Applicant M v Minister for Immigration & Multicultural Affairs [2001] FCA 1412 (5 October 2001)

Last Updated: 5 October 2001

FEDERAL COURT OF AUSTRALIA

Applicant M v Minister for Immigration & Multicultural Affairs [2001] FCA 1412

MIGRATION - application for order of review of decision of Refugee Review Tribunal affirming decision of respondent's delegate not to grant a protection visa - applicant claimed fear of persecution in the form of being press-ganged into Taliban militia - whether Tribunal erred in law or fell into jurisdictional error by not considering whether real chance that applicant as a member of a particular social group (able-bodied Afghan males) might be persecuted, by reason of such membership, by forcible conscription into the Taliban militia to fight in the civil war, there being no evidence of any law of general application - whether matter should be remitted with a direction as to the constitution of the Tribunal.

Migration Act 1958 (Cth), s 476(1)(b), (c) and (e)

Randhawa v Minister for Immigration, Local Government and Ethnic Affairs (1994) 52 FCR 437 distinguished

Applicant A v Minister for Immigration and Multicultural Affairs [1997] HCA 4; (1997) 190 CLR 225 referred to

Chen Shi Hai v Minister for Immigration and Multicultural Affairs [2000] HCA 19 followed

Minister for Immigration and Multicultural Affairs v Yusuf [2001] HCA 30 applied

Applicant Z v Minister for Immigration and Multicultural Affairs [2001] FCA 881 referred to

Mahmoodi v Minister for Immigration and Multicultural Affairs [2001] FCA 1090 not followed

Wang v Minister for Immigration and Multicultural Affairs [2000] FCA 1599 referred to

Minister for Immigration and Multicultural Affairs v Applicant C [2001] FCA 1332 referred to

APPLICANT M v MINISTER FOR IMMIGRATION AND

MULTICULTURAL AFFAIRS

W 15 of 2001

CARR J

5 OCTOBER 2001

PERTH

IN THE FEDERAL COURT OF AUSTRALIA
WESTERN AUSTRALIA DISTRICT REGISTRY W 15 of 2001

BETWEEN:	APPLICANT M
	Applicant
AND:	MINISTER FOR IMMIGRATION AND
	MULTICULTURAL AFFAIRS
	Respondent
JUDGE:	CARR J
DATE OF ORDER:	5 OCTOBER 2001
WHERE MADE:	PERTH

THE COURT ORDERS THAT:

1. The applicant have leave further to amend his application in terms of the two minutes of further proposed amended grounds of application lodged on 14 May 2001 and 24 July 2001 respectively.

2. The decision of the Refugee Review Tribunal, made on 2 January 2001, be set aside.

3. The matter be remitted to the Tribunal for decision in accordance with the law.

4. In the event that there is a dispute over the constitution of the Refugee Review Tribunal that is to determine the matter, the parties have liberty to apply on that issue.

5. The respondent pay the applicant's costs.

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

IN THE FEDERAL COURT OF AUSTRALIA

WESTERN AUSTRALIA DISTRICT REGISTRY W 15 of 2001

BETWEEN: APPLICANT M

Applicant

AND: MINISTER FOR IMMIGRATION AND

MULTICULTURAL AFFAIRS

Respondent

JUDGE: CARR J

DATE: 5 OCTOBER 2001

PLACE: PERTH

REASONS FOR JUDGMENT

INTRODUCTION

1 This is an application for an order of review of a decision of the Refugee Review Tribunal, made on 2 January 2001, by which the Tribunal affirmed the decision of a delegate of the respondent not to grant a protection visa to the applicant. The applicant, who is a national of Afghanistan, arrived in Australia on 11 July 2000 travelling by boat from Indonesia, with the assistance of a people smuggler. On 25 July 2000 the applicant applied for a protection visa. On 5 September 2000 a delegate of the respondent refused to grant him a protection visa. On 8 September 2000 the applicant sought review of the delegate's decision by the Refugee Review Tribunal.

THE APPLICANT'S CLAIMS AND THE TRIBUNAL'S DECISION

2 The applicant's claims, in summary, were as follows:

* the applicant is Pashtun by ethnicity and worked as a self-employed tailor;

* he is married and has a young son. His wife and son are now living with his parents and three brothers in a village in a provincial district;

* in about April 2000 the Taliban leader in that area spoke to the applicant's father and told him that the family had to give one son to fight against the opposition then led by Ahmed Shah Masood;

* on that occasion his father gave the Taliban some money and neither he nor any of his brothers was required to fight. The same had happened to other families in the village;

* his family could not afford to continue paying money to the Taliban;

* if he were returned to Afghanistan he would be forcibly recruited into the Taliban forces;

3 The applicant, in later written submissions, stated that:

* he worked as a sewing machinist and ran the tailor's shop. Apart from one brother who worked as a driver, the rest of his brothers and his father worked on a farm;

* when he was working in his shop the Taliban used to come to the shop and give him a very hard time about his beard and long hair, saying that the beard had to be very long and he should not have long hair;

* in about August 1999 the Taliban had taken his cousin away and the cousin was killed in battle;

* when the Taliban had come to the family house in April 2000, the applicant was hiding inside the house. The Taliban told his father that his son had to be sent to fight. His father had told the Taliban that the applicant was not at home. It was on that occasion that his father decided that the applicant had to leave Afghanistan;

* he held the political opinion that the Taliban should not be able to take young men to the front if they did not want to fight. Because of that opinion, he would be in danger if he remained in Afghanistan;

* if he were returned to Afghanistan the Taliban would kill him, first because he had escaped from Afghanistan and secondly because, having been asked to fight, he had refused;

* there were no authorities who could protect him from the Taliban;

* after his cousin had been killed he had begun to speak out against the Taliban. His family had also been very upset and began talking to people against the practice of sending young men to fight if they did not want to go;

* the applicant had also told people that the Taliban were not really Talibs (Muslim religious leaders) as they should be in mosques learning religion rather than fighting.

4 Shortly before the Tribunal hearing, the applicant made further claims in a written submission. They were as follows:

* one of his customers was a member of the Jamiat-e-Islami (the main opposition party to the Taliban) and gave him anti-Taliban newspapers and articles to distribute secretly;

* he gave these leaflets to other people and discussed the material with them;

* the Taliban realised that he was spreading propaganda; and

* he feared that he would be captured by means of forcible conscription into the militia or would be killed on return to Afghanistan.

5 Rather than attempt to summarise the Tribunal's findings and reasons, I set them out below in full. I have added numbers to the paragraphs to facilitate the references which I make later in these reasons. Where the Tribunal used paragraph numbers I have put them in brackets.

*"**FINDINGS AND REASONS***

1. The Applicant's original application and subsequent interviews were such that he can be taken to have claimed to fear "persecution" at the hands of the Taliban authorities in Afghanistan for reasons of conscription to fight for them in the same way that other young men or men of fighting age had been conscripted from time to time. He also claimed that he disagreed with the fighting and killing people and that his failure to fight would be regarded as opposition to Taleban (sic)*.*

2. At the Tribunal hearing and in a submission around the time of the hearing the Applicant made fresh claims to the effect that his fear of discriminatory treatment amounting to persecution was based on Taliban's motivation to target him as a person who had spoken out against the Taliban and that the motivation for recruiting him was because of his opposition. He further claimed that he could not return having left and that he would be sent to an area or to a situation such as a mine field so that he would be killed.

3. In determining this matter I have considered the credibility of the Applicant's account.

4. After making findings of fact I have then considered the situation of conscription in Afghanistan and the consequences the Applicant could face on return to that country now or in the reasonably foreseeable future.

The Linguistic Assessment and the Applicant's Nationality

5. The assessment was carried out by linguistic experts not locally engaged interpreters who may draw conclusions based on their experience but linguistic experts whose skills extend beyond the interpretation of language to identifying accents, dialects and useage patterns peculiar to regions.

6. That assessment is clear and unambiguous. It states clearly that the Applicant speaks Pashtu and uses words and terms from the region the Applicant states he comes from.

7. I accept this independent evidence as being objective and independent from an appropriate expert to make these observations.

8. Although the information suggests that he has had contact with Pakistan or significant people speaking with the pronunciation of Pakistan I am satisfied that he is Afghan and a national of Afghanistan.

9. I further accept the Applicant's account find (sic) *that the region the Applicant is from has been in control of the Pashtun dominated Taliban for several years as the Applicant claims.*

10. He claims that it was about seven or eight years. However, independent information indicates that it was most likely six years:

At the end of 1994, a new political and military force - the Taleban - emerged on to the scene. Stating as their aim to rid Afghanistan of corrupt Mujahideen groups, the Taleban have succeeded in capturing large areas of country from opposing armed groups. They are now said to control around 80 per cent of Afghanistan. Fighting however continues between the Taleban and opposition forces and the political situation remains volatile. Cisnet document CX44544 Human rights defenders in Afghanistan: Civil society destroyed Amnesty International 11 Nov 1999.

11. In any event I accept his evidence to the effect that his area was under Taliban control for several years before he left.

12. Although he claims he wanted to move from there for some considerable time he has, by his own account remained there with his family carrying on the family business until last year and, apart from being told to keep his beard long and hair short, by his account, has not suffered any discriminatory harm at the hands of the Taleban authorities.

13. I have discussed his claims to have been called on to serve in the Taleban military below.

The Applicant's Account.

14. The Applicant has claimed that he left Afghanistan two and half months prior to the departmental interview of 16 July 2000.

15. From the time of his arrival, through his interview with two departmental officers, face to face counsel of his representative and the details he provided in his protection visa application he stated that the reason he left Afghanistan was a fear of being conscripted into the Taliban army.

16. He clearly stated on several occasions that the reason Taliban would take him was for fighting.

17. In his written statutory declaration submitted with his application he stated:

The reason I left Afghanistan was that the Taliban forced us to go to the front line and fight against their enemies. Otherwise we have to pay 20,000,000 Afghani a month not to go and fight.

18. He said that he would have to kill other people and, if he refused to fight they would probably kill him.

19. He stated at the hearing that his older brother was not called to fight, nor his younger brother who was too weak.

20. He also clarified that his family had only payed (sic) Taliban once.

21. His claims to that point clearly point to a situation of a young man who has lived under Taliban for a number of years without coming to undue interest of the Taliban becoming fearful that he will be recruited.

22. I find his experience in this regard was in a drive for recruits in his area where his household and others in his area were called on to give up one of the young men in their families to fight.

23. This fear of recruitment is all the more understandable when his cousin's tragic fate is taken into account.

24. Another young man, related and living close to the Applicant being called to fight by Taliban and, shortly afterwards, being killed in battle.

25. I accept that his cousin died in this manner and I also accept his claim that Taliban had tried to conscript him but, not as a registered or listed person but as part of the "ad hoc" Taliban system of demanding a male from each of the households in the area serve. On that one occasion he managed to avoid conscription by his father paying the Taliban.

26. I do not accept the Applicant's eleventh hour claims to have spoken out against Taliban and to have made his opposition known.

27. The Applicant had every opportunity to put these claims and, for reasons discussed under the heading, "The Applicant's claims in regard to Conscription in the Taliban Armed Forces." I find he did not oppose the Taliban openly.

28. The issues which are material to his case and which I accept are:

(1) He is Afghan.

(2) He is Pashtun.

(3) He is of fighting age and, could have faced conscription in Afghanistan.

(4) The Taliban is predominantly Pashtun and does not have a regular conscription programme but, on an ad hoc basis has a practice of rounding up or pressganging young men available at the time into their services.

(5) The Taliban has been in control of his area for a number of years and continues to do so .

(6) The situation in Taleban held areas has stabilised to the extent that the UN is prepared to facilitate return to them.

29. The information contained in the Cisnet document CX40735 leads me to conclude that the United Nations is satisfied that, in general circumstances it is safe for Afghan citizens to return to Taliban held rural areas considered safe and, the U.N is facilitating that return.

30. That information is consistent with information in the US State Department Country Reports on Human Rights Practices 1999 in which it states:

According to the UNHCR, there were no reports of the forced return of persons to a country where they feared persecution. The Government is cooperating with the UNHCR to support voluntary repatriation of Afghans to rural areas of Afghanistan considered to be safe. During the year, approximately 92,000 Afghans returned to Afghanistan; in 1998, approximately 93,000 Afghans returned to Afghanistan.

31. For reasons discussed below I find that the Applicant's claims do not come within the Ambit of the Convention.

The Applicant's Claims in Regard to Conscription in the Taliban Armed Forces.

32. The terms of Article 1A(2) of the Convention are such that for harm to amount to Convention persecution that harm must have a discriminatory element to it as it states that the persecution must be "for reasons of race, religion, nationality, membership of a particular social group or political opinion."

33. In the absence of any element of discrimination the harm, even if oppressive or constituting "generalised human rights abuses" does not bring the claims within the ambit of the Convention.

34. In the matter of Applicant A & Anor v MIEA [1997] HCA 4; (1997) 190 CLR 225 at 244 Dawson J stated, in reference to claims of serious harm:

For my part, however, I do not see how those considerations assist the appellants, since they merely suggest that the persecution which they face is serious and may infringe internationally recognised human rights. That is not the issue in this appeal. The issue is whether that persecution is for one of the five Convention reasons. (my emphasis added)

35. The courts have held that the harm may be multi faceted and so long as a facet played, "a substantial part in the persecution feared by the applicant that would be persecution 'for reasons of'" (See: Mahespararam v MIMA (unreported, Federal Court of Australia, Madgwick J, 15 April 1999) but that there must be an element of discrimination for one of the five Convention reasons.

36. In Applicant A Brennan CJ stated:

... the feared persecution must be discriminatory. The victims are persons selected by reference to a criterion consisting of, or criteria including, one of the prescribed categories of discrimination ("race, religion, nationality, membership of a particular social group or political opinion") mentioned in Art 1(A)(2).

37. The Applicant had ample opportunity to state his claims. However, in the questionnaire he stated that neither he nor any member of his family had been involved in activities against any government or political group.

38. Under the counsel of his representative he made no claims to have spoken against Taliban or to have indicated his opposition to it other than not wanting to fight as it was dangerous and that he did not wish to kill people and finding the requirement to keep his beard long and his hair short oppressive.

39. Although the Applicant was interviewed twice by departmental officers and counselled by a solicitor, prior to the hearing and the submission of 13 October 2000 he made no claims to have feared harm at the hands of the Taliban for any reason other than being made to fight for them.

40. I am of the opinion that his representative would have discussed the Applicant's claims and pointed out to him the need for a discriminatory element to exist if his matter was to come within the Convention.

41. I have considered the Applicant's background, the fact that he was raised in a rural village and had little outside contact. I have also taken into account the Applicant's claims, which I accept, that he is illiterate and has had no formal education.

42. This would explain his lack of understanding of the Convention and also any confusion he may have held that gave him the misconception that harm, of itself, was sufficient to identify him as a refugee.

43. However, having due regard to the handicaps he faced I have also considered the counsel from his representatives and the nature of the questions put to him by the department to draw out his claims.

44. I consider it reasonable to expect, regardless of education levels, that a person fleeing persecution would be able to identify the basis for his fear and the reason for any persecution if it was known or if he had reasons to suspect the motivation.

45. The Applicant was articulate and not hampered by undue tension at the Tribunal hearing and therefore, having regard to the above, I find that his failure to mention that he had spoken out against Taliban at any time prior to the Tribunal hearing was because he had not done so and that he had come to realise, possibly from contacts in the detention centre, that such a claim could provide him with a Convention basis for his claimed risk of harm. I do not accept that the Applicant had ever spoken out against Taliban or that Taliban regarded him as an opponent.

46. I accept the information cited above in Cisnet document CX39867, DFAT cable IS500488 to the effect that Taliban does not have a regular conscription policy but has as a practice the recruitment, often forced, of young men regarded to have the potential to fight.

47. I accept that, in some instances, Taliban has been reported to have forced youths of families it regards as being opposed to it to cross mine fields or undertake tasks which could lead to harm for reasons of their opposition.

There were reports that some prisoners of the Taliban, including the sons of families that had opposed Taliban social restrictions, had been drafted forcibly and sent to the front. There were also reports that the Taliban forcibly conscripted or attempted to forcibly conscript persons in 1997 and 1998; some of these reports were unconfirmed. US State Department Country Reports on Human Rights Practices 1999.

48. However, I do not accept this is the case in the current matter since I do not accept that he or his family has opposed the Taliban such as to be identified as being of the opposition.

49. He has lived under Taliban control for many years and has not come to their adverse attention except the minor annoyance of being told to keep his beard long and his hair short.

50. In the several years he and his family lived under the control of Taliban he made no claim to have opposed their "social restrictions" and, except for the recent claims which I do not accept he made no claim to have suffered in a discriminatory way under Taliban.

51. While the ad hoc practice of recruitment and press ganging new recruits including young students as described in the independent material cited above, is not one which would be condoned internationally, Taliban's motivation is solely based on whether or not the recruits are capable of fighting. This selective process which targets young, able bodied males does not amount to discrimination for a Convention reason. The selection of young men or men of fighting age albeit in an "ad hoc" manner does not amount to discrimination and is not Convention related any more than regularised conscription is in other countries.

52. In the matter of Mijoljevic v MIMA [1999] FCA 834 (Branson J, 25 June 1999) the Applicant objected to military conscription on the basis of his pacifist views. The Tribunal found that this objection and the possible consequences of failing to undertake conscription, did not bring the Applicant's case within the ambit of the Convention.

53. In determining the appeal Branson J stated:

In my view, the conclusion of the Tribunal that the applicant's pacifist views did not provide a basis upon which it could be satisfied that he was a person to whom Australia owes protection obligations under the Refugees Convention was open to it on the evidence and material before it. Further, in my view, the Tribunal's reasons for decision do not suggest that the Tribunal's conclusion in this regard involved any error of law. This Court has on a number of occasions recognised that the enforcement of laws providing for compulsory military service, and for the punishment of those who avoid such service, will not ordinarily provide a basis for a claim of persecution within the meaning of the Refugees Convention (see for example, Murill-Nunez v Minister for Immigration and Ethnic Affairs (1995) 63 FCR 150; Timic v Minister for Immigration and Multicultural Affairs [1998] FCA 1750). See also Hathaway, The Law of Refugee Status at para 5.6.2. (Ibid at 23).

54. In the current matter the Applicant has claimed he fears harm if he is taken to fight for Taliban. He also claims to have pacifist views in that he claims he would be forced to kill people and, "[he is] totally against the fighting that is happening and [he has] no reason to kill anyone."

55. He also claims that Taliban is a foreign force from neighbouring Pakistan.

56. I have considered the information before me and, while I am left in no doubt that Taliban is by most standards a ruthless and despotic political body founded on extremist religious tenets. It is, nevertheless the body which controls 90 percent of Afghanistan and, though not internationally recognised by many states, is the current de facto government of Afghanistan.

57. While I accept that Pakistani extremists both promote and support the movement and accept the evidence cited above that many Afghan Taliban were trained in Madrassas in Pakistan I do not accept the Applicant's views that it is a foreign force. It is, according to independent material a "Pashtun-dominated ultra-conservative Islamic movement" headed by Mullar Omar of Afghanistan.

58. I do not intend to further consider the issue of whether or not it is a foreign force as this would not, in any event, convert the Applicant's fear to a Convention based claim.

59. As discussed above it is clear that Taliban does not have, as a policy, a regularised military service or conscription programme but rather, takes young men at random, as needed for its military purposes and I accept the DFAT advice in cable IS500488 of 21 October 1996 to the effect that thousands of young men have left Afghanistan for this reason.

60. I find that this is what occurred in the case of the Applicant.

61. By his own account his family was approached in an ad hoc recruitment drive and, I also find that the recruiters in that exercise were not seriously concerned whether he did fight or not as they were equally content with being payed (sic) to allow him to avoid the recruitment drive.

62. This leads me to conclude that he was not targeted to the extent that he was listed or registered for recruitment by the Taliban but was merely seen as a young man who was available in that area at that time.

63. There is no regular programme neither is there in the independent material or the Applicant's evidence any indication of a penalty for failure to serve.

64. In the Applicant's case, he has given an account which indicates he evaded service firstly when his father payed (sic) a bribe and secondly by leaving the area to avoid recruitment rather than one of open defiance.

65. His fear, as he has expressed it, was that he may be unfortunate enough to be rounded up or recruited into the Taliban as was one of his cousins in 1998.

66. While I have sympathy for this young man and the tragic plight of his country over the past twenty years and under the current control of the extremist Taliban movement I find that his fear is that of many young men in his circumstances that, for non Convention reasons he will be recruited to fight for Taliban and that, the consequences could be that he may face serious harm or death.

67. However, as discussed above I do not accept that he is of concern to the Taliban as someone who is opposed to them for speaking out against them nor, do I find that his departure to avoid the ad hoc conscription practices of the Taliban would lead them to consider he was politically opposed to them.

68. Large numbers of people who formerly fled Afghanistan are returning, in conditions which UNHCR considers safe.

69. I find that this young man can do as thousands of his fellow citizens are doing and not face a "real chance" of persecution for a Convention reason.

70. However, as discussed above I find that while he could face serious harm that harm does not constitute Convention persecution.

71. In summary, I find that the Applicant is a national of Afghanistan and is a Pashtun who could be considered to be of fighting age by the Taliban.

72. I find that his claims to fear harm because of forced conscription into the Taliban forces are not for reasons of his opposition to the Taliban, as I do not accept his belated claims that he was outspoken in this regard.

73. I accept that he may face serious harm as a consequence of being recruited into the Taliban militia but, I find this harm would be the consequence of fighting between two opposing forces and, although he may not be committed to the aims and objectives of the Taliban, the motivation of the Taliban in recruiting him would be solely because he is a male with the potential to fight and for no other reason.

74. This being the case, I find that his claims are such that I can not be satisfied that he faces discriminatory treatment for any one or a combination of the five Convention reasons or for an aggregate of other reasons with a component of any of the five Convention reasons.

75. This being the case, any fears he may hold in that regard are not well-founded and his claims do not bring the matter within the ambit of the Convention.

CONCLUSION

76. Having considered the evidence as a whole, the Tribunal is not satisfied that the applicant is a person to whom Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol. Therefore the applicant does not satisfy the criterion set out in s 36(2) of the Act for a protection visa."

GROUNDS OF THE APPLICATION, RELEVANT SUBMISSIONS AND MY REASONING

6 The applicant was unrepresented at the time when he filed his application. When the matter came on for hearing on 24 April 2001, Mr J McGrath of counsel was good enough to appear on behalf of the applicant on a pro bono publico basis. I mention that date so that it may be noted that it was before the High Court of Australia handed down its decision in *Minister for Immigration and Multicultural Affairs v Yusuf*

[2001] HCA 30. Mr McGrath applied for, and was granted, leave to substitute four new grounds for those originally contained in the application. I shall summarise those grounds. Ground 1 asserted a failure to comply with the requirements of s 430(1)(b)-(d) of the Act. The failure was said to be that the Tribunal had failed to address the question whether the applicant had a well-founded fear of persecution:

(a) because he held a political opinion, namely a conscientious objection to military service; or

(b) by reason of his membership of a social group comprising those persons who held a conscientious objection to military service.

7 Ground 2 alleged an error of law by the Tribunal incorrectly interpreting Article 1A(2) of the Convention, and in particular the concept of persecution, by reason of the two matters mentioned in Ground 1.

8 Ground 3 alleged error of law in the form of an incorrect application of Article 1A(2) to the facts as found by the Tribunal, in relation to conscientious objection to military service being regarded as imputed political opinion for which the applicant would be persecuted.

9 Ground 4 asserted that the Tribunal had failed to comply with s 430(1)(a) of the Act by failing adequately to expose its reasoning process for its conclusion that the applicant's claims to a fear of persecution by reason of a political opinion, namely opposition to the Taliban, were belated and could not be accepted.

10 The hearing proceeded on 24 April 2001 and judgment was reserved. A few days later, on 1 May 2001, I heard a very similar case namely *Applicant S v Minister for Immigration and Multicultural Affairs* [2001] FCA 1411 in which I gave leave to the applicant to formulate proposed grounds based upon the applicant's membership of a particular social group namely young able-bodied Afghan males. On the same date I made directions in this matter to enable the applicant to consider applying to amend his application to incorporate a similar ground.

11 On 14 May 2001 counsel for the applicant filed a minute of further proposed amended grounds which I shall refer to as proposed Grounds 5 and 6. Proposed Ground 5 asserts an error of law in the application by the Tribunal of Article 1A(2) of the Convention in concluding that the Taliban's selection of young, able-bodied males for conscription did not amount to discrimination and persecution for membership of a particular social group. Proposed Ground 6 alleges that the Tribunal had failed to comply with s 430(1)(b)-(d) of the Act by failing to address the question referred to in proposed Ground 5.

12 Then, on 24 July 2001 (i.e. after the decision in *Yusuf)*, the applicant sought to add proposed Ground 7 asserting jurisdictional error on the Tribunal's part in failing to address the questions referred to in proposed Grounds 5 and 6 i.e. whether the selection of young, able-bodied males for conscription amounted to persecution for membership of a particular social group.

13 The respondent opposed the application to add proposed Grounds 5, 6 and 7. The basis for that opposition was the same as that adopted by the respondent in *Applicant S.* In order to make these reasons a self-contained set of reasons, I shall repeat here as applicable to this case my summary of the respondent's main arguments and my reasoning.

14 The respondent argued that the principles explained in *Bank Commerciale SA en Liquidation v Akhil Holdings Ltd [1990] HCA 11;* (1990) 169 CLR 279 at pp 284 and 416, as followed by Lee J in *Teoh v Minister for Immigration and Ethnic Affairs* (1994) 49 FCR 409, applied notwithstanding that this is an application for judicial review, not an appeal. The applicant should not be granted leave, so it was put, completely to alter the basis of his claims to the Tribunal as to his entitlement to a protection visa.

15 I propose to grant leave to amend for the following reasons. First, the respondent has not pointed to any prejudice which he may sustain if the amendments are allowed. On the other hand, there is a risk of very substantial prejudice to the applicant if the amendments are not allowed, should there be any merit in them. Secondly, this being an application for judicial review, all the relevant facts have been determined by the Tribunal. The question is one of construction of law and, in my view, it is expedient and in the interests of justice that the point be decided.

16 The respondent asserted that the applicant had made no claim to the Tribunal that he feared persecution by reason of his membership of a particular social group. He also referred to the fact that the applicant had legal representation in putting his case before the Tribunal. In my view, those matters go to whether the proposed amendments have any merit and, although relevant to the question of leave to amend, do not outweigh the other considerations to which I have referred.

17 In my opinion, it is in the interests of justice that the applicant have leave to amend by adding what will now become Grounds 5, 6 and 7.

MY REASONING

18 The issues which I now have to decide, as I see the distillation of the various grounds, are as follows: Did the Tribunal err in law or fall into jurisdictional error by failing to consider:

(a) whether the applicant held a conscientious objection to military service which would be regarded as imputed political opinion for which there was a real chance that he would be persecuted?; or

(b) whether the applicant was a member of a relevant particular social group by reason of which there was a real chance that he would be persecuted?

THE FIRST QUESTION - IMPUTED POLITICAL OPINION

19 Mr McGrath pointed to evidence given by the applicant to the Tribunal that the performance of military service would have required his participation in military

action contrary to his political beliefs. That evidence is reproduced at p 6 of the Tribunal's reasons as follows:

"I do not agree that the Taliban should make young people go to the war zone and fight. I will never agree to kill anybody. If the Taliban caught me and wanted me to go and fight and I refused, they would either have taken us by force, put me in jail or killed me.

It is my political opinion that the Taliban should not be able to take young men to the front if they do not want to fight, but they take them by force. Because of that opinion I would be in danger if I stayed in Afghanistan."

20 There is also reference to this claim at p 13 (the paragraph reproduced and numbered 1 above), p 14 (the paragraph reproduced and numbered 18 above) and p 19 (the paragraph reproduced and numbered 54 above) of the Tribunal's reasons.

21 The applicant submitted that the Tribunal had erred when it made the statement at p 17 of its reasons (in the paragraph reproduced and numbered 39 above) to the effect that he had made no claims to have feared harm at the hands of the Taliban for any reason other than being made to fight for them.

22 The respondent submitted that this paragraph (paragraph numbered 39) had to be read in context. That, of course, is so, but I consider that the context shows that the Tribunal confined its reasoning, on the question whether the applicant had suffered persecution by reason of political opinion, to the question whether he had spoken out against the Taliban and had been identified as such. I think that it is sufficiently clear that the applicant put forward, as part of his claims, that he would be at risk of persecution by reason of political opinion, a claim that such opinion would be attributed to him on the basis of his pacifist views. There were two aspects to this, first, what might happen to him in the reasonably foreseeable future by reason of his departure from Afghanistan to avoid conscription and, secondly, what might happen to him in the reasonably foreseeable future if he were again required as a conscript. All that is found in the reasons (at paragraph reproduced and numbered 67 above) is that the Tribunal declined to find that the applicant's departure to avoid conscription would lead the Taliban to consider that he was politically opposed to them.

23 The respondent submitted that the fact that an applicant may have particular political views in relation to conscription and military service which might cause him or her to disobey a law of general application did not cause the sanction for non-compliance to amount to persecution for a Convention reason. The apprehended persecution which attracts Convention protection, so the respondent submitted, must be motivated by possession of the relevant Convention attributes on the part of the person or group persecuted.

24 At this point I note that in relation to the matter of conscription there was no evidence before the Tribunal of any "law of general application". I return to that subject further below.

25 The respondent, in his first set of written submissions, claimed that the applicant had not suggested that he would be singled out from other objectors to conscription on

the basis that he was a conscientious objector and thus held a political opinion for which he would be persecuted. In my view the applicant's claims and evidence, to which I have referred in summary above, did raise that issue. I think that the Tribunal can be seen to have recognised this when, at paragraph reproduced and numbered 1 above, it said this:

*"He **also** claimed that he disagreed with the fighting and killing people and that his failure to fight would be regarded as opposition to Taleban* (sic) [emphasis added]."

26 The respondent submitted that there was no evidence or material which suggested that conscientious objectors were singled out by the Taliban.

27 In my opinion, the fact (as I have found) that the applicant had raised the issue that his failure to fight (which would include his future refusal to fight) would be regarded as opposition to the Taliban, not only required the Tribunal to consider the significance of that claim under the heading of political opinion but as a claim simultaneously raising the possibility that there was a relevant particular social group the members of which were persecuted by reason of such membership (a matter which I discuss further below).

28 At paragraphs reproduced and numbered 52 and 53 above the Tribunal relied upon the authorities, which it there cited, for the proposition that the holding of pacifist views and the consequences of failure "to undertake conscription" did not bring the applicant's case within the ambit of the Convention.

29 I would distinguish all of those cases on the basis that they concerned the enforcement of laws of general application providing for compulsory military service.

30 There was no evidence before the Tribunal that there was such a law in Afghanistan. On the contrary, the Tribunal (at paragraphs numbered 10 and 11 above) appears to have accepted that there are two groups fighting for control in Afghanistan, namely the Taliban and the opposition forces with the former said to control about 80% of the country. At paragraphs numbered 25, 28, 47 and 51 above, the Tribunal found that the Taliban did not have a regular conscription programme, but used force to press-gang new recruits into its forces. It described the process (at paragraph numbered 51) as targeted at "young, able-bodied males", but said that this did not amount to discrimination for a Convention reason. It repeated such a view at paragraph numbered 73 above when it said that the Talbian's motivation in recruiting him would be solely because he was a male with potential to fight and for no other reason.

31 Even if there exists a conscription law of general application in the country from which a claimant refugee has fled, conscientious objectors, or a class of conscientious objectors defined by reference to a particular belief or opinion, may be, for the purposes of the Convention, a particular social group - see Lehane J in *Mehenni v Minister for Immigration and Multicultural Affairs* [1999] FCA 789 and the authorities there cited. As his Honour pointed out, it would be necessary for an applicant for a protection visa to show that he or she had a well-founded fear of persecution for reason of membership of that group.

32 In paragraph numbered 54 above the Tribunal acknowledged the applicant's claim to have pacifist views. At paragraph 51 the Tribunal referred to the Taliban's ad hoc practice of recruitment as "... not one which would be condoned internationally". At paragraph 66 the Tribunal found that the applicant's fear was the same as "... that of many young men in his circumstances ...".

33 In the present matter, as I have mentioned, there was no evidence of a law of general application on the matter of conscription. All the evidence points to forcible conscription by the Taliban without any lawful justification. In my opinion, when the Tribunal relied on Branson J's decision in *Mijoljevic v Minister for Immigration and Multicultural Affairs* [1999] FCA 834, which was a case of enforcement of laws of general application providing for compulsory military service, it fell into error.

34 In my view, the Tribunal was obliged to consider whether the applicant had a well-founded fear of persecution by reason of his membership of a particular social group comprising those persons who held a conscientious objection to military service. In failing to do so I consider the Tribunal erred in law to the extent that it fell into jurisdictional error.

THE SECOND QUESTION - YOUNG, ABLE-BODIED MALES AS A PARTICULAR SOCIAL GROUP

35 I have already considered this question in two very similar cases, *Applicant Z v Minister for Immigration and Multicultural Affairs* [2001] FCA 881 and *Applicant S,* a judgment delivered today. Instead of incorporating by reference my reasons in those two cases I shall largely reproduce below the relevant portion of the reasons in the latter case.

36 In *Applicant Z v Minister for Immigration and Multicultural Affairs* I held that the Tribunal had erred in a manner giving rise to reviewable error when it had failed to consider:

* whether able-bodied Afghan men comprised a particular social group of which the applicant in that case was a member;

* whether forcible recruitment by the Taliban of such persons to fight on the Taliban's side against the Northern Alliance (which, on the evidence in that case, controlled about 10% of Afghanistan), amounted to persecution by reason of membership of that particular group within the meaning of the Convention;

* whether, despite the fact that people may pay to avoid such recruitment, such extortion could amount to persecution within the meaning of the Convention; and

* whether there was any evidence that the Taliban were acting pursuant to a law of general application.

37 Mr P R Macliver, counsel for the respondent, in written submissions, acknowledged that although the findings in the present case were not in precisely the same terms of the findings by the Tribunal in *Applicant Z,* they were of a sufficiently similar nature as to make my reasoning in that case equally applicable to the

Tribunal's decision here. Mr Macliver submitted that my decision and reasoning in *Applicant Z* was in error.

38 The respondent contended that because:

(a) the applicant had had legal assistance from solicitors in making his application for a protection visa and his application to the Tribunal for review;

(b) he had never asserted a claim to be considered as a refugee on the basis of his membership of a particular social group; and

(c) he had never made any claim to have a well-founded fear of persecution by reason of his membership of any particular social group;

there was no error on the part of the Tribunal in failing to consider whether the applicant was a member of a particular social group. Counsel relied upon the observations of Black CJ in *Randhawa v Minister for Immigration, Local Government and Ethnic Affairs* (1994) 52 FCR 437 (at 443) where his Honour said:

"... the extent of the decision-maker's task will be largely determined by the case sought to be made out by an applicant."

39 In *Randhawa* the question was whether the appellant, a Sikh from Punjab, could reasonably be expected to relocate elsewhere in India. The appellant had raised several matters in relation to that issue and the Tribunal was held to have dealt with those issues (on the question of whether it was reasonable to relocate elsewhere in India). Those matters (so it would appear from p 443) were concerned with certain impediments to relocation. It was in that context that his Honour held that because the appellant had not raised certain other impediments to relocation, there was no error on the Tribunal's part in failing to consider whether there were such other impediments.

40 The respondent also relied upon a decision of a Full Court of this Court in *Suleiman v Minister for Immigration and Multicultural Affairs* [2001] FCA 752.

41 I would distinguish *Randhawa* on the facts of this matter. In my view, the appropriate test is whether in this matter it could fairly be said that sufficient facts were placed before the Tribunal as to require it to consider whether there existed a particular social group, being able-bodied Afghan men, and whether the applicant, as a member of that particular social group, had a well-founded fear of persecution if returned to Afghanistan.

42 In his written submissions, the respondent said this:

"For example, if an applicant had no representation or assistance, and if the evidence and material before the Tribunal disclosed the existence of a particular social group within the relevant country, and that the members of that group were persecuted for reason of their membership of that group, and if the evidence and material also showed that the applicant was a member of that particular social group, the Tribunal would be bound to consider whether the applicant had a well-founded fear of persecution by reason of his membership of that particular social group, even if the

applicant had not raised that as an issue. However, such a case will be rare, and does not arise on the evidence and material before the Tribunal in the present case."

43 As I see it, the only difference between the test which I propose and the test for which counsel for the respondent contends, is the fact that the applicant had representation or assistance.

44 I do not think that, in the present context, the fact that the applicant was legally represented can shield the Tribunal from legal error or jurisdictional error if, on the facts before it, there appeared to be a particular social group of which the applicant was a member and by reason of such membership had a well-founded fear of persecution if returned to his country of origin. In my view, it was the Tribunal's duty to consider whether the facts threw up an arguable basis for the existence of any of the five Convention reasons.

45 I would also distinguish *Suleiman* on the facts. In *Suleiman* the Court was, in my view, very much influenced by the fact that there was nothing before the Tribunal to suggest that the appellant had a fear of harm or injury by reason that he was a member of a class of "coastal people". As will be seen below, that was very different from the circumstances of this case.

46 The respondent contended that there was simply no evidence or material before the Tribunal from which it might have been open for it to conclude that there existed within Afghanistan a particular social group such as able-bodied Afghani men, nor, so it was submitted, was there any evidence that the Taliban's conscription of such men was by reason of their membership of any such particular social group.

47 Finally, the respondent submitted that there was no evidence that the applicant in any way feared persecution (i.e. a subjective fear) by reason of his membership of a particular social group.

48 On the question of such a subjective fear, I first refer to the following passage at pp 12-13 of the Tribunal's reasons where it was summarising the applicant's claims in his application and subsequent interviews:

"The Applicant's original application and subsequent interviews were such that he can be taken to have claimed to fear "persecution" at the hands of the Taliban authorities in Afghanistan for reasons of conscription to fight for them in the same way that other young men or men of fighting age had been conscripted from time to time."

49 At p 14 of its reasons the Tribunal referred to part of the applicant's statutory declaration submitted with his application. That part read:

"The reason I left Afghanistan was that the Taliban forced us to go to the front line and fight against their enemies. Otherwise we have to pay 20,000,000 Afghani a month not to go and fight".

50 Finally at p 20 of its reasons there is the following passage:

"While I have sympathy for this young man and the tragic plight of his country over the past 20 years and under the current control of the extremist Taliban movement I find that his fear is that of many young men in his circumstances that, for non Convention reasons he will be recruited to fight for Taliban and that, the consequences could be that he may face serious harm or death."

51 In my view, the above constitutes a finding that the applicant, as one of many similar young men, held a subjective fear of persecution in the form of forced conscription (without the authority of any law) to fight on the Taliban's side in the civil war. At the very least there was, in my opinion, evidence before the Tribunal that the applicant had a subjective fear of such persecution.

52 It is also, in my view, quite clear that the Tribunal found that there was a real chance of the applicant facing persecution (in the sense of some significant detriment or disadvantage) if returned to Afghanistan. This can be seen in paragraph numbered 73 of its reasons set out above.

53 This finding is comparable to the finding of the Tribunal in *Chen Shi Hai v Minister for Immigration and Multicultural Affairs* [2000] HCA 19, which was referred to at paragraph 4 of the main reasons for judgment.

54 There is no reference anywhere in the Tribunal's reasoning to there being a law of general application in Afghanistan requiring military service. On the contrary, the Tribunal in several parts of its reasoning acknowledged that there was no regular conscription in Afghanistan, but that the Taliban was known to have conscripted people into their forces in an ad hoc way by rounding up young men in the areas of their control to serve in their militias. I refer to paragraphs numbered 28(4), 46, 51 and 59 of its reasons set out above.

55 The Tribunal cited some authorities which involved conscription-based refugee claims, mainly authorities in this Court. Each of those decisions concerned the enforcement of laws of general application which provided for compulsory military service and for punishment, without discrimination, of those who avoided such service.

56 This case was different. The Tribunal accepted that Afghanistan was in a state of civil war between the Taliban, on the one hand (which controlled about 90 per cent of the country) and on the other hand, the forces of two other factions of those who formerly opposed the Soviet Union.

57 In paragraph numbered 51 of its reasons, set out above, the Tribunal characterised the Taliban's ad hoc practice of press-ganging recruits as being "... not one which would be condoned internationally". In my view, this can be seen to have come very close to characterising that practice as "... such a significant departure from the standards of the civilised world as to constitute persecution" and not being "appropriate and adapted to achieving [a] legitimate government object" [the quotes are from *Chen Shi Hai* at [29]]. The Tribunal then characterised the Taliban's motivation, whereby it based its selection process upon targeting young able-bodied men, as not amounting to discrimination and not being Convention-related, any more than regularised conscription was in other countries. It was at this point, in my

opinion, that the Tribunal started to fall into error by asking itself the wrong questions, being such an error of law as to amount to jurisdictional error.

58 In my view, the circumstances of:

* civil war of the type described above;

* recruitment by force (without legal right) on an ad hoc basis of able-bodied young men at random;

* preparedness to extort money as the price for not conscripting such young persons; and

* the existence of a targeted class of persons, namely able-bodied young men

all point to a classic situation for the generation of a particular social group of refugees.

59 As to the Taliban's motivation - the High Court of Australia in *Chen Shi Hai* at [33] to [35] explained that the absence of "enmity" or "malignity" does not mean that conduct does not amount to persecution for a Convention reason.

60 The particular social group (able-bodied Afghan men) is not defined by reference to the discriminatory treatment that its members fear. They are defined by the very characteristic of being able-bodied Afghan men, in the same way as the appellant in *Chen Shi Hai* was identified as a "black child". As McHugh J said in *Applicant A* at 264:

"Left-handed men are not a particular social group. But, if they were persecuted because they were left-handed, they would no doubt quickly become recognised as a particular social group."

61 The fact that able-bodied Afghani men receive adverse treatment from the Taliban, as the Tribunal found in this matter, is "descriptive of their situation" and facilitates their recognition as a social group for the purposes of the Convention, but it does not define them - see *Chen Shi Hai* at [23].

62 The evidence accepted by the Tribunal showed that the applicant would be persecuted (the Tribunal expressly found this) because he was an able-bodied Afghan male. There was no scope, in my view, for the Tribunal to conclude that that treatment was for any other reason - see *Chen Shi Hai* at [32].

63 In my opinion, the Tribunal should have considered whether able-bodied young men (or possibly able-bodied young men without the financial means to buy-off the conscriptors) in the above circumstances, comprised a particular social group within the meaning of Article 1A(2) of the Convention.

64 By not doing so, in my opinion, the Tribunal erred in law in the manner to which I have referred above. The extent of its error was, in my view, such as to amount to jurisdictional error within the meaning of the principles explained in *Yusuf*.

65 Since writing the above reasons I have had the advantage of reading the reasons for judgment of Tamberlin J in *Mahmoodi v Minister for Immigration and Multicultural Affairs* [2001] FCA 1090, to which I was referred by the respondent's solicitor about a week after I reserved judgment in this matter. At that stage his Honour's reasons, delivered ex tempore, were not available, so I proceeded to draft the above set of reasons and deferred delivering judgment until the judgment in *Mahmoodi* was published.

66 One of the grounds of the application in that case was that the Tribunal had failed to consider and make findings on whether there was a real chance that the applicant as a member of a particular social group (able-bodied Afghan males) might be persecuted, by reason of such membership, by forcible conscription into the Taliban militia to fight in the civil war. Tamberlin J held that "able-bodied Afghan males" could not be a basis for defining and delineating a particular social group for Convention purposes. The relevant paragraphs of his Honour's reasons were as follows:-

"7. In the present case, the class contended for - "able-bodied Afghan males" - is a reference to characteristics based on gender and health or fitness. In my view, neither of these criteria, either taken alone or in conjunction, ***could*** *amount to a basis on which to find the existence of a particular social group within the meaning of the definition in the Refugees Convention as amended by the Protocol. The reference to "able-bodied" is a reference which could encompass any Afghan male regardless of age, location and political, religious or social persuasion or beliefs. It would encompass a major section of the community. Indeed, the characteristic of being "able-bodied" could well be transient or fortuitous and vary from day to day because at any particular time a person may not be "able-bodied" or at a later point in time may become "able-bodied" within the description. Such a criterion is quite unsatisfactory and inappropriate as a basis for defining and delineating a relevant class or group for Convention purposes. There is simply no common, unifying element apart from basically having a sound body and being male.*

8. Accordingly, on this aspect of the matter, I am not persuaded that there has been any error of law by the RRT in failing to take into account the question whether this possible description amounted to a particular social group or whether any possible persecution based on that classification could amount to persecution within the meaning of the Convention.

9. There is another aspect to the case and that is the reference in the authorities to "laws of general application". The RRT considered that because laws relating to conscription in Afghanistan were in substance laws of general application, using the expression "law" in the broad sense of "policy" or "objective", then there could be no discrimination, the assumption being that the laws would be applied on a general and non-selective or discriminatory basis. In support of this proposition reference is made to Applicant A, where McHugh J said, at 258:

"Conduct will not constitute persecution, however, if it is appropriate and adapted to achieving some legitimate object of the country of the refugee. A legitimate object will ordinarily be an object whose pursuit is required in order to protect or promote

the general welfare of the State and its citizens. The enforcement of a generally applicable criminal law does not ordinarily constitute persecution."

10. In my view, these principles meet the argument that there has been an error in the conclusion reached by the decision-maker in this case. The requirement of conscription, on the material before the decision-maker, could be reasonably considered to be a legitimate object of the refugee's country.

. . .

12. In the course of argument, reference was made to a recent decision by Carr J in Applicant Z v Minister for Immigration and Multicultural Affairs [2001] FCA 881. In that case, his Honour found that there had been an error in a decision of the RRT because it gave no consideration to a number of questions, one of which was "whether able-bodied Afghan men comprised a particular social group" for Convention purposes: at 9. Other matters which had not been considered and which flowed from that failure were whether conscription by the Taliban amounted to persecution by reason of membership of that particular group and whether there was any evidence that the Taliban were acting pursuant to a law of general application: ibid.

13. It appears that the question as to the application of the decision of the High Court in Applicant A was not argued before his Honour. For reasons given above, I do not consider that it was an issue which the RRT was bound to consider in this case."

67 I regret that I must differ, respectfully, from Tamberlin J on this point. I decline to follow *Mahmoodi* because, with the greatest respect, I think it is plainly wrong. First, the description "able-bodied" does not encompass any Afghan male. In practical terms, it will exclude those who are too young or too old to fight, but will include, mostly, fit Afghan males ranging from early teenagers through to, say, men in their fifties or possibly sixties. The fact that such a group would encompass a major section of the community is, in my respectful opinion, not relevant in the context of the Convention. History has shown that persecution can, at any particular time, be targeted at millions of people. The clearest example, of course, is Nazi Germany's persecution of five to six million Jewish people. Had they been able to escape and had the Convention been in force, they would quite clearly have been refugees within its terms.

68 Nor do I regard the fact that the characteristic of being "able-bodied" might vary from day to day as being determinative of, or even, (again respectfully), relevant to the existence of a particular social group. Some persons may change their political opinions or religious persuasion from time to time. Thus the composition of those groups who might seek protection on political or religious grounds may also change from time to time. That cannot be a basis for exclusion from protection under the Convention.

69 The proposition that forcible conscription by the Taliban forces could be reasonably considered as a legitimate object of Afghanistan, as the refugee's country, and thus fall within the "law of general application" exception is not one which fits the facts as found by the Tribunal in this matter. As mentioned above, the evidence before the Tribunal was that Taliban controlled about 90% of Afghanistan by force of

arms. Judicial knowledge can be taken of the facts that the Taliban were not recognised, at the time of the Tribunal's decision, as the government of that country by the United Nations or (with only three exceptions) by the individual members of the international community. In my opinion, the Tribunal erred in law and committed jurisdictional error in characterising what the Taliban do to any able-bodied male they can lay their hands on, (or whose family cannot afford to bribe them), as the enforcement of a law of general application.

C**ONCLUSION**

70 For the foregoing reasons, the application will be allowed. The Tribunal's decision will be set aside and the matter will be remitted to it for decision in accordance with the law. I have given consideration to the question whether the matter should be remitted to a differently-constituted Tribunal. The question was not debated at the hearing, but has been the subject of some recent authority, including *Wang v Minister for Immigration and Multicultural Affairs* [2000] FCA 1599 at [11-12], [23-27] and [112], and *Minister for Immigration and Multicultural Affairs v Applicant C* [2001] FCA 1332. As the issue has not been the subject of any submissions, I will take the course adopted in *Wang* of reserving liberty to apply on that matter. The respondent should pay the applicant's costs.

I certify that the preceding seventy (70) numbered paragraphs are a true copy of the Reasons for Judgment of Justice Carr.

A/g Associate:

Dated: 5 October 2001

Counsel for the Applicant:	Mr J McGrath (who appeared on a pro bono publico basis)
Counsel for the Respondent:	Mr P R Macliver
Solicitor for the Respondent:	Australian Government Solicitor
Date of Hearing:	24 April 2001, 2 August 2001
Date of Judgment:	5 October 2001