this reveals that the Tribunal misunderstood both the 'real chance' test and the meaning of a Convention nexus.*

39. However, this submission did not take into account what the Tribunal actually found. In the sentence following the passage set out above at [37], the Tribunal continued:

> *In consideration of the evidence as a whole, the Tribunal is not satisfied that his inability to get work in his field is essentially and significantly related to his actual or perceived lack of support for the Iranian regime. … in consideration of the evidence as a whole, the Tribunal is satisfied that the applicant did not and would not suffer serious harm on this basis as contemplated by the Act or persecution as contemplated by the Convention.*

40. The Tribunal concluded, on the facts, that the applicant's inability to get work in his field was not Convention-related. This was a factual finding open to it and does not disclose a misunderstanding of the relevant test. Moreover, the Tribunal concluded that such harm as the applicant may have suffered or might suffer in the future was not "serious harm" as those words are understood for the purposes of s.91R(1). No error is disclosed by this approach.

41. Finally in relation to this ground, the applicant submitted that whether or not a response to an interview question was in the applicant's interest was irrelevant and revealed error in the *Appellant S395/2002* sense. The applicant submitted that the Tribunal was suggesting that there was an expectation that the applicant ought to have answered the question to avoid discrimination in the workplace. For the reasons given above at [40] concerning the other aspect of this part of the allegation, this submission does not point to error on the Tribunal's part.

Failure to consider the totality of the applicant's claims

42. The applicant alleged that the Tribunal rejected the various integers of his claims individually without considering them in their totality. He cited what Jacobson J had said in *SZGUW v Minister for Immigration & Citizenship* [2008] FCA 91 at [53] and [54]:

> *It is well established that in determining whether the persecutory conduct claimed by an applicant amounts to serious harm, the Tribunal is under a duty to consider the "totality of the case put forward":* NBFP v Minister for Immigration and Multicultural and Indigenous Affairs *[2005] FCAFC 95 at [54] – [62];* VTAO v Minister for Immigration and Multicultural and Indigenous Affairs *(2004) 81 ALD 332 at [62];* Khan v Minister for Immigration and Multicultural Affairs *[2000] FCA 1478 at [31]. In doing so, it must consider each integer of the claims:* VTAO *at [62];* Htun v Minister for Immigration and Multicultural Affairs *(2001) 194 ALR 244.*
>
> *As Weinberg J said in* MZWPD v Minister for Immigration and Multicultural and Indigenous Affairs *[2006] FCA 1095 at [69], the Tribunal was bound to consider each incident of alleged persecution, not merely in isolation but also in conjunction with the others. An act that might not amount to persecutory conduct*

involving serious harm when viewed in isolation may do so when considered in its full context.

43. The applicant submitted that the Tribunal dealt with his claims to fear persecution by reference to three discrete issues, namely:

a) his difficulties in high school;

b) his difficulties entering university; and

c) his difficulties obtaining employment.

He submitted that although the Tribunal considered whether, individually, each of these matters amounted to persecution and concluded that they did not, it failed to consider whether, cumulatively, they did amount to persecution. He submitted that by failing to consider these matters cumulatively, the Tribunal constructively failed to exercise its jurisdiction in the sense considered in *SZGUW*.

44. The applicant acknowledged that the Tribunal said in para.97 that it had "considered the applicant's claims independently and cumulatively", but submitted that this "wrap up" style of conclusion was not sufficient to constitute proper consideration of the matters on a cumulative basis. He submitted that the Tribunal demonstrated that its consideration had not involved "an active intellectual process" in the sense discussed by Black CJ in *Tickner v Chapman* (1995) 57 FCR 451 at 462.

45. Whether a Tribunal's statement that it has considered an applicant's claims independently and cumulatively should be accepted at face value will depend on whether there is a proper basis for disbelieving what the Tribunal has said. In *SZGUW's case*, Jacobson J found that although the Tribunal stated in its reasons that "overall, based on the evidence" it was satisfied that SZGUW's fear was not well-founded, by only looking at the integers of his claims individually, and not also as a whole, it had overlooked a substantive aspect or integer of his case. This further aspect of the claim was apparent when the case was considered cumulatively. A review of the Tribunal's decision in *SZGUW's case* demonstrated that the way it considered the applicant's claim led it to overlook an essential element of the claim,

notwithstanding that it believed it had considered everything it had been required to consider.

46. In this case, it must first be noted that the Tribunal gave substance to its statement that it had considered the applicant's claims on a cumulative basis. In para.97 it said:

> *The Tribunal has considered the applicant's claims independently and cumulatively; the Tribunal has carefully considered the applicant's overall circumstances including but not limited to, his ethnicity, being a Muslim of Turkish background, his involvement in the Australian Azerbaijani Community, being a returnee from Australia and the reports that he has provided. In consideration of the evidence as a whole, the Tribunal is not satisfied that the applicant has suffered any serious harm amounting to persecution and that there is not a real chance that he would suffer any Convention harm in the reasonably-foreseeable future if he were to return to Iran.*

This passage gives sufficient substance to the Tribunal's statement that it had undertaken a cumulative consideration of the claims for that statement to be accepted on its face.

47. Whether, notwithstanding that consideration, the Tribunal had overlooked a claim which ought to have been apparent on a cumulative consideration, is a different matter. Significantly, the applicant has not pointed to any aspect of his claim which was overlooked in the sense considered in *SZGUW's case*. It does not appear that any substantive aspect or reasonably apparent unarticulated claim was, in fact, overlooked. Consequently, this ground is not made out.

Failure to deal with claims

48. The applicant particularised his allegation that the Tribunal failed to deal with the claims before it as follows:

> *(a) The Applicant claimed that he faced a well founded fear of persecution by reason of his pro-Azerbaijani activities and by reason of being of Azerbaijani ethnicity per se, whereas the Tribunal only dealt with the question of whether pro-Azerbaijani activities gave rise to a well founded fear of persecution without asking itself whether being of*

Azerbaijani ethnicity per se gave rise to a well founded fear or persecution.

(b) The Tribunal failed to deal with the claim that the Applicant would be sent to various Middle Eastern warzones for the purpose of Jihad and that the authorities were well known for sending non-members of the regime to wage terror attacks. The Tribunal merely considered the question of conscription at a general level without addressing the claim as it was put.

(c) The Tribunal failed to deal with the claim that conscription would constitute persecution of the Applicant in view of his claim that he was against war, was a believer in peace, and wanted to help people rather than kill them.

Ethnicity

49. The applicant's written submissions in support of the first particular of this allegation were expressed in the following terms:

> *In respect of the latter, he referred to daily 'humiliation' because of his Azerbaijani background (CB122.6), him and other Azerbaijanis suffering (CB122.7), and him being treated as 'lower person' (CB123.1). Clearly this was not merely a claim in respect of past events but a claim as to what would occur in the future were he to return to Iran.*
>
> *The Tribunal, however, only dealt with the question of whether pro-Azerbaijani activities gave rise to a well founded fear of persecution and whether the Applicant had in the past suffered 'daily humiliation' (Tribunal decision at [90]-[92]). In so doing, the Tribunal failed to consider the forward looking aspect of the claim relating to the position of Azerbaijanis in Iran (i.e. whether he would be humiliated and the like in the future), thereby committing jurisdictional error.*

50. At para.91 of its decision the Tribunal said:

> *In consideration of the evidence as a whole and in light of* [comments the applicant made in his post-hearing submission], *the Tribunal does not accept that the applicant was involved in any Azerbaijani activities in Iran, … or that he got humiliated on a daily basis because of his Azerbaijani background, or that they picked on him and discriminated against him,* ***or that he cannot***

return to Iran because he would face the same conditions. (emphasis added)

It is well accepted that the past can be a guide to the future including the chance that a future event will occur: *Minister for Immigration & Ethnic Affairs v Guo* (1997) 191 CLR 559 at 574-575. Here, the Tribunal clearly rejected the very claim which the applicant says it failed to consider. In para.91 of its decision, the Tribunal should be understood to have been rejecting the applicant's claims to fear the occurrence of certain future events because it rejected his allegation that similar events had occurred in the past. Specifically, it rejected his claimed fear of future humiliation and the like because it did not accept that the applicant had experienced this treatment in the past. Consequently, the first particular of this allegation is not made out.

Forced participation in "Islamic jihad" and terror attacks

51. In relation to the second particular of the allegation that the Tribunal failed to deal with his claims, the applicant submitted that he expressly claimed that were he to return to Iran the authorities would send him on "Islamic jihad" and that he would refuse to obey, leading to certain imprisonment and death. He said his claim was, in essence, that a militia group sent non-members to various war zones in the Middle East, in which Iran has no formal military involvement, to wage terror attacks and that he would refuse to participate and suffer persecution as a consequence.

52. The applicant submitted that the Tribunal did not deal with the claim as put and merely said that, in general, compulsory military service is a law of general application and that it was satisfied that the administration of compulsory military service in the applicant's case would not amount to persecution. The applicant submitted that such a response, dealing with the Iranian government law in respect of conscription, missed the point entirely.

53. The relevant portions of the applicant's allegations are found in the statement he submitted with his protection visa application form where he said:

- *I cannot go back to Iran because the Iranian Authorities and government will force me to be a member of the Iranian Revolutionary Guards and "Velayat-e Fakih Islamic Party and will send me to Iraq, Pakistan, or Afghanistan, for the purpose of the "Islamic Jihad". I would refuse to do so.*

- *The Iranian Revolutionary Guards and "Velayat-e Fakih Islamic Party are well known and are supported by the Iranian Authorities to send non-members to wage terror attacks assignments. When I refuse, my fate would be certain imprisonment and death.* (CB 28)

In his written submissions the applicant conceded that, by the time of the Tribunal hearing, he had accepted that there was no "Velayat-e Fakih Islamic Party" and that the Basij was part of the Guards.

54. Notwithstanding the applicant's submissions, this claim should be seen as no more than a claim to fear a form of forced conscription by Iranian authorities. The applicant submitted that his claim was not that he was being conscripted for national military service but that he was being pressed into a military force which would send him to make terror attacks. However, this submission lacks substance when it is recalled that both the Guards and the Basij are arms of the Iranian state. All the applicant pointed to was a policy of general application which contained no element of special discrimination against him individually. That the conscription may have been into forces which might be considered to be irregulars, rather than conventional military forces, is not significant.

55. Moreover, as the Minister put in his written submissions:

> *The Tribunal expressly raised with the applicant at the hearing "compulsory military service" and "asked him if he has any concerns". That led to the response that if there was a war he could be called by the Iranian authorities to serve. The claim allegedly not considered was either considered when the Tribunal considered this issue, or, if it was relevantly different, the claim was effectively abandoned when the Tribunal raised with the applicant in a broad and open ended way, what he feared about "compulsory military service" and asked what his concerns were, and the applicant replied as he did, and in doing so did not refer to a fear of being send to a warzone to wage Jihad.*

56. For these reasons, the second particular of the allegation is not made out.

Conscientious objection

57. As to the third particular of the allegation, the applicant submitted that the Tribunal failed to deal with his claim that conscription would constitute persecution in the context of his claim to be a conscientious objector. In this connection he referred to the statement lodged with his protection visa application where he said that he was against war, was a believer in peace and wanted to help people rather than kill them. He submitted that the Tribunal had to ask why he was objecting to military service and also should have asked why he believed in peace over war.

58. The applicant referred to the first instance decision of Gray J in *Erduran v Minister for Immigration & Multicultural Affairs* (2002) 122 FCR 150 and to the decision of Jagot J in *SZMFJ v Minister for Immigration & Citizenship (No.2)* [2009] FCA 95 from which can be derived the principle that, depending on the particular facts found, the non-discriminatory application of a general law may constitute persecution for a reason within the scope of the Convention.

59. What the applicant said in his statement accompanying his protection visa application was, relevantly:

- *I am against the wars and believe in peace, to help humans and not to kill them.* (CB 29)

The Tribunal canvassed the issue of compulsory military service with the applicant at his hearing. The transcript of the Tribunal hearing records the following exchange:

TM: *I'll consider that very carefully. Now you have completed your compulsory military service haven't you?*

A: *Yeah.*

TM: *So you don't have any concerns about that anymore?*

A: *No.*

TM: *Is there any possibility of you being required to serve in the Iranian army?*

A: *Yes.*

TM: *How?*

A: *Yes, if, in the war conditions any disabled conditions they call everyones* [sic]. *They push everyone. It doesn't matter you …*

TM: *Most countries do, yeah. Generally speaking obligations for military service are not considered to be persecution because they apply to everyone. If the Iranian Government wants to send military or is involved in a war, they can call on people who have been trained obviously, they can do that. That would not necessarily mean persecution. For the purpose of the convention. Do you understand me?*

A: *Yeah I can understand, but they push everyone by in different ways.*

TM: *I don't have anything else to say or ask you. Is there anything else you want to say to me?*

A: *Yeah just I don't want to go back, in Iran. I don't want to go back. Because especially now I applied for the refugee visa. If I go back straight they shoot me or put me in the jail. Believe me.*

60. Neither in his written statement or in his subsequent evidence did the applicant allege, in terms, that he was a conscientious objector. Indeed, the fact that he previously completed compulsory military service suggests that he was not, although it is possible that his opinions changed over time. However, even if by the time of his visa application and Tribunal hearing the applicant had become a conscientious objector, this was not a claim which arose sufficiently from the materials to require the Tribunal to appreciate its existence: *NAVK v Minister for Immigration & Multicultural & Indigenous Affairs* [2004] FCA 1695 per Allsop J at [15]. In his written statement, all the applicant expressed was a commonplace preference for peace over war and life over death. Neither there nor in his evidence to the Tribunal when he was given an opportunity to articulate the conscientious objection he now asserts did he make any reference to it.

61. However, it was not necessary for the applicant to do so. As held in *SZMFJ v Minister for Immigration & Citizenship (No.2)*, the steps which the Tribunal was, in the circumstances, required to take were those set out by Gray J in *Erduran's case*:

> *It therefore appears that, when an issue of refusal to undergo compulsory military service arises, it is necessary to look further than the question whether the law relating to that military service is a law of general application.* ***It is first necessary to make a finding of fact as to whether the refusal to undergo military service arises from a conscientious objection to such service****. If it does, it may be the case that the conscientious objection arises from a political opinion or from a religious conviction. It may be that the conscientious objection is itself to be regarded as a form of political opinion. Even the absence of a political or religious basis for a conscientious objection to military service might not conclude the inquiry. The question would have to be asked whether conscientious objectors, or some particular class of them, could constitute a particular social group. If it be the case that a person will be punished for refusing to undergo compulsory military service by reason of conscientious objection stemming from political opinion or religious views, or that is itself political opinion, or that marks the person out as a member of a particular social group of conscientious objectors, it will not be difficult to find that the person is liable to be persecuted for a Convention reason. It is well-established that, even if a law is a law of general application, its impact on a person who possesses a Convention-related attribute can result in a real chance of persecution for a Convention reason. See* Wang v Minister for Immigration & Multicultural Affairs *[2000] FCA 1599 (2000) 105 FCR 548 at [65] per Merkel J. Forcing a conscientious objector to perform military service may itself amount to persecution for a Convention reason.* (at 156-157 [28]) (emphasis added)

62. In this case, what the Tribunal said was:

> *The Tribunal discussed with the applicant compulsory military service and asked him if he has any concerns. The applicant stated that if there is war, he could be called by the Iranian authorities to serve. The applicant stated that the Iranian authorities push everyone in different ways. In the applicant's circumstances, the Tribunal is satisfied any obligations arising from compulsory military service, do not constitute serious harm or persecution for the purpose of the Convention. Generally-speaking, compulsory military service is a law of general*

> *application. The Tribunal has carefully considered the applicant's circumstances, including his ethnicity and lack of support for Islamic groups in Iran. The Tribunal is satisfied that the administration of compulsory military service in the applicant's case would not be discriminatory or selective or disproportionate or that it would have a differential impact on the applicant, and as such it would not amount to persecution.* (para.95)

63. The allegation made by the applicant in his statement accompanying his protection visa application, that he preferred peace to war, should be understood to be an explanation of his preceding statements quoted above at [53] that he would refuse to participate in "Islamic jihad" or in terror attack assignments. As such, it does not stand alone but is to be considered in the context of those allegations appearing earlier in the written statement. Whether the applicant's claim to prefer peace over war pointed to a truly conscientious objection to "Islamic jihad" and participation in terror attacks is not an issue which must or can be determined in these proceedings. That was a matter for the Tribunal. *Erduran's case* demonstrates that if an applicant has alleged that he or she will refuse to comply with a non-discriminatory conscription regime the Tribunal is required to determine whether this is because he or she conscientiously objects to it. The Tribunal acknowledged the applicant's allegation in that he would refuse to be conscripted or pressed into military or quasi-military service but failed to consider whether this was based on a conscientious objection and one which was in turn based on a ground referred to in the Convention. Because it failed to do so, the Tribunal constructively failed to exercise its jurisdiction.

64. As the Tribunal's decision is affected by jurisdictional error by reason of its constructive failure to exercise jurisdiction, it will be set aside.

Failure to ask the right question, application of wrong test and making a finding in the absence of evidence

65. The applicant particularised this allegation as follows:

> *(a) The Tribunal rejected the Applicant's sur place claim on the basis that, while there were some exceptions, country information suggested that deportees did not face significant*

problems upon return (Tribunal Decision at [94]). The Tribunal, however, failed to determine what the 'exceptions' were and whether the Applicant fell into one of these exceptions.

(b) The Tribunal was obliged to ask itself these questions and, accordingly, the Tribunal committed jurisdictional error by failing to ask itself the right questions.

(a) Further and in the alternative, the Tribunal misapplied the 'real chance' test because, having not determined what the 'exceptions' were and whether the Applicant fell into one of them, it was not open to the Tribunal to conclude that there was no real chance that the Applicant faced a well founded fear of persecution for a Convention reason in the reasonably foreseeable future.

(b) Further and in the alternative, the evidence relied upon by the Tribunal was incapable of establishing the finding made. It indicated that some people might face 'significant problems' and, therefore, absent a determination as to whether the Applicant was such a person, the evidence could not support the finding.

66. In para.94 of its decision the Tribunal said:

> *Whilst, there are exceptions, country information shows that there is no evidence that failed claimants, persons who had illegally exited Iran, or deportees face any significant problem upon returning to Iran. The information cited in the Decision indicates that returnees may face closer scrutiny, questioning and temporary detention where they are a fugitive from justice or departed illegally and that the circumstances of some returnees is unclear. In consideration of the evidence as a whole, the Tribunal is not satisfied that there is a real chance that the applicant would suffer serious harm on this basis if he were to return to Iran.*

67. The applicant relied on the fact that the Tribunal accepted there were exceptions to the general proposition that deportees do not face any significant problems upon return to Iran. He submitted that unless the Tribunal determined whether or not he fell within the exceptions which it had identified, it had no basis to be satisfied that there was no real chance that he had a well-founded fear of persecution if he returned to Iran.

68. In reality, the applicant's argument is one addressed to the Tribunal's fact finding not to its application of the relevant test. Read as a whole, para.94 of the Tribunal's decision discloses that it considered that the applicant would not be one of the exceptions which it identified. Proceeding from this finding, it concluded that the evidence before it did not satisfy it that if he returned to Iran the applicant had a real chance of serious harm on the basis that he was a failed claimant, a person who had illegally exited Iran or a deportee from Australia. Paragraph 94 of the Tribunal's decision records factual findings. It does not evidence a misapplication of the relevant test.

69. The applicant also submitted that unless the Tribunal found that he would not fall into one of the exceptions to which it referred, there was no evidence that he would not face persecution. The exceptions to which the Tribunal made reference in para.94 of its decision were referred to in para.93 of its decision. As already observed, the Tribunal must be understood to have meant by its discussion in para.94 that the applicant did not fall into the exceptions to which it had specifically referred in para.93. The Tribunal should be understood to have been saying that because the exceptions which it identified did not apply to the applicant it was not satisfied that there was a real chance that he would suffer serious harm if he were to return to Iran as a failed claimant, a person who had illegally exited a country or a deportee from Australia.

70. For these reasons, the third particular of this allegation is not made out.

Conclusion

71. As jurisdictional error on the part of the Tribunal has been demonstrated, its decision will be set aside and the matter remitted to be determined according to law.

I certify that the preceding seventy-one (71) paragraphs are a true copy of the reasons for judgment of Cameron FM

Associate:

Date: 16 December 2009