FEDERAL COURT OF AUSTRALIA

VCAD v Minister for Immigration & Multicultural & Indigenous Affairs [2005] FCAFC 1

MIGRATION - appeal - protection visa - claim based on conscientious objection to military service - primary judge held error in Tribunal decision did not affect correctness thereof - whether primary judge erred in not granting relief - whether Tribunal justified in concluding that appellant protected from persecution for reasonably foreseeable future due to changed circumstances

Judiciary Act 1903 (Cth) s 39B
Migration Act 1958 (Cth) ss 5(1), 36, 415, 430, 430(1)(c)

Applicant VEAZ of 2002 v Minister for Immigration & Multicultural & Indigenous Affairs [2003] FCA 1033, cited
Erduran v Minister for Immigration & Multicultural & Indigenous Affairs (2002) 122 FCR 150, applied
Minister for Immigration & Multicultural Affairs v Yusuf (2001) 206 CLR 323, cited
Minister for Immigration & Multicultural & Indigenous Affairs v VFAI of 2002 [2002] FCAFC 374, cited
NAIF v Minister for Immigration & Multicultural & Indigenous Affairs [2005] FCA 114, cited
NAUW v Minister for Immigration & Multicultural & Indigenous Affairs [2005] FCA 1086, cited
VBAP v Minister for Immigration & Multicultural & Indigenous Affairs [2005] FCA 965, cited
VCAD v Minister for Immigration & Multicultural & Indigenous Affairs [2004] FCA 1005, approved

VCAD v MINISTER FOR IMMIGRATION & MULTICULTURAL & INDIGENOUS AFFAIRS
VID 1010 OF 2004

GRAY, SUNDBERG and NORTH JJ
26 AUGUST 2005
MELBOURNE

GENERAL DISTRIBUTION

IN THE FEDERAL COURT OF AUSTRALIA

VICTORIA DISTRICT REGISTRY **V 1010 OF 2004**

ON APPEAL FROM A SINGLE JUDGE OF THE FEDERAL COURT OF AUSTRALIA

BETWEEN:	**VCAD** **APPELLANT**
AND:	**MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS** **RESPONDENT**

JUDGES: **GRAY, SUNDBERG and NORTH JJ**

DATE OF ORDER: **26 AUGUST 2005**

WHERE MADE: **MELBOURNE**

THE COURT ORDERS THAT:

1. The appeal be dismissed.

2. The appellant pay the respondent's costs of the appeal.

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules.

GENERAL DISTRIBUTION

IN THE FEDERAL COURT OF AUSTRALIA

VICTORIA DISTRICT REGISTRY **V 1010 OF 2004**

ON APPEAL FROM A SINGLE JUDGE OF THE FEDERAL COURT OF AUSTRALIA

BETWEEN:	**VCAD** **APPELLANT**
AND:	**MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS** **RESPONDENT**
JUDGES:	**GRAY, SUNDBERG and NORTH JJ**
DATE:	**26 AUGUST 2005**
PLACE:	**MELBOURNE**

REASONS FOR JUDGMENT

GRAY J:

The nature and history of the proceeding

1 The question in this appeal is whether a decision of the Refugee Review Tribunal ('the Tribunal'), refusing to grant the appellant a protection visa, was the result of jurisdictional error on the part of the Tribunal. The question arises from the manner in which the Tribunal dealt with the appellant's claim that he would be liable to suffer persecution in his country of origin by reason of his evasion of compulsory military service.

2 The appeal is from the judgment of Kenny J, given on 4 August 2004. See *VCAD v Minister for Immigration & Multicultural & Indigenous Affairs* [2004] FCA 1005. Her Honour dismissed with costs the appellant's application for relief pursuant to s 39B of the *Judiciary Act 1903* (Cth) in respect of the Tribunal's decision.

3 The appellant is a citizen of the Federal Republic of Yugoslavia. He arrived in Australia on 23 October 1998. He was joined in Australia on 31 March 1999 by his de facto wife and her daughter, both citizens of Ukraine. On 14 May 1999, all three lodged an application for a protection visa. On 5 August 1999, a delegate of the Minister for Immigration and Multicultural Affairs (now the Minister for Immigration and Multicultural and Indigenous Affairs) (in both cases 'the Minister') refused to grant a protection visa. The appellant and his wife and her daughter applied for review of that decision by the Tribunal. The Tribunal's decision was dated 23 January 2002 and was handed down on 29 January 2002. The Tribunal affirmed the decision not to grant protection visas.

4 Section 36 of the *Migration Act 1958* (Cth) ('the Migration Act') provides that there is a class of visas to be known as protection visas. A criterion for a protection visa is that an applicant for it be a non-citizen in Australia to whom the Minister is satisfied Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol. The terms 'Refugees Convention' and 'Refugees Protocol' are defined in s 5(1) of the Migration Act to mean respectively the Convention relating to the Status of Refugees done at Geneva on 28 July 1951, and the Protocol relating to the Status of Refugees done at New York on 31 January 1967. It is convenient to call these two instruments, taken together, the 'Convention'. For present purposes, it is sufficient to note that, pursuant to the Convention, Australia has protection obligations to a 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'.*

5 An alternative criterion for a protection visa is that the applicant for it be a non-citizen in Australia who is the spouse or a dependent of a non-citizen in Australia to whom the Minister is satisfied Australia has protection obligations under the Convention and who holds a protection visa. In the present case, the appellant claimed to be a person to whom Australia has protection obligations under the Convention. His de facto wife and her daughter claimed to fall within the alternative criterion. Their claims therefore depended upon the success of the appellant's claim.

The appellant's claims

6 The appellant claimed to be entitled to protection on the basis of his conscientious objection to military service and on the basis of his active membership of a political party in opposition to President Milosevic. He said that he had refused to fight in or support the war in Bosnia because he was a Christian and was firmly opposed to killing another human being. He said that he was 'morally and religiously' opposed to war. He was served with a number of notices to appear for army training during the civil war in Bosnia and was in hiding to avoid military service. He was eventually arrested in the street and taken to the army barracks. His father was able to obtain the necessary supporting signatures to nominate him as a candidate for the Senate, which had the effect of freeing him from military duties.

7 The appellant claimed that, because of his support of an opposition political party, he was 'on a number of occasions severely beaten up by police' for attending street meetings in Belgrade in March 1993 and March 1996.

8 In October 1998, there were renewed military call-ups. Someone came to serve the appellant with a call-up notice, but he was not at home. He decided to leave Yugoslavia. On 26 March 1999, a summons to report for military duties, directed to the appellant, was served on his parents.

The Tribunal's reasons

9 With respect to the appellant's claim to fear persecution because of his refusal to perform military service, the Tribunal said:

> *'It is not enough that an Applicant's refusal to perform military service is motivated by reasons of being a pacifist, a conscientious objector or a partial conscientious objector; there may be cases where conscientious objection to military service may be the basis of a well-founded fear of persecution for a Convention reason, for example the refusal to perform military service may derive from one's religious beliefs or may be by virtue of one's political opinion. It is not enough to found a claim for refugee status based on*

punishment for refusal to perform military service, unless the sanctions that are imposed on an applicant are for Convention reasons...

The applicant did imply a Convention reason for not wanting to fight in a war. It is implied in the reading of his claims that he did not agree with the Milosevic regime and its policies...

Conscription or compulsory military service, does not of itself constitute persecution. As stated in Mijoljevic v MIMA *[1999] FCA 834, the Federal Court has on a number of occasions recognised that the enforcement of laws providing for compulsory military service and punishment of those who avoid such service, will not ordinarily provide a basis for a claim of persecution within the meaning of the Convention (Branson J at 23).'*

10 The Tribunal then referred to pars 167 – 169 of the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status, and to certain information it had about the law in Yugoslavia relating to draft evasion. The Tribunal continued:

'It is a law of general application and in the present case there is no evidence before the Tribunal that the Applicant would suffer disproportionate punishment on account of his race, nationality, religion, membership of a particular social group or actual or imputed political opinion. Nor is there evidence to suggest that punishment under the code is applied in a discriminatory manner and for Convention reasons.'

11 The Tribunal then found that the situation in Yugoslavia had changed considerably after the appellant's initial claims were made. The Milosevic regime had been overthrown by a bloodless coup and a number of reforms had been put into place. An amnesty was declared for draft dodgers and deserters. The Tribunal referred to an article from Reuters News Service, dated 26 February 2001, concerning the passage through Yugoslavia's 'reformist-dominated parliament' of an amnesty law, covering 28 000 draft dodgers and deserters from the army during a series of Balkan wars in the 1990s, mainly during NATO's 1999 bombing of Yugoslavia. The Tribunal also referred to information supplied by the Australian Department of Foreign Affairs and Trade on the nature of compulsory military training in Yugoslavia. It concluded:

'Even if the applicant were to face some punishment, penalty or sanctions,(even though this has been ruled out by the amnesty) such sanctions

would be imposed because of his failure to perform military service and not attributable to his political opinion, membership of a particular social group or any other Convention ground. The Tribunal finds that any punishment the applicant may face for refusal to perform military service is not for a Convention reason.'

12 The Tribunal went on to reject the appellant's claim, to the extent that it was based on his political involvement, for a number of reasons that are not relevant to this appeal.

The primary judgment

13 At first instance, it was common ground that the correct approach to a claim for refugee status based on a claim of conscientious objection to military service was set out in *Erduran v Minister for Immigration & Multicultural Affairs* [2002] FCA 814 (2002) 122 FCR 150 at [18] – [28] and, particularly at [28]:

'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.'*

14 Kenny J referred to *Minister for Immigration & Multicultural & Indigenous Affairs v VFAI of 2002* [2002] FCAFC 374 and to *Applicant VEAZ of 2002 v Minister for Immigration & Multicultural & Indigenous Affairs* [2003] FCA 1033 at [21] – [27].

15 In the primary judgment at [35], Kenny J said:

> *'As noted above, whilst the Tribunal in the present case referred to the applicant's claim that he was "religiously opposed to war", it made no finding as to whether his avoidance of military service arose from a conscientious objection and, if so, whether that objection was a religious one. The Tribunal apparently 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. This is plainly erroneous, and involved the Tribunal asking itself the wrong question. 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. As Branson J said in* Okere *at 118, in a passage quoted with approval in* Wang *at 564 per Merkel J:*
>
> > History supports the view that religious persecution often takes "indirect" forms. To take only one well known example, few would question that Sir Thomas Moore was executed for reason of his religion albeit that his attainder was based on his refusal to take the Succession Oath in a form which acknowledged Henry VIII as head of the Church of England.
>
> *As we have seen, Gray J made the same point, in* Applicant VEAZ of 2002, *in the passage quoted above. Because the Tribunal misstated the law, it also failed properly to address the applicant's claim that he had avoided military service for religious reasons.'*

16 At [36], her Honour said that she did not consider that the Tribunal's error in this regard entitled the appellant to relief. The appellant's claim was that he feared punishment as a deserter if he returned to Yugoslavia. The Tribunal found that an amnesty had been declared for 'draft dodgers and deserters'. Her Honour said:

> *'Given this finding, the Tribunal was justified in concluding that the applicant would not be persecuted in Yugoslavia for any Convention reason that*

> *included his religious or political objections to military service. I accept that, as the respondent submitted, the applicant is not entitled to relief in a case where the decision must have been made regardless of an identified error in the decision-maker's reasons for decision.'*

17 At [37], her Honour expressed the view that there was error in the Tribunal's statement that, even if the appellant were to face some punishment, penalty or sanctions, this would not be attributable to any Convention ground. The statement followed from the Tribunal's misunderstanding of the law and of the question that it was bound to address in a case involving a conscientious objector. Again, her Honour expressed the view that, because of the Tribunal's finding that an amnesty had been declared, the Tribunal's error did not entitle the appellant to the relief he sought.

The grounds of appeal

18 Counsel for the appellant contended that, having found that the Tribunal's decision was affected by error, Kenny J was wrong not to grant the relief the appellant sought. Having found that the Tribunal made an error of law, which resulted in it asking itself the wrong question, and that the Tribunal failed to address the appellant's claim that he had avoided military service for religious reasons, her Honour was wrong to hold that the fact that an amnesty had been declared justified the Tribunal in concluding that the appellant would not be persecuted for any Convention reason. Her Honour was wrong to hold that this was a case in which the decision must have been made, regardless of an identified error in the reasons for decision. The argument fell into three categories:

(a) the Tribunal had made no finding on whether the amnesty declared would be effective protection in practice. The Tribunal was required to determine whether for the reasonably foreseeable future the appellant would be protected from persecution. A finding that an amnesty had been declared, without a finding about whether it would be respected or effective, could not answer the question the Tribunal was required to answer.

(b) the question for Kenny J was not whether the Tribunal was justified in concluding that the appellant would not be persecuted, but whether the decision might have been

different if the Tribunal had not made the errors that her Honour found. It was not clear that the Tribunal would have determined that the practical implementation of the amnesty would have reduced the appellant's risk of persecution to a probability less than a 'real chance'.

(c) The Tribunal considered the possibility of the applicant facing some punishment (in the passage I have quoted in [11]). This must be taken to have been consideration by the Tribunal of a material question of fact, because it had expressed this consideration in its reasons, in accordance with s 430(1)(c) of the Migration Act. The Tribunal was to be taken as considering the possibility that the declared amnesty would not be effective. In considering this situation, it fell into the error identified by Kenny J and its decision was therefore flawed by jurisdictional error.

The completeness of the Tribunal's finding on the amnesty

19 It is clear that the Tribunal's conclusion that the appellant did not have a well-founded fear of persecution for any Convention reason, should he return to Yugoslavia, was based on the Tribunal's findings that the situation in Yugoslavia had changed considerably since the occurrence of the events dealt with in the appellant's claims. One of these changes was the declaration of the amnesty for draft evaders and deserters. The Tribunal specifically found that the possibility of the appellant facing some punishment, penalty or sanctions had been ruled out by the amnesty. Although the Tribunal did not expressly find that the amnesty would be effective, such a finding is implicit in its reasons. The only basis on which the Tribunal could have found that the possibility of the appellant facing punishment, penalty or sanctions had been ruled out by the amnesty was that the Tribunal took the view that the amnesty would be effective to rule out this possibility. Otherwise, its reasons would make no sense.

20 It was clearly open to the Tribunal to reach the conclusion on the material before it, that the declaration of the amnesty excluded the possibility that the appellant would be persecuted as a draft dodger or deserter, if he should return to Yugoslavia.

The correct question for the primary judge

21 When Kenny J said that, given the Tribunal's finding that an amnesty had been declared, it was justified in concluding that the appellant would not be persecuted in Yugoslavia for any Convention reason, her Honour was not applying an incorrect test. It is clear that her Honour was simply making the point that the Tribunal's conclusion was open to it. The critical question for the Court was not whether the decision might have been different if the Tribunal had expressed a further finding of fact, but whether the Tribunal's conclusion was open to it on the material before it. Her Honour clearly took this approach.

22 It is true, as counsel for the appellant submitted, that the Tribunal's expressed reasons can be taken to expose its reasoning. They may reveal errors of omission or commission. See *Minister for Immigration & Multicultural Affairs v Yusuf* [2001] HCA 30 (2001) 206 CLR 323 at [69] per McHugh, Gummow and Hayne JJ. This does not lead to the conclusion that, whenever the Tribunal's reasons disclose that it has made an error, its decision must be set aside. In order to be a jurisdictional error of one of the kinds described by McHugh, Gummow and Hayne JJ in *Yusuf* at [82], the error must be of a kind that 'affects the exercise of power'. The powers of the Tribunal are found in s 415 of the Migration Act. They include powers to affirm or vary a decision, and the power to set aside a decision and substitute a new decision. When the Tribunal's decision as to how it will exercise its powers is based on a conclusion unrelated to the error, the exercise of power is not affected. Kenny J was correct in holding that the Tribunal's decision in the present case was based on its finding as to the amnesty, so that the error in the Tribunal's approach to the law requiring compulsory military service in the appellant's country of origin did not affect the exercise of the Tribunal's power.

23 There have been numerous cases in which decisions of tribunals under the Migration Act have been upheld, notwithstanding error apparent in the tribunals' reasons, because those reasons also disclose that there is another basis on which the tribunal concerned found against the person applying for a visa. Recent examples include *NAIF v Minister for Immigration & Multicultural & Indigenous Affairs* [2005] FCA 114 at [17], *VBAP v Minister for Immigration & Multicultural & Indigenous Affairs* [2005] FCA 965 at [33] and *NAUW v Minister for Immigration & Multicultural & Indigenous Affairs* [2005] FCA 1086 at [24].

The possibility of an ineffective amnesty

24 The contention that the Tribunal's consideration of the possibility of the appellant suffering punishment, penalty or sanctions involved a consideration by the Tribunal of such a possibility as a matter of fact flies in the face of the Tribunal's expressed reasons. It is inconsistent with the Tribunal's finding that this possibility had been ruled out by the amnesty. The attempt by counsel for the appellant to contend that the Tribunal's incorrect approach to the question of compulsory military service in Yugoslavia affected the result of its consideration of the appellant's case on this basis must also fail.

Conclusion

25 Kenny J was correct to hold that the Tribunal had taken an erroneous approach to the relationship between persecution and compulsory military service. Her Honour was also correct in holding that this error of the Tribunal did not affect the result in the appellant's case.

26 The appeal must be dismissed. No reason was advanced, and none appears, why the usual rule, that costs follow the event, should not be applied the appellant should be ordered to pay the respondent's costs of the appeal.

I certify that the preceding twenty-six (26) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Gray.

Associate:

Dated: 26 August 2005

GENERAL DISTRIBUTION

IN THE FEDERAL COURT OF AUSTRALIA

VICTORIA DISTRICT REGISTRY **V 1010 OF 2004**

ON APPEAL FROM A SINGLE JUDGE OF THE FEDERAL COURT OF AUSTRALIA

BETWEEN:	**VCAD** **APPELLANT**
AND:	**MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS** **RESPONDENT**

JUDGES:	**GRAY, SUNDBERG and NORTH JJ**
DATE:	**26 AUGUST 2005**
PLACE:	**MELBOURNE**

REASONS FOR JUDGMENT

SUNDBERG and NORTH JJ:

BACKGROUND

27 The appellant, a citizen of the Federal Republic of Yugoslavia (now known as Serbia and Montenegro), arrived in Australia in October 1998. His wife and her daughter arrived in March 1999. In May of that year the appellant applied for a protection visa, including the wife and child in the application. In August 1999 the respondent's delegate refused the application. The appellant unsuccessfully applied for review of this decision by the Refugee Review Tribunal. An application under s 39B of the *Judiciary Act* 1903 (Cth) for judicial review of the Tribunal's decision was dismissed by the primary judge, Kenny J. This appeal is from that decision.

TRIBUNAL'S DECISION

28 The appellant's claims were that he feared persecution on two grounds. First, as a result of his failure to comply with a notice requiring him to attend for military service in Yugoslavia.

Secondly, because of his membership of a political organisation called "Srpski Pokret Obnove" (Serbian Renewal Movement).

29 As to the first ground, the Tribunal said that conscription or compulsory military service does not itself constitute persecution, and went on:

> *"It is not enough that an Applicant's refusal to perform military service is motivated by reasons of being a pacifist, a conscientious objector or a partial conscientious objector; there may be cases where conscientious objection to military service may be the basis of a well-founded fear of persecution for a Convention reason, for example the refusal to perform military service may derive from one's religious beliefs or may be by virtue of one's political opinion. It is not enough to found a claim for refugee status based on punishment for refusal to perform military service, unless the sanctions that are imposed on an applicant are for Convention reasons …."*

After noting that the Yugoslav law about draft evasion was of general application, the Tribunal observed that there was no evidence that the appellant would suffer disproportionate punishment on any Convention ground, and no evidence to suggest that punishment under the law is imposed in a discriminatory manner or for Convention reasons.

30 The Tribunal then referred to country information that the situation in Yugoslavia had changed considerably since the appellant had made his initial claims. It found that one of the reforms introduced was an amnesty for draft dodgers and deserters.

31 The Tribunal concluded as follows on the appellant's first claim:

> *"Even if the applicant were to face some punishment, penalty or sanctions (even though this has been ruled out by the amnesty) such sanctions would be imposed because of his failure to perform military service and not attributable to his political opinion, membership of a particular social group or any other Convention ground. The Tribunal finds that any punishment the applicant may face for refusal to perform military service is not for a Convention reason."*

32 The Tribunal then rejected the appellant's claim of persecution on the ground of his membership of the Serbian Renewal Movement. This part of the Tribunal's decision was not challenged before the primary judge, and we need not deal further with it.

PRIMARY JUDGE

33 The primary judge noted that the parties had accepted that the decision of Gray J in *Erduran v Minister for Immigration and Multicultural and Indigenous Affairs* (2002) 122 FCR 150 sets out the correct approach to a claim for refugee status based on a claim of conscientious objection to military service. Her Honour set out passages from *Erduran,* including the following:

> *"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. … Forcing a conscientious objector to perform military service may itself amount to persecution for a Convention reason."*

The emphasis is that of the primary judge.

34 Her Honour noted that *Erduran* had been reversed by the Full Court (*Minister for Immigration and Multicultural and Indigenous Affairs v VFAI of 2002* [2002] FCAFC 374), but only on the ground that the transcript of the hearing before the Tribunal (which was not before Gray J) showed that the Tribunal had in fact dealt with the case that had been put to it. The primary judge also referred to Gray J's later decision in *Applicant VEAZ of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCA 1033, in which his Honour said he did not regard anything said by the Full Court in *VFAI* to be inconsistent with what he had said at first instance.

35 The primary judge concluded that the Tribunal had erred in law in its treatment of the appellant's military service claim. Her Honour said:

> *"whilst the Tribunal in the present case referred to the applicant's claim that he was 'religiously opposed to war', it made no finding as to whether his avoidance of military service arose from a conscientious objection and, if so, whether that objection was a religious one. The Tribunal apparently 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. This is plainly erroneous, and involved the Tribunal asking itself the wrong question. 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 ….*
>
> *Because the Tribunal misstated the law, it also failed properly to address the applicant's claim that he had avoided military service for religious reasons."*

36 Notwithstanding the Tribunal's error, the primary judge refused relief. Her reasons were expressed as follows:

> *"This was not a case in which a conscientious objector was a claimant for refugee status because he or she feared military conscription into active combat if returned to a country of origin. The applicant's claim that, on account of his religious beliefs, he had a conscientious objection to military service was relevant only because he claimed to fear punishment as a deserter if he returned to Yugoslavia. The Tribunal found, as a fact, that the situation in that country had 'changed considerably' since the applicant first sought a protection visa. The Tribunal found that there had been a 'bloodless coup' against the Milosevic regime and that an amnesty had been declared for 'draft dodgers and deserters'. Given this finding, the Tribunal was justified in concluding that the applicant would not be persecuted in Yugoslavia for any Convention reason that included his religious or political objections to military service. I accept that, as the respondent submitted, the applicant is not entitled to relief in a case where the decision must have been made regardless of an identified error in the decision-maker's reasons for decision."*

37 Her Honour went on to identify a related error on the Tribunal's part when it said (see [5]) that even if the appellant were to face some punishment, this would not be attributable to any Convention ground. However, again because of the amnesty finding, that error did not entitle the appellant to relief.

THE APPEAL

38 The appellant's sole ground of appeal is that the primary judge erred in refusing relief notwithstanding the errors (amounting to jurisdictional error) that she had identified in the Tribunal's decision. In particular, the primary judge is said to have erred because:

(a) the Tribunal made no finding on whether the amnesty would be effective protection in practice;

(b) the critical question was not whether "the Tribunal was justified in concluding that the applicant would not be persecuted", but whether the decision might have been different but for the Tribunal's errors, and the decision may have been different had the Tribunal made a finding of fact concerning the implementation of the amnesty;

(c) the Tribunal considered the possibility "if the applicant were to face some punishment", and by operation of s 430 of the *Migration Act* 1958 (the Act), "this should be construed as a consideration by the Tribunal of a material question of fact, demonstrating that the Tribunal's errors … may have affected the decision".

Each of these reasons is dealt with in turn.

Reason (a)

39 Although the Tribunal did not expressly find that the amnesty would be effective in practice, a fair reading of its reasons indicates that that was its view. In reference to the country information about post-Milosevic Yugoslavia, it first said that "the situation in Yugoslavia … has changed considerably", and that a number of reforms have "already been put into place in the FRY". The language of a changed situation in Yugoslavia, and reforms put into place, is the language of effective change.

40 Further, the Tribunal's finding that "an amnesty was declared for draft dodgers and deserters" coupled with the later statement that punishment "has been ruled out by the amnesty", assumes the effectiveness of the amnesty.

41 In addition, given its findings about the amnesty, the Tribunal's conclusion that the appellant would not be punished as a deserter if he returned to Yugoslavia carries with it the

assumption that the amnesty would be effective in practice. That was the primary judge's reading of the Tribunal's decision. Her Honour said that given the Tribunal's finding that an amnesty had been declared for "draft dodgers and deserters", it was justified in concluding that "the applicant would not be persecuted in Yugoslavia for any Convention reason that included his religious or political objection to military service". We agree.

42 It is to be noted that the appellant did not put material before the Tribunal to the effect that the amnesty was not being honoured. Nor, so far as appears, was it put to the primary judge that the amnesty was not in fact in operation.

43 For the foregoing reasons the submission that the Tribunal made no finding that the amnesty would be effective protection in practice must be rejected.

Reason (b)

44 This ground is predicated upon the Court accepting that the Tribunal did not find that the amnesty was effective. In light of the foregoing, this ground must also fail.

Reason (c)

45 Section 430(1)(c) of the *Migration Act* requires the Tribunal to prepare a written statement that sets out any findings on any material questions of fact. The Tribunal found that because of the amnesty the appellant was not at risk of persecution. It then added:

> *"Even if the applicant were to face some punishment, penalty or sanctions, (even though this has been ruled out by the amnesty) such sanctions would be imposed because of his failure to perform military service and not attributable to his political opinion, membership of a particular social group or any other Convention ground."*

This statement, although erroneous, is merely an unnecessary fall-back position: as demonstrated by the words in parentheses referring to the amnesty. As such, it does not demonstrate that the error identified by the primary judge may have affected the Tribunal's decision.

46 The appeal must be dismissed.

I certify that the preceding twenty (20) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Sundberg and Justice North.

Associate:

Dated: 26 August 2005

Counsel for the Applicant:	Mr A Krohn
Solicitor for the Applicant:	Zeljko Stojakovic
Counsel for the Respondent:	Ms S E Moore
Solicitor for the Respondent:	Australian Government Solicitor
Date of Hearing:	14 February 2005
Date of Judgment:	26 August 2005