Oganes Israelian v. Minister for Immigration & Multicultural Affairs [1998] FCA 447 (1 May 1998)

FEDERAL COURT OF AUSTRALIA

CITIZENSHIP AND MIGRATION - protection visa - Armenian citizen - objection to military service in Nagorno-Karabakh war - absence of conscientious objection conceded - whether Tribunal failed to consider applicant was a member of particular social group of deserters and draft evaders - whether Tribunal wrongly concluded applicant had well-founded fear of persecution based on political opinion - whether Tribunal failed to appreciate conscientious objection may not be a necessary element in the establishment of such a fear - whether Tribunal took a mistaken view of the evidence.

Migration Act 1958(Cth), ss 420(2)(b), 430(1), 476(1)(a), 476(1)(e)

Migration Regulations

Muralidharan v Minister for Immigration and Ethnic Affairs (1996) 62 FCR 402, followed

Epeabaka v Minister for Immigration and Multicultural Affairs (1997) 150 ALR 397, referred to

Applicant A v Minister for Immigration and Ethnic Affairs [1997] HCA 4; (1996) 142 ALR 331, followed

OGANES ISRAELIAN v THE MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS

VG 516 of 1997

R D NICHOLSON J

PERTH (HEARD IN MELBOURNE)

1 MAY 1998

GENERAL DISTRIBUTION

IN THE FEDERAL COURT OF AUSTRALIA

VICTORIA DISTRICT REGISTRY VG 516 of 1997

BETWEEN: OGANES ISRAELIAN
Applicant

AND: Minister for Immigration and Multicultural Affairs

Respondent

JUDGE: R D NICHOLSON J

DATE OF ORDER: 1 May 1998

WHERE MADE: PERTH (heard in melbourne)

THE COURT ORDERS THAT:

1. The application for review be allowed.

2. The Tribunal's decision be set aside.

3. The matter be referred to the Tribunal to determine whether the applicant had a well founded fear of being persecuted for the reason of membership of a particular social group.

4. The respondent pay the applicant's costs of the application.

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 VG 516 of 1997

BETWEEN: OGANES ISRAELIAN

Applicant

AND: Minister for Immigration and Multicultural Affairs

Respondent

JUDGE: r d nicholson j

DATE: 1 MAY 1998

PLACE: perth (HEARD IN MELBOURNE)

REASONS FOR JUDGMENT

HIS HONOUR: This is an application under Pt 8 of the *Migration Act 1958* (Cth) ("the Act") to review a decision of the Refugee Review Tribunal ("the Tribunal"). The decision of the Tribunal was to affirm a decision by a delegate of the respondent not to grant a protection visa to the applicant. The basis of the decision was the Tribunal found the applicant was not a person to whom Australia has protection obligations under the Convention relating to the Status of Refugees done at Geneva on 28 July 1951 as amended by the Protocol relating to the Status of Refugees done at New York on 31 August 1967 ("the Convention").

The decision affirmed had been made by the delegate on 6 May 1994. That decision was affirmed by a Tribunal on 23 March 1994. Pursuant to an application for judicial review, this Court remitted the application for re-consideration by the Tribunal. The decision of which review is now sought was dated 7 August 1997.

Applicant's circumstances

The applicant's circumstances as found by the Tribunal are as follows. He is a 29 year old male citizen from Armenia. He arrived in Australia on 8 September 1992.

On 29 October 1993 the applicant applied for a protection visa. In his initial application he stated he still had military service obligations in his country. He was the subject of a call-up notice there and officials had visited his house apropos of that notice.

By letter dated 27 January 1994 the applicant stated he had been called up for military service in January 1993, while he was out of the country, and he conscientiously objected to such service. He said the war in which his country was engaged is futile, partly because the area under contention (Karabakh) had already been ceded to Azerbaijan; he did not want to kill others; and he did not want to be killed. In the letter the applicant claimed he would refuse to serve and he would be taken away and probably executed as a consequence. He further stated he had previously served in the Soviet Union Army between October 1986 and December 1988 when he had "no choice to serve or not to serve". He was discharged with the rank of Sergeant. The applicant told the delegate that some officials had visited his family concerning his call-up but had made no threats. The delegate had before him information from the United Nations Human Rights Commission on Refugees that Armenian laws on military service were amended in 1993 to provide that Armenians between 18 and 45 years are subject to conscription and, further, draft evaders and deserters faced imprisonment of up to ten years.

On 14 October 1994 the applicant submitted he refused to fight against the Azeris because he regarded them as his countrymen among whom he has friends, although it is Armenians who predominantly populate Nagorno-Karabakh ("NK"). He submitted that in the conflict over NK significant numbers of civilians were being killed and the conflict revolved around the concept of ethnic cleansing and its attendant atrocities. His view was he had a moral objection to serving in it and was at risk of imprisonment for as long as the conflict continued. He regarded this as distinct from his willingness to serve out his prior conscription period in East Germany when the alternative was a period of imprisonment.

Submissions to the same effect were repeated on 6 December 1994 with emphasis being placed on the significance of the nature of the conflict in assessing a claim of conscientious objection.

Additionally, the applicant submitted he did not want to serve in the Armenian army because he was unhappy over the break-up of the Soviet Union. He did not wish to fight people who had previously been friends. He had told the first Tribunal hearing he was an active supporter of the Communist Party in Armenia and would be unpopular for that reason, so that he would be sent to the war front when he was called up. He also submitted the authorities had visited his parent's house several times and they had broken in and searched the house.

Prior to the second hearing before the Tribunal the applicant reiterated his objection to compulsory military service particularly in the conflict over NK. He stated he could not obtain protection from persecution for failing to respond to the call-up notice from either the authorities or the wider community. On his behalf it was submitted his persecution would flow from his political opinions and from his membership of a particular social group, namely deserters and/or draft evaders.

Both at that time and previously the submissions of the applicant were accompanied by Country Information. It was submitted the documents showed the "particular difficulties experienced by those persons regarded as draft evaders and/or deserters".

Further, information was provided concerning the use of the issue of new passports contingently on satisfactory completion of military service requirements as a means of controlling the movement, work and accommodation of Armenians.

At the hearing before the Tribunal the applicant reiterated he objected to the war over NK and did not wish to fight and be killed in a senseless war. He stated "that he had evaded the draft by not responding to his January 1993 call-up notice and that he would be treated as a deserter, imprisoned and forced to serve in the military at the front line." He had not migrated from Armenia but had only permission to make an overseas visit and had failed to return. This would result in him being refused a passport with the abovementioned consequences. He said his brother had previously served two years in the Soviet Army and on being more recently called up, ran away. However he had not been punished or forced to serve again because he had a small child.

Evidence was given to the hearing of a recent amendment to call-up laws having the effect that every Armenian over the age of 18 years was subject to conscription without exception. The evidence was by breaching these laws the applicant would be imprisoned, forced to serve and probably denied a passport.

Legislative framework

The prescribed criteria for the grant of a protection visa are set out in s 36 of the Act and Pt 866 of Sch 2 of the *Migration Regulations* ("the Regulations"). One of the criteria is that the applicant is a person to whom Australia has protection obligations under the Convention. For the purposes of this application, Australia has protection obligations to the applicant if he demonstrates he is a person who is a refugee:

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

The Tribunal, after consideration of the decision of the High Court in *Chan Yee Kin v Minister for Immigration and Ethnic Affairs [1989] HCA 62;* (1989) 169 CLR 379, said:

"Where `well-founded fear of persecution' exists, it must be for one of the reasons set out in the definition - race, religion, nationality, membership of a particular social group or political opinion. If it arises solely for any other reason, the applicant does not fall within the definition regardless of the suffering he may endure."

The Tribunal continued:

"The Court in **Chan's** *case observed that the term `well-founded fear of persecution' required that the applicant have a subjective fear and that there must be an objective justification or foundation for this fear (at 396, per Dawson J.; at 406, per Toohey J.; at 413, 415, per Gaudron J.; at 429, per McHugh J.). It held that fear of persecution is well-founded if there is a `real chance' of being persecuted on return to the country of nationality (at 389, per Mason C.J.; at 398, per Dawson J.; at 407, per Toohey J.; at 429, per McHugh J.). A `real chance' is one that is `substantial' as distinct from `remote', `insubstantial' or `far-fetched' (at 389 per Mason C.J.; at 398, per Dawson J.; at 407, per Toohey J.; at 429, per McHugh J.)."*

Tribunal's reasoning

The Tribunal commenced by finding the applicant had no genuine subjective fears of harm deriving from his support of the Communist Party other than his fears with respect to the war over NK. It approached his application for review on the basis his claims were related to his objection to that war. It summarised the basis of his particular conscientious objection to that war in the following way:

"At various times he has said his reasons for that objection are that the war is futile; it has no resolution in sight unless the ethnic Armenians withdraw from NK and relocate to Armenia; he does not wish to fight former colleagues from the Army; he does not want to be sent to the front; as a conscript he will be sent to the front; he does not want to be killed in a pointless war; the war has been condemned by the international community; he has already served two years and does not want to waste any more time in the army; and he does not want to be involved in a war that resorts to ethnic cleansing."

The Tribunal referred to the UNHCR Handbook ("the Handbook") which recognised an applicant may have claims to recognition as a refugee "when [the

applicant] can show the performance of military service would have required his participation in military action contrary to his genuine political, religious or moral convictions, or to valid reasons of conscience". It referred also to a UN report on "Conscientious Objection to Military Service" by Eide and Mubanga-Chipoya, New York (1985) in which the reference to "conscience" was referred to as meaning "genuine ethical convictions, which may be of religious or humanist inspiration".

In relation to the applicant's claim that he did not have an absolute objection to military service but rather a particular objection to the war over NK, the Tribunal said:

"The concept of a partial conscientious objection is defined by the U. N. as follows:

`Partial conscientious objection to military service ... is built on the conviction that armed force may be justified under limited circumstances, derived from standards of international or national law or morality. Objection based on reference to standards of international law may concern the purpose for which armed force is used, or it may concern the means and methods used in armed combat.' (UN Report pp.3-4).

The concept of partial conscientious objection recognises that, although an individual does not necessarily object to the use of violence in all circumstances, that individual may legitimately refuse to comply with conscription in certain circumstances."

The Tribunal said the legitimacy of the concept of "conscientious objection to participation in a war which involved gross human rights abuses or is internationally condemned", that is a "partial objection", was implicitly accepted in *Jovicic v Minister for Immigration and Ethnic Affairs* (Goldberg J, Federal Court of Australia, 18 March 1997, unreported).

Furthermore it noted the Handbook states "where, ... the type of military action, with which an individual does not wish to be associated, is condemned by the international community as contrary to basic rules of human conduct, punishment for desertion or draft evasion could, in the light of all other requirements of the definition, in itself be regarded as persecution".

Following from examination of these materials the Tribunal found:

"In examining the available materials, the Tribunal is satisfied that applicants who rely on conscientious objection to military service in general or have a partial objection in respect of a particular situation, must demonstrate that they hold a genuine ethical, moral or political conviction in opposition to the purpose for which they may be conscripted. It is not sufficient, for example, that they merely do not want to fight and that the war they wish to avoid has been condemned by the international community. In addition, there must be an ethical, moral or political conviction that underpins the desire not to be inducted into the condemned situation."

The Tribunal then drew a distinction (for reasons not explained in the Tribunal's reasons) between matters which had been the subject of written submissions by or for the applicant and matters which were raised in oral representations at the Tribunal hearing. Matters said to be the subject of written but not of oral submissions were the war over NK was futile; the applicant did not wish to put his life at risk for something which is pointless; the UN Security Council had condemned the NK conflict; the applicant did not wish to be engaged in fighting former colleagues; and the applicant did not wish to be involved in a war having the possibility of NK Armenians being victims.

The Tribunal then concluded:

"The essence of the Applicant's objections is that he did not wish to risk his life for a purpose that did not benefit ethnic Armenians and he did not wish to spend further time in military service as he had already served two years. While the Tribunal sympathises with those motives, they do not disclose a genuinely held conscientious objection to the war over NK. The Applicant did not express objections to killing other people in war situations, subject to the inference that they were not Armenians."

The Tribunal found his expressed views did not disclose genuine convictions based on ethical, moral or political grounds, "despite there being some passing written reference to such grounds". His references to the futility of the war were to be seen as an objection to the Armenian Government's political justifications for pursing that war which had been specifically recognised by the Handbook as not enough. The Tribunal also found his desire not to be called into military service was not based on a conscientious objection to the war over NK but a desire to avoid personal danger and to minimise the intrusion of it into the use of his time and opportunities to pursue other actions, particularly as he had previously completed two years of military service and believed he had already contributed to his country in that regard.

The Tribunal's reasons then embark upon a passage around which the nub of the applicant's present appeal lies. The passage reads:

"...even if his objection to conscription was conscientious and Convention-related, the evidence he gave suggests that State punishment does not arise from political opinion, religious belief, nationality, race or membership of a particular social group. He said his brother, who has also served for two years in the Soviet military, evaded a call-up notice but then returned home and was exempted from serving because he has a small child. He has not claimed that his parents or his brother have been detained in an effort to force him to return, despite the U.S. State Department information that such things occur (*Country Reports on Human Rights Practices for 1996: Armenia *at 5). In addition, as confirmed by Mr. Kateb, there has been peace fire and a lull in fighting since May 1994, although there have been some border skirmishes. While there may be an intensification in seeking conscripts, it is notable that the Applicant is not a conscript but, in effect, a Reservist like his brother. It is also clear that, despite there being a ten year maximum term of imprisonment for draft evaders, that penalty is not always invoked, as is the case of the Applicant's brother. The flexibility of the authorities in

applying or failing to apply a penalty supports the conclusion that political opinions are not, in the absence of other evidence, imputed to people who do not answer a call-up notice. In particular, the brother's experience demonstrates that reservists can expect lenient treatment if they evade call-up notices, contrary to the claim that they are imputed with dissident political opinions for that reason."

From this the Tribunal led onto the following conclusions:

"A consideration of the circumstances leads to the conclusion that the Applicant is not a conscientious objector. Even if he did have a conscientious objection, his punishment for avoiding his call-up notice would not be motivated by a Convention reason but would be the application of a law of common application, imposed by the authorities regardless of those authorities imputing any political opinion to the Applicant or otherwise being motivated by Convention reasons.

As the balance of the Applicant's fears arise from his objection to fighting in the war over NK, the Tribunal finds that they are not Convention related. Thus, if he is denied the internal passport he requires to pursue accommodation and work, this would not be for one of the reasons in the Convention. It is noted, however, that the Applicant's parents still live in Armenia and it is not unreasonable that the Applicant should live with them or his brother, at least until he makes more suitable arrangements. Further, it is apparent that his brother has accommodation, despite evading his call-up notice.

In summary, the Tribunal finds that the Applicant is an Armenian citizen who is entitled to return to his country of nationality. His does not hold genuine conscientious objections to military service and, even if he was to be punished on return, such punishment would not be motivated by Convention reasons. His fears related to work and accommodation or other types of harm he may encounter if he returns all flow from his desire not to comply with his call-up notice and are, therefore, not Convention related."

Membership of a particular social group

The first ground of appeal is the Tribunal failed properly or at all to deal with the submission the applicant experienced persecution as a consequence of his membership of a particular social group comprising deserters and/or draft evaders. This ground is said to be supported by par 476(1)(a) of the Act and/or by par 476(1)(e) in its reference to an error involving an incorrect interpretation of the applicable law.

As has been seen the references made by the Tribunal in its reasons to this issue were twofold: (1) It acknowledged that in submissions prior to the hearing the applicant had made the submission his persecution would flow from his membership of that particular social group. (2) In dealing with all five Convention grounds and on the assumption the applicant had a conscientious objection, the Tribunal found the evidence which the applicant had given "suggested" State punishment did not arise from those grounds including membership of a particular social group. It was common ground this second reference should be treated as a finding.

For the applicant it is submitted these references and the conclusion of the Tribunal on this issue was a wholly inadequate reference to deal with the material question of whether any feared persecution could be found by reason of membership of the particular social group contended for, irrespective of whether the applicant had a conscientious objection. The antecedent and material question raised on the evidence was said to be whether a sufficiently cognisable particular social group consisting of deserters and draft evaders could be said to exist in Armenia at any material time and, if so, whether the applicant was a member of such a group: *cf Ram v Minister for Immigration and Ethnic Affairs* (1995) 57 FCR 565 at 568-570. It is submitted the Tribunal simply failed to make a decision on the claim because it neither set out its findings on the relevant material questions of fact nor referred to any evidence in support of them. It is further submitted this treatment is manifestly inadequate and constituted error of law by failing to deal with a substantial issue on which the case turned - in that the procedures required by law to be observed had not been observed by the Tribunal: *cf Muralidharan v Minister for Immigration and Ethnic Affairs & Anor* (1996) 62 FCR 402 at 413-416.

For the respondent it is said the Tribunal proceeded on the basis most favourable to the applicant but nevertheless concluded "the evidence he gave suggests the State punishment does not arise from" the Convention grounds. It is said because the Tribunal assumed the position most favourable to the applicant it is not to be taken as asserting that conscientious objection was a necessary pre-condition to a finding in the applicant's favour.

The circumstances in which an applicant for refugee status may be found to be such as the consequence of the membership of a particular social group were considered by members of the High Court in "*Applicant A" & Anor v Minister for Immigration and Ethnic Affairs & Anor [1997] HCA 4;* (1996) 142 ALR 331. In that case the appellants claimed if they were returned to China they faced forcible sterilisation pursuant to China's "one child policy". It was not disputed that forcible sterilisation was "persecution" or that it gave rise to "a well-founded fear". It was disputed whether the appellants feared that persecution "for reasons of ... membership of a particular social group".

Dawson J (at 341) said:

"A particular social group, ... is a collection of persons who share a certain characteristic or element which unites them and enables them to be set apart from society at large. That is to say, not only must such persons exhibit some common element; the element must unite them, making those who share it a cognisable group within their society".

However, he considered one important limitation which is obvious is "that the characteristic or element which unites the group cannot be a common fear of persecution". He said (at 342) that "[w]here a persecutory law or practice applies to all members of society it cannot create a particular social group consisting of all those who bring themselves within its terms." Viewed in that way he considered this accorded with the distinction drawn by Black CJ in

Morato v Minister for Immigration, Local Government and Ethnic Affairs **(1992) 39 FCR 401 at 404-405 between what a person is and what a person does.**

In his reasons in *Applicant A*, McHugh J at 356-358 reviewed decisions of courts and tribunals in the United States and Canada which he considered could not be reconciled with each other. One of these included a decision that family members of deserters from the Salvadorian Army were not a particular social group: *De Valle* (1990) 901 F 2D 787. At 358, he said "[a]llowing persecutory conduct of itself to define a particular social group would, in substance, permit the "particular social group" ground to take on the character of a safety net": *cf* Dawson J at 342.

McHugh J continued (at 358) by saying "persons who seek to fall within the definition of "refugee" in Art 1A(2) of the Convention must demonstrate that the form of persecution they fear is not a defining characteristic of the "particular social group" of which they claim membership". He continued (at 359) that while persecutory conduct cannot define the social group, the actions of the persecutors may serve to identify or even cause the creation of a particular social group in society. He instanced the example of left-handed men not being a particular social group but who could become such if persecuted because they were left-handed. There must be some characteristic, attribute, activity, belief, interest or goal uniting the persons into a particular *social* group (at 359). McHugh J concluded on this aspect (at 361) that "once a reasonably large group of individuals is perceived in a society as linked or unified by some common characteristic, attribute, activity, belief, interest or goal which itself does not constitute persecution and which is known in but not shared by the society as a whole, there is no textual, historical or policy reason for denying these individuals the right to be classified as `a particular social group' for Convention purposes."

The third member of the majority (Gummow J) grounded his decision on the view the form the persecution takes should not be inserted into the definition of the social group. He agreed with McHugh J that the Refugee Review Tribunal in *Applicant A* had made a finding the relevant group comprised "those who, having only one child, either do not accept the limitations placed on them or who are coerced or forced into being sterilised" (at 377). He said the former was merely a group for demographic purposes and the latter was in error because it defined membership of the group by reference to acts giving rise to the well-founded fear of persecution.

There appears to be some difference of reasoning between Dawson J and McHugh J on the account which may be taken of the effect of persecutory conduct beyond the prohibited use of that conduct to define the particular social group. McHugh J (at 359) envisages the persecutory conduct "may serve to identify or even cause the *creation* of a *particular* social group in society" whereas Dawson J (at 342) said that "where a persecutory law or practice applies to all members of society it cannot *create* a *particular* social group consisting of all those who bring themselves within its terms" (emphasis added). In my opinion the reasoning of McHugh J is not excluded from application by the reasons of other members of the Court (other than Dawson J) in *Applicant A* and therefore

requires consideration. The consequences of its application in *Applicant A* were expressly agreed with by Gummow J.

In the present case, on the reasoning of McHugh J with the consequences of which Gummow J agreed, it is arguable the particular social group of which the applicant claimed to have membership was not defined by acts giving rise to the well-founded fear of persecution. The argument would be that the particular social group was defined by the acts of desertion or draft evasion and that such characteristic unites them. The fact requires to be found whether such acts define a group. That may or may not, according to the facts to be found in relation to the country, give rise to a well-founded fear of persecution because of penalties subsequently imposed in relation to those defining acts. If that were found, this would not be a case where the group contended for is defined by the fact its members face a particular form of persecutory treatment. The fact to be found was whether the attribute of being a deserter and draft evader identified such persons as a particular social group. In that fact finding it is permissible to take into account the actions of the persecutors to identify the group but such actions would not themselves define the particular social group (see McHugh J at 359).

Here there was before the Tribunal, as acknowledged by it, the statement in the Handbook that punishment for desertion or draft evasion could in itself be regarded as persecution where the type of military action with which the individual does not wish to be associated is condemned by the international community as contrary to basic rules of human conduct.

Another important piece of evidence was before the Tribunal, to which no reference is made in its reasons. In the Country Information a record was made of a German Press Report that the UN High Commissioner for Refugees had issued an order to the effect that Armenian draft resisters should be given refugee status. If that were factually correct, it may amount to the requisite condemnation by the International Community of the military action in NK as being contrary to basic rules of human conduct. It would open the door to the possibility of a finding of fact that in this particular case the punishment for desertion or draft evasion could be persecution and persecution of the applicant as a member of a particular social group.

In my opinion the Tribunal failed to form a view about the crucial issues which the definition required it to examine: *cf Muralidharan* at 415-416. The Tribunal ought not to have rejected the applicant's claim without coming to a view, if it could, concerning whether the International Community through the UN High Commissioner for Refugees had condemned the military action in NK as contrary to basic rules of human conduct and whether all the circumstances of the matter, deserters and/or draft evaders in Armenia were a particular social group; that is defined, united or linked otherwise than by the fear of the allegedly persecutory law.

To so read the reasons of the Tribunal is not to scrutinise them with too fine an eye. Nor do I consider it can be said when the Tribunal dealt with the submissions in relation to a well-founded fear based on political opinion it has

effectively dealt with the applicant's case in relation to membership of a particular group.

The basis on which I consider the Court has jurisdiction to review this decision of the Tribunal is, pursuant to s 476(1)(e) of the Act, the decision involved an error of law, being an error involving an incorrect interpretation of the applicable law. If it is the case s 476(1)(e) permits a review on procedural matters there is an incorrect interpretation by the Tribunal of the procedural law which governs its processes. The Tribunal also failed to act in accordance with s 430(1) in that it did not set out the findings on the material questions of fact concerning whether the applicant had the membership contended for in a particular social group. If it is the case only s 476(1)(a) can be relied upon where there is a complaint about the Tribunal's process, I consider the procedures required in s 430(1)(c) in this respect were not observed by the Tribunal in connection with the making of its decision.

Political opinion

For the applicant it is conceded the Tribunal decision that he did not possess a partial conscientious objection is a finding of fact open to it. However, it is contended there were sufficient errors in dealing with other elements required to establish the existence of a well-founded fear on the basis of imputed political opinion to taint the ultimate finding in relation to this Convention ground. It is submitted the Tribunal neglected to consider that, absent a conscientious objection to military service, it was open to it to find the evidence before it nonetheless gave rise to an attribution or imputation of political opinion by the Armenian authorities to someone in the position of the applicant who had evaded conscription in the particular circumstances of the NK war.

This is supported by reference to evidence which the Tribunal had before it and which was not referred to in its reasoning or rejected. That evidence comprised the applicant's evidence of two named persons taken away and not seen again; evidence of a threat made to his mother that if he was caught he would be killed; and uncontroverted independent evidence of harsh official government policy in relation to draft evaders.

It is contended in addition to this being a breach of par 476(1)(e), there was a failure by the Tribunal to act according to substantial justice and the merits of the case, contrary to s 420(2)(b) of the Act, and in consequence, procedures required by the Act in connection with the making of the decision were not observed pursuant to s 476(1)(a): see *Eshetu v Minister for Immigration and Multicultural Affairs* (1997) 71 FCR 300 at 312-313 per Davies J; at 641-643 per Burchett J (to which the respondent makes formal objection in view of the grant of special leave to appeal to the High Court); *Thambythurai v Minister for Immigration and Multicultural Affairs & Anor* (Finklestein J, Federal Court of Australia, 16 September 1997, unreported); *Khan v Minister for Immigration and Multicultural Affairs* (1998) 47 ALD 19; *Sun Zhan Qui v Minister for Immigration and Ethnic Affairs* (1998) 151 ALR 505 at 546-549 per Wilcox J, at 554-555 per Burchett J; *Calado v Minister for Immigration and Multicultural Affairs* (Tamberlin J, Federal Court of Australia, 19 December 1997, unreported at 6).

See also *Epeabaka v Minister for Immigration and Multicultural Affairs* (1997) 150 ALR 397 at 400-402.

It is also submitted for the applicant the Tribunal made a number of errors in the passage in which it dealt with the applicant and his brother. Firstly it is said it failed to distinguish that the brother's situation in having a young child was materially different from the situation of the applicant. Secondly, it wrongly created a false distinction between reservists and conscripts, treating the applicant as a reservist. It is also contended the Tribunal wrongly relied on flexibility in the Armenian authorities in relation to penalties.

A further way in which the respondent says the applicant's case puts the submission relating to imputation of political opinion is as follows. It is the Tribunal proceeded under a mistaken view of the evidence as to the attribution of political opinion and likely harm to be faced by the applicant if he were to return to Armenia and, in so doing, failed to act in accordance with the substantial justice and merits of the case as required by par 420(2)(b) of the Act by failing to rationally consider probative evidence. What is alleged is a failure to rationally consider probative evidence within the meaning of *Epeabaka*. In the submission of the respondent the Tribunal was entitled to make judgments about what evidence to believe and which to disbelieve. It did this and concluded the punishment the applicant could expect for draft evasion would not be punishment imposed for a Convention reason. It is submitted this finding was clearly open to the Tribunal and the matters adverted to in the applicant's contentions do not go to demonstrate this was not so or the Tribunal's decision was not rationally made on probative evidence, but simply other findings may have been possible.

I have already concluded the Tribunal failed to properly consider all the evidence of government policy towards deserters and draft evaders in the context of the question whether the applicant feared persecution as a consequence of membership of a particular social group comprising deserters and draft evaders (if a finding were made such persons constituted a defined group). Likewise I have concluded above that this is not just to be viewed as evidence which it would be over-zealous to expect the Tribunal to have recounted. Apart from that, I consider the submissions for the applicant relating to political opinion invite the Court to impermissibly go behind the findings of fact of the Tribunal. An error of fact is not within the permissible grounds of review in s 476(1). Furthermore, the assumption by the Tribunal in the course of its alternative reasoning of the fact the applicant had a conscientious objection favoured the applicant. It did not mean the Tribunal should have considered its findings independently of such assumption because patently, had it done so, it would have not have reached any different conclusion.

Conclusion

For these reasons I consider the application for review should be allowed to the extent the Tribunal is required to make findings on the issue of whether the applicant had a well founded fear of being persecuted for the reason of membership of a particular social group.

I certify that this and the preceding fifteen (15) pages are a true copy of the Reasons for Judgment herein of the Honourable Justice R D NICHOLSON J

Associate:

Dated: 1 May 1998

Counsel for the Applicant: J A Gibson

Solicitor for the Applicant: Armstrong Ross

Counsel for the Respondent: P Gray

Solicitor for the Respondent: Australian Government Solicitor

Date of Hearing: 13 March 1998

Date of Judgment: 1 May 1998